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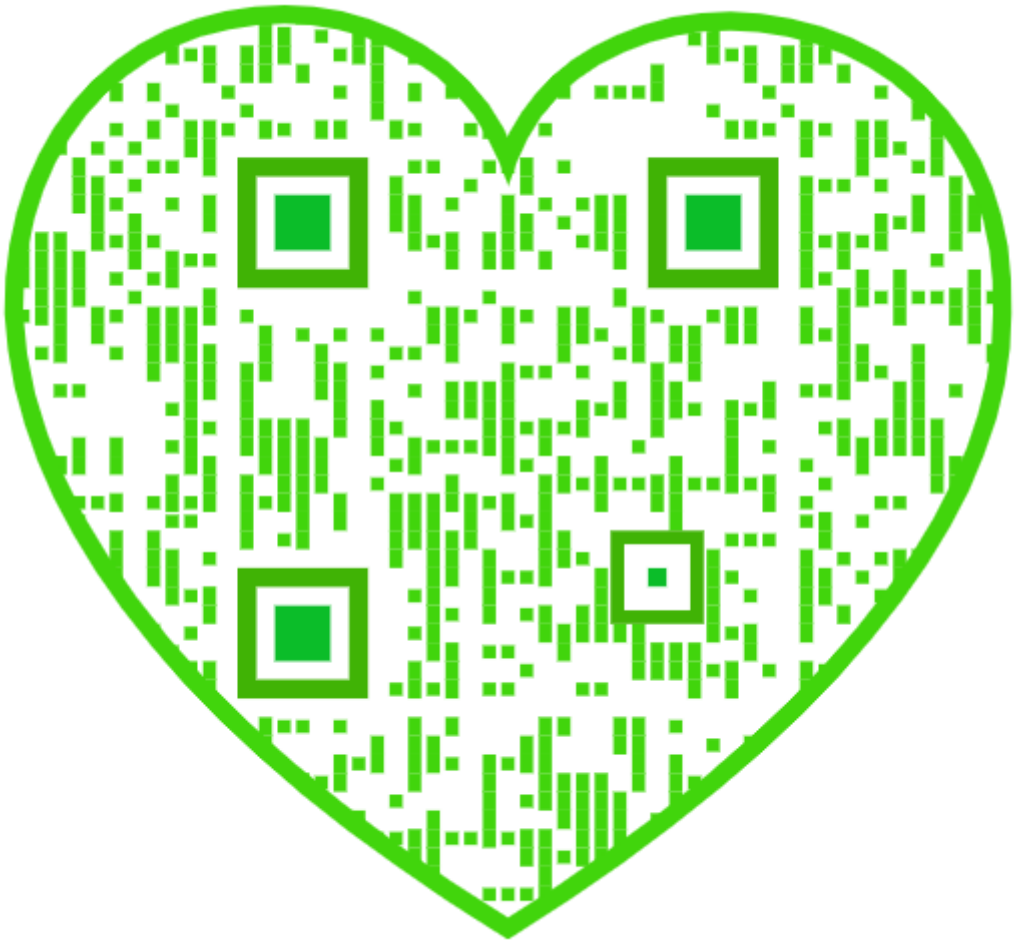

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The Era of Law.

WHILE the members of the legal profession are a very influential class, their power in the past has been secondary; exercised not directly as lawyers, but indirectly as persons elected or appointed to office. In Europe the military caste has always overshadowed the lawyer. In the United States the complaint has often been made in late years that the lawyers were losing their professional status and becoming an appendage to commercial enterprise. The ideals of the military leader and the captain of industry have often been at variance with the true concept of law. Law is to them an inconvenient interference with the pursuit of their ambitions, to be broken if that can be safely done or evaded if open breach is not politic. But the last year has seen those once dominant ideals sadly discredited. The War Lord sulks in exile and his empire is given over to anarchy. The business monarch finds himself in scarcely less evil case. After years of more or less successful industrial battle, meeting strike with lockout and boycott with black list, he now looks with alarm at the growing power of Bolsheviki and I. W. W. and sees visions of wholesale confiscation. No man who believes in American institutions and the American people can doubt that the era which is dawning will prove better than that which is passing away. Looking at the needs of the world to-day, is it not probable that this new era will be an era of law; an era in which men and nations will think in terms of law rather than in terms of violence? The ideal of law is the establishment of a common rule of right for rich and poor, great and small, and the determination of all controversies as to its application by impartial arbitrament. Always that ideal has been opposed by those who thought themselves too great to be fettered by the common judgment of their fellows, but whether in government or in business those who have pursued that path have found that it leads to disaster. To-day manual labor is presenting itself as a claimant for the crown of supremacy over law. Must we await another bitter experience to teach us anew the folly of admitting any such supremacy, or are we ready to inaugurate a reign of law which shall displace combat not only between individuals, but between classes and between nations? Perfect justice is not to be hoped for in these newer fields any more than in those which have already been brought within the domain of law. But the judgment of impartial men sincerely seeking the right will approximate justice more closely than the result of the struggle of men each seeking his own advantage. It is a barren pessimism which says that human nature cannot be changed; that men will always be dominated by the love of power rather than the love of justice. Human nature does change—attempt to re-establish human slavery or trial by corsned if you doubt it. It is a fact of some significance that it was the governments controlled by lawyers which overthrew the government controlled by military chiefs. The lawyer is coming into his own as the ruler of the world because he alone of all the orders of men represents not force but justice, not caprice but law. His ascendency will last until, intoxicated by authority, he seeks to substitute personal will for the orderly processes of law.

Lawyers and Reconstruction.

IT has more than once been pointed out in these pages that the legal profession occupies such a vantage ground of impartiality that it is the natural arbiter and director of industrial reconstruction. If the members of the profession fail to rise to their opportunity it will probably be because of ultra conservatism. There is a spirit of change and unrest in the air which is irresistible. By the work of thoughtful and patriotic men it may be so guided as to work only good. Confronted with mere opposition, it will break down that opposition and take such shape as ignorance and passion may dictate. The unwise measures which from time to time are exploited in the United States derive their power from the fact that they are designed to remedy real ills. Take, for example, the recall of judges, a measure of doubtful merit. It would probably have gained little vogue were it not for the fact that there were in the United States judges (albeit their number has always been almost negligible) who were corrupt or biased, who rendered unjust decisions in behalf of large vested interests and against whose injustice existing law provided no adequate relief. If adequate provision is made to meet this evil, the agitation for the recall will speedily die out. If the bar contents itself with ejaculations of pious horror, the agitation will steadily grow in power. Bolshevism is a foreign born monster, absolutely incompatible with American institutions; absolutely destructive of true freedom. With it there must be no paltering and no compromise. But while prompt and vigorous repression of all revolutionary propaganda is absolutely necessary, it is not sufficient. The effective remedy for Bolshevism is true and intelligent Progressivism. There are a few representatives of special interests to whom every change appears to be revolutionary; who will brand as Bolshevistic every suggested re-

form. It must not be forgotten that there are American Junkers and that the supremacy of the Junker will lead to a dangerous reaction as certainly in America as in Europe. The economic and political balance of our nation rests with the "middle class"—the skilled workmen, salaried employees, small property owners and the like. As long as these find that our institutions give a fair opportunity for redress for any just grievances of which they may complain, Bolshevism will gain no footing outside a small fringe of idle and lawless men. It rests with the members of the legal profession, as the makers and interpreters of law, to see to it that this class of citizens is not subjected to such conditions as will drive it to ally itself with the forces of unrest.

No Compromise with Crime.

But if there is danger in an attempt to oppose a "stand pat" policy to the prevailing epidemic of disloyalty, there is yet greater danger in any attempt to palter with its exponents. Under our system of government there is always a possibility that officers or candidates for office will truckle to a movement which apparently commands a considerable vote though they are not in sympathy with its aims or methods. Between Bolshevism and Americanism, between those who would preserve and those who would overthrow the republic, there can be no compromise. It is purely a question of arousing a popular appreciation of the situation. During the war no man outside a few localities thought of truckling to the German vote. It must be plainly understood that the Bolshevist movement in the United States is not peace but war. The American Bolsheviki are more plainly enemies of the human race than any pirate who ever cruised the high seas. They stand for the proposition that economic wrongs may be redressed by bloodshed, violence and the overthrow of government. In dealing with the exponents of that theory, whether any economic wrongs exist is quite beside the question. If a suitor comes into court with a shot gun demanding a decision in his favor, an investigation into the merits of his case is not in order, and the situation calls for the prompt interposition of the sheriff. It is very probable that additional legislation is necessary to deal with the problem. All propaganda looking to the overthrow of government should be prohibited. Since labor strikes furnish an ideal setting for the activities of the revolutionist, strict measures should be enacted to prevent the fomenting of violence or lawlessness on such occasions. The foreign language press is one of the principal vehicles for Bolshevist propaganda and has thereby furnished another reason for its suppression. Immigration should be more rigidly regulated, and the undesirable aliens now in our midst should be promptly deported. At present the Bolshevist movement in the United States is vociferous out of all proportion to its size. But if we neglect it, palter with it or attempt to play politics with it, we may find too late that it contains the seed of civil war.

Punish the World Criminals.

While the long delays in formulating the terms of the peace treaty may be justified by the complexity of the questions involved, it is hard to find an excuse for the delay in bringing to justice the arch criminal responsible for the world conflict. As has been recently shown at length in Law Notes (January, 1919, p. 184) there is no doubt as to the liability of William Hohenzollern to such punishment as an international tribunal may assess. Even if technical objections might be raised, the action of the allied powers cannot be stayed by technicalities and they need consider only whether their action satisfies the conscience of the world. The thing most needed at the present time to make future wars impossible is a convincing demonstration that the world will hold to the full measure of criminal liability the persons responsible for an unjust war. A league of nations and a program for dealing with the person who starts the next war are an empty threat if justice is not done to the person responsible for this one. Equally essential is the condign punishment of those officers who were guilty of the more glaring atrocities. It is true that they acted under orders, but it is well settled that the order of a superior will not always excuse a person in the military service. "A soldier is bound to obey only the lawful orders of his superiors. If he receives an unlawful order he is bound neither by his duty nor his oath to do it. For instance, an order from an officer to a soldier to shoot another for disrespectful words merely would if obeyed be murder both in the officer and the soldier." *U. S.* v. *Carr,* 1 Woods (U. S.) 480. No protection can be claimed from an order "so palpably atrocious as well as illegal, that one must instinctively feel that it ought not to be obeyed." *McCall* v. *McDowell,* Deady (U. S.) 233. This doctrine has received the approval of the Supreme Court. *Mitchell* v. *Harmony,* 13 How. 115. The officers of the German army and navy are men of education. Officers directing the ravishment of women and the mutilation of children knew perfectly well that the orders under which they acted were in violation of the law of nations. The submarine commanders who shelled the lifeboats in which women and children were escaping from a sinking wreck knew that international law pronounced their act murder. Not for vengeance, not even for punishment, but to establish a principle for future generations, those acts must be taken out of the category of lawful acts of war in the one effective manner, by the ignominious execution as common criminals of the persons responsible for them. Without that, any declaration of illegality will be but one more addition to the increasing heap of scraps of paper.

Amnesty for the Seditious.

A considerable agitation is being started in favor of a general amnesty for "political prisoners," meaning thereby Berger, Haywood, Emma Goldman, et ejusdem generis, who have been convicted of seditious conduct during the war. The matter would be beneath notice were it not for the fact that executive clemency has already been extended to a considerable number. In technical criminology there is of course a distinction between political crime and common crime, political crime being supposed to involve less of moral turpitude for the reason that its motive is often a sincere desire for social or political reform rather than mere personal gain or personal passion. In the domain of morals the distinction is a sound one, for success may transform a rebel into a patriot while success but adds to the infamy of a common criminal. But in the administration of government, political crime may be the more dangerous and the less deserving of clem-

ency. It threatens the existence of government itself while common crime involves only the lives or property of a few individuals. Whether, after a particular emergency such as war has passed, amnesty may safely be extended to persons guilty of political offenses during its continuation depends on circumstances. At the close of the Civil War amnesty to the leaders of the Confederacy was safe and justifiable. The entire situation made perfectly plain what subsequent events proved that no further danger to the government was to be apprehended from those men. But the case of the persons guilty of sedition during the present war stands on a very different footing. The war with Germany was not the sole cause and occasion of their offending. The causes which led them to offend did not cease with the closing of that war. The persons for whom amnesty is now asked were before the war in active opposition to the government of the United States as now constituted. The war merely afforded them another avenue for the manifestation of that hostility. If now released from prison they will promptly resume the same kind of activities, and posing as martyrs before their followers will acquire added influence for evil. The fact is that for many years we have tolerated a brand of agitation which should never have been allowed. The war brought us, temporarily at least, to our senses. To grant amnesty to the seditious agitators now would simply be to go to sleep again while anarchistic demagogues assail the foundations of the republic.

Foreign Born Voters.

IT is very doubtful whether the average person who was born and grew to maturity in a country whose government differs markedly from ours can acquire such familiarity with our institutions as to be a competent voter. But as long as we admit naturalized citizens to vote we should require educational qualifications which will insure some measure of capacity. Compulsory education laws in almost every state require that every child shall receive a common school education, and such an education may be accepted as the average qualification possessed by an American born voter. If we give the suffrage to the foreign born, we should exact something approximating that qualification. The mere ability to read and write, possessed by the average American born child nine years of age, is not enough. The would-be voter should be compelled to show that he has used that ability to inform himself as to American institutions. The determination of the existence of such qualifications should not, as has heretofore been done when an educational test has been fixed, be left to election officers. A board should be established before whom a would be voter could appear at any time and take a regular examination. On passing the examination he would receive a certificate of capacity to vote. In case of failure a certain time, say a year, should elapse before a re-examination. Quite apart from the gain in the intelligence of voters, the general effect of such a requirement would be good. Foreigners coming to our shores attach little importance to American citizenship. Too often they gravitate quickly to the ranks of those who despise and vilify our institutions. To a considerable extent the fault is our own. How can we expect them to prize what we hold so lightly? A college degree or a membership in an ancient fraternal order would be of little value to its holder if it was given freely to every casual applicant. Let it be understood that the privilege of participating in the government of the nation is open only to those who make themselves fit for it, and it will be valued more highly by those who seek it and exercised more worthily by those who possess it.

Judicial Nullification of Statutes.

THE opinion that the courts have no power to annul an act of Congress as being in conflict with the constitution has always been maintained by a respectable minority. If it had no other defender it would be entitled to consideration because of its advocacy by Chief Justice Walter Clark of North Carolina, whose earnest championship of this supposed heresy gains weight from the fact that his own thirty years of judicial service obviates any suspicion of hostility to the just powers of the courts. The arguments on behalf of the prevailing view have been often and ably stated and it is not proposed now to recapitulate them. It is at the present time a condition rather than a theory which confronts us, and it is not at all plain that the condition would not have been a great deal worse had the opposite theory prevailed from the beginning. A government by three departments each absolutely independent is a glittering dream. Nothing of the kind ever has existed or ever can exist in practice. If each department were to judge for itself the validity of an act of Congress we would have confusion worse confounded, and the law would change with the whim of each local executive in whose jurisdiction it is supposed to become effective. If no department could question an act of Congress, then the supremacy would merely pass from the judiciary to the legislature. There is room for argument that it would not be unwise to repeal all the limiting provisions of the Constitution and hold Congress strictly responsible for its every act. But it is certainly unwise and illogical to keep those provisions with no means whatever of making them effective. It is easy but scarcely fair to refer to a judicial declaration against the validity of a statute as an assumption of infallibility. As long as we have a government every question must be decided finally by some one. The decision must inevitably be wrong sometimes. Inevitably it must in some instances be overruled on a subsequent consideration. But, in spite of this, the power to decide finally must be reposed somewhere if anarchy is to be avoided. The power to decide finally whether statutes infringe the Constitution is at present considered as resting in the courts. Despite the mistakes which the courts have made in its exercise will any one assert that it would have been as well exercised by any other department of the government? Theoretically of course all this is beside the question and the real issue is to whom the power is granted by the Constitution. But where one construction has prevailed for nearly a century and has worked well, it is hard to get up much enthusiasm for a crusade to change it.

Lobbying.

THE practice of lobbying with the members of legislative assemblies has been universally held by the courts to be contrary to public policy. Thus in *Marshall* v. *Baltimore, etc., R. Co.,* 16 How. (U. S.) 314, it was said: "Legislators should act with a single eye to the true interest of the whole people, and courts of justice can give

no countenance to the use of means which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors. Influences secretly urged under false and covert pretences must necessarily operate deleteriously on legislative action, whether it be employed to obtain the passage of private or public acts." In *Tool Co.* v. *Norris,* 2 Wall. 45, it was said by Mr. Justice Field that contracts for lobbying have universally been held to be invalid and that "the decisions have not turned on the question whether improper influences were contemplated or used but upon the corrupting tendency of the agreements." Despite this universal condemnation there probably never has been a session of Congress at which lobbyists have not thronged. The practice is hard to reach, because of the difficulty of distinguishing between lobbying and the indubitable right of the citizen to make his wishes known to his representatives. But of late lobbying has developed an elaborateness of organization which may readily be prohibited. The suffrage organization maintains a bureau having a card index, said to have cost a hundred thousand dollars, giving in detail the antecedents, habits, etc., of every Congressman. The methods of the Anti-Saloon League are equally well known and its members boast of their efficacy. Practices of that sort are destructive of the whole theory of representative government. If that theory is to be maintained, the representatives should be kept free from every form of organized importunity. If that can not be done, the only way to obviate government by a small organized minority is to abolish the representative system and submit every question to a direct popular vote. Congress must abolish the lobbyist or the lobbyist will cause the abolition of Congress.

Incorporated Families.

Scanning the blank form of an income tax return, one cannot but be impressed with the fact that in this as in every other economic situation the salaried man is at a disadvantage. His salary is regarded as net income and the authorized deductions are few. A business corporation is entitled to deduct all its operating expenses and pay tax on what is truly net profit. Is not the necessary living cost of a salaried man just as truly operating expense? Suppose he and his wife should incorporate as the John Smith Domestic Establishment, Limited, for the corporate purpose of securing the livelihood of John, his wife and such progeny as should come to them. The rental of the house would go in as plant expense. John's clothing, car fare, lunches, etc., would be strictly comparable to the expenses of a traveling salesman. His salary would represent not net income but gross receipts, from which every expense necessary to enable him to earn that income would be properly deducted. The cost of maintaining the children might be called expense of branch establishments not yet brought to a productive basis. Are not doctor's bills for the salary earner as legitimate a deduction as the cost of repairs for factory machinery? The salaried man is now between the upper and the nether millstone. Heaven knows he is not a capitalist, while the proletariat scornfully term him "bourgeois" and "white collar slave." By all means let him incorporate and thereby elevate himself to a recognized economic position. But would the court which denied a charter to the Young Hassy Association (see Law Notes, March, 1919, p. 240) look with more favor on a petition for the incorporation of the John Smith Domestic Establishment?

Precedents.

Now that the pressure of war news is over the lay press has resumed its favorite indoor sport of railing at the action of courts in following precedent. One paper quotes a "prominent attorney" as saying, "I would have to go out of business if the courts stopped following precedents and began to do justice." Were every judge gifted with omniscience he could ascertain the justice of each case quite readily. But in these days of fallible men, justice according to the length of the judge's foot would be certain and definite compared with justice according to his individual notion of the merits. Imagine the new regime safely established. The editor goes to his lawyer and inquires: "Is it safe for me to publish this article about the candidate for governor?" "It's impossible to say," the lawyer would have to respond. "It all depends on whether the judge thinks it is libellous." "But," insists the editor, "I don't want to take any chances." "I don't see how I can help you," answers the attorney. "The Supreme Court has four times decided that such an article is not libellous, but you know they don't follow precedents any more. It all depends on the judge." Possibly such an experience would beat into the newspaper man as nothing else seems to do that the doctrine of precedent is used not only to judge the legality of past actions but to determine the legality of future actions. Without it no man, however careful, could make a contract with any assurance of its legality or plan a business deal with any idea of the rule of law by which it is to be governed. Occasionally of course precedent has been followed unwisely. Only by a departure from a precedent whose reason has failed can law be progressive. But the evils that follow the most rigid adherence to precedent are as nothing to those which would ensue if judges sought without compass or chart to embark on the broad sea of justice.

ACTIONS AGAINST RAILROADS UNDER FEDERAL CONTROL.

The present political situation makes it problematical when the federal control of the railroads will be relinquished. Thousands of actions are normally brought against railroad companies every year, and federal control being unprecedented it has necessarily raised some novel questions with respect to such actions.

The assumption of federal control of the railroads was undoubtedly a valid exercise of the war power. While the validity of the proclamation of December 26, 1917, was questioned in *Muir* v. *Louisville, etc., R. Co.,* 247 Fed. 888, the subsequent act of March 21, 1918, was squarely sustained in *Wainwright* v. *Pennsylvania R. Co.,* 253 Fed. 459, the court saying: "Whether the exigencies existed when Congress enacted this statute was for that body to determine, and cannot be questioned by the courts, if there is any substantial ground therefor. *McCulloch* v. *Maryland,* 17 U. S. (4 Wheat.) 316, 421 (4 L. ed. 579)." See also *Rhodes* v. *Tatum,* (Tex.) 206 S. W. 114.

The provision of the act authorizing the taking over

of the roads (Act Mar. 21, 1918) which relates to actions against railroads under federal control is found in section 10, which reads as follows: "Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any Act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control."

The one restriction imposed by the act is of course that against the levy of process on any property under federal control. Of that provision the Kentucky court said in *Louisville, etc., R. Co.* v. *Steel,* 202 S. W. 878: "Obviously, the effect of the foregoing provisions of the statute is to entirely suspend the right of issuing and levying executions, attachments, or other like process against the property of common carriers under federal control, during the continuance of such control; but it does not prevent a litigant from bringing his action against the latter in any court of competent jurisdiction, or such court from granting him such relief in the form of a judgment or otherwise, short of the coercive payment or satisfaction of such judgment by the levy of an execution or other like process upon or against any property of the carrier, as the litigant might, but for the passage of the act, under the laws of the state of his residence, have been entitled to. In other words, he may, notwithstanding the act, bring his action and obtain judgment against the carrier; but he cannot enforce against the latter the satisfaction of the judgment, when obtained, by execution or similar process. The object of the act of Congress and of the President's proclamation referred to is to prevent, except as allowed by the director general of the railroad under the control of the government, the seizure or sale of its property, which, if allowed, would interfere with the government's use of such property as required in its efforts to bring the war to a successful issue." In *Dooley* v. *Pennsylvania R. Co.,* 250 Fed. 142, it was held that money constituting traffic balances was not subject to process. But in *U. S. Railroad Administration* v. *Burch,* 254 Fed. 140, it was held that land owned by a railroad company but not used for railroad purposes was subject to execution, and that the Director General had no power to take possession of it. The court said: "The only question thus for the court is whether or not, under the terms of the statutes of the United States, the complainant in this case is legally in possession of the property, so as to entitle him to the benefit of the exemption given by the act from the levy of final process. It does not appear to the court that the property is property of which, under the terms of the statute, the President was authorized to take possession. If the President was not authorized to take possession, then he could not authorize the Secretary of War or the Director General to take possession, and any possession taken by them would be unlawful and would in no wise divest the rights of other parties. The complainant being thus not in legal possession of this property, and the property being, in the opinion of this court, not property of which he could legally take possession, under the terms of the statutes, it is not property which, under the terms of those statutes, is exempt from the levy of final process; and it follows from that, that the injunction should be refused." As bearing collaterally on the question it may be noted that in *Commercial Club* v. *Chicago, etc., R. Co.,* (S. D.) 170 N. W. 149, it was held that an order of a public service commission for the construction of a connecting track could not be enforced without the consent of the government.

The exceedingly limited means of enforcement left by the statute were however taken away by a departmental regulation. In his report for 1918 the Director General of Railroads says: "It having been found that suits were being brought and judgments and decrees rendered against carrier corporations on matter based on causes of action arising during Federal control, for which the carrier corporations were not responsible, General Order No. 50 was issued on October 28, providing that actions at law, suits in equity, the proceedings in admiralty brought thereafter, based on contract, binding upon the Director General of Railroads, claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control, or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding, but for Federal control, might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise: Provided, however, That this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.'" This order obviously makes it impossible to collect any claim except as the Director General chooses voluntarily to order it paid, since the judgment is against him and not against the railroad, and no levy on lands not used for railroad purposes is possible. With every disposition to indulge in presumptions in favor of the action of the Director General, it is to be regretted that he did not see fit to explain somewhat more fully the situation which led to this order. His statement that judgments were rendered against carriers on causes of action "for which the carrier corporations were not responsible" would seem to mean that though the act of Congress provides that suits may be brought and judgments rendered as now provided by law the Director General asserts the power to review the action of the courts and refuse payment of such judgments as he considers unjust. Since he obviously cannot give the matter his personal attention he must act on the advice of his counsel, which means that the attorneys who lost the case decide whether the judgment is just. No data are available as to how the provision has been applied, but it was asserted before the Interstate Commerce Committee of the Senate last January that there were more unpaid claims for damages filed with the railroad administration

than there had ever been before in the history of American railroads.

Order number 18, made April 9, 1918, as modified by number 18a is as follows: "It is therefore ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose." That order was supplemented by order number 26, made May 23, 1918, which is stated in *Rhodes* v. *Tatum,* (Tex.) 206 S. W. 114, as follows: "It is therefore ordered that upon a showing by the defendant carrier that the just interests of the government would be prejudiced by a present trial of any suit against any carrier under federal control, which suit is not covered by general order No. 18, and which is now pending in any county or district other than that where the cause of action arose, or other than in which the person alleged to have been injured or damaged at that time resided, the suit shall not be tried during the period of federal control."

In view of the provision of the Act of Congress that actions may be brought and judgments rendered "as now provided by law" a serious question arises as to the validity of the regulations heretofore quoted. The natural construction of the language would seem to be that Congress designed that such an action should be governed in all respects by existing law except for its single prohibition of the levy of process. Such was the view taken in *Moore* v. *Atchison, etc., R. Co.,* 174 N. Y. S. 60. In that case an action was brought in a district other than that permitted by order 18a. After quoting the statute the court said: "A reading of the paragraph above quoted leads to the conclusion that Congress did not intend to authorize the President or his agent or agents to make orders affecting the jurisdiction of the state courts, or affecting the right to maintain actions therein, since it is expressly provided, without qualification of any kind, that actions at law and suits in equity may be brought against carriers and judgments rendered 'as now provided by law.'"

But in two cases the contrary view has been taken. In *Wainwright* v. *Pennsylvania R. Co.,* 253 Fed. 459, which also arose in connection with order 18a, the court after setting out the statute said: "In the opinion of the court all this quotation means is that any person having a cause of action shall not, by reason of this act or any regulation made thereunder, be deprived of the right to maintain it in a proper court, if, under the state, federal, or common law, he is entitled to a legal remedy. It does not mean, as claimed, that, having a cause of action against the carrier, he has the right to institute it in any forum in which he could have brought it before the passage of this act." In *Rhodes* v. *Tatum,* (Tex.) 206 S. W. 114, the court sustained orders 18a and 26, saying: "Any order issued by Mr. McAdoo as Director General must be considered as the order of the President. General orders 18, 18a and 26, above sent out, were all issued subsequent to the approval of the act of March 21, 1918, and we must presume were issued for the purpose of putting into execution the provisions of the act and in furtherance of the President's effort to carry out the evident purpose of Congress in its enactment. Since the act and the orders referred to affect the relator's remedy only, they are not subject to the objection that they were ex post facto or retroactive in their effect. The importance of having absolute control of transportation systems in the prosecution of the war is a matter of common knowledge. After hearing the motion the trial judge decided that a trial of relator's case in the district court of Oldham county would be prejudicial to the justice interests of the government and would seriously interfere with the physical operation of the defendant railways. Under the record here the presumption of the validity of the court's order obtains. The case, therefore, comes within the purview of the general orders above quoted, and the further prosecution of the action should, we think, be controlled by their provisions."

While the weight of authority is thus in favor of the validity of the orders of the railroad administration, it is to be borne in mind that both the Wainwright case and the Rhodes case were decided in October, 1918, while hostilities were rife. Both justify the orders as emergency war measures, the court saying in the Wainwright case: "That the exercise of the right to maintain actions in a forum distant from the place where the witnesses reside will seriously interfere with the successful prosecution of the war cannot be open to doubt. How are the soldiers drafted under the Selective Draft Act to be transported from the interior to the seaports, if the operation of trains is to be interfered with in this manner? How are munitions, clothing, food, coal, and other supplies necessary to carry on the war, to be transported expeditiously, if the employees, without whom trains cannot be operated, are to be compelled to leave their employment to attend as witnesses at places hundreds of miles away from where their duties require them to be, whenever a person has, or imagines he has, a cause of action against the carrier, and for his convenience, or in some instances, perhaps, to prevent a proper defense, institutes the action in a court far distant from the district where the cause of action arose, and in a district other than that of the residence of the plaintiff at the time of the accrual of the cause of action?" Whether the orders would be deemed reasonable now that hostilities are at an end is a debatable question. We are still legally at war and the war power is in no degree abated by the armistice. This was clearly demonstrated by the court in the decision which sustained the taking over of the transatlantic cables after the signature of the armistice.

It seems therefore that there is at the present time no substantial right of action against a railroad which is under government control. An action may be brought if service can be had in the prescribed district (see *Moore* v. *Atchison, etc., R. Co.,* 174 N. Y. S. 60, wherein the plaintiff was unable to bring suit in either of the jurisdictions specified in the order of the Director General). When a judgment is obtained it will be paid when the Director General sees fit to order it to be paid. This is obviously a situation of no little hardship. Shippers are absolutely at the mercy of clerks of the railroad administration in the matter of claims for loss or damage. Crippled employees are condemned to wait indefinitely for compensation. It is not likely that railroad claim agents have changed their methods with the change of employers, and it is impossible to say how many unjust and inadequate settlements have been forced on persons unable to endure the long delays which the system makes possible.

Criticism of measures enforced during the war is in the main unreasonable. At that time men were dealing with

unaccustomed problems under the stress of a desperate emergency. Mistakes and individual cases of hardship were inevitable, and the blame must fall on those who allowed the day for intelligent preparation to pass. But five months have elapsed since the armistice was signed and while conditions have not returned to normal, the stress of the emergency has relaxed. On every hand the need for the speedy resumption of peaceful industry is felt. What could more effectually impede that resumption than for the great arteries of commerce, with which all business comes into contact, to remain the beneficiaries of a substantial moratorium? Inconvenience and injustice which were endured without complaint in the hour of the nation's peril will not be borne patiently now that the peril has passed. An act of Congress is not necessary to restore the rights of litigants against the railroads. All that is needed is the revocation by the Director General of the orders which have been referred to and the making of an order for the immediate payment of every claim on the rendition of a judgment by the highest court to which it is desired to carry the case. The problem of railroad control is one which will require much time and consideration for its solution, but the restrictions on suits against the railroads, however useful as war measures, have outlived the necessity which alone could justify their existence.

Aside from mere considerations of expediency there is a principle involved which should not be ignored. If the federal government is to engage in activities which partake of the nature of industry rather than of government, it should not carry its sovereign capacity into those activities. In strictly governmental matters it may not be unseemly for executive powers to be asserted in derogation of the jurisdiction of the courts. But in a matter so far removed from the sphere of government as the operation of a railroad such an assertion is inconsistent with the spirit of our institutions and destructive of public respect for law. Free access to the courts and unquestioning obedience to their decisions are the very foundation of public law and order. Any official act in derogation of these essentials of good citizenship, however well intentioned, is very apt to bear fruit in future lawlessness.

W. A. S.

REGULATION OF CHILD LABOR BY FEDERAL TAXATION.

AT the outset it may be well to say that the writer is in hearty sympathy with all legitimate efforts to protect the child from exploitation by mercenary employers, and would like to see adequate laws passed by every state in the Union which would encompass this result. It is not with the end sought but with the means adopted that the quarrel lies. Undismayed by the decision of the Supreme Court in *Hammer* v. *Dagenhart,* 246 U. S. 667, 38 S. C. R. 581, declaring the act of Congress prohibiting the shipment in interstate commerce of the products of child labor to be unconstitutional on the ground that the regulation of labor conditions was purely a local matter, and as such reserved to the states for control, Congress has again attempted to usurp this right, this time by means of the very effective bludgeon of taxation. In the War Revenue bill passed at the recent session of Congress the following provision was incorporated: "Every person (other than a bona fide boys' or girls' canning club recognized by the Agricultural Department of a State and of the United States) operating (*a*) any mine or quarry situated in the United States in which children under the age of sixteen years have been employed or permitted to work during any portion of the taxable year; or (*b*) any mill, cannery, workshop, factory, or manufacturing establishment situated in the United States in which children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen have been employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian, during any portion of the taxable year, shall pay for each taxable year, in addition to all other taxes imposed by law, an excise tax equivalent to 10 per centum of the entire net profits received or accrued for such year from the sale or disposition of the product of such mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment." By thus taxing the products of manufacturers employing child labor Congress has put an end to such labor as effectively as if all the states had passed laws specifically forbidding it, and to make assurance doubly sure and prevent the employment of children so young and at a wage so low as to enable the manufacturer to pay and still compete successfully with his rivals it is further provided by the act: "If any such person during any taxable year or part thereof, whether under any agreement, arrangement, or understanding or otherwise, sells or disposes of any product of such mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment at less than the fair market price obtainable therefor either (*a*) in such manner as directly or indirectly to benefit such person or any person directly or indirectly interested in the business of such person; or (*b*) with intent to cause such benefit; the gross amount received or accrued for such year or part thereof from the sale or disposition of such product shall be taken to be the amount which would have been received or accrued from the sale or disposition of such product if sold at the fair market price." It seems futile in these days of the wholesale destruction and surrender of the rights of the states to protest against the action of Congress in thus invading by indirect methods the domain of the rights of the states. That the regulation and control of labor conditions is purely a local state matter cannot now be denied—it is no longer a debatable question, for the Supreme Court has declared in no uncertain terms that it is beyond the power of Congress to control. To a firm believer in the doctrine of states' rights as conceived by the founders of our government and embodied in our constitution it brings a rather unpleasant realization of the trend of the times to see the greatest law-making body in the country deliberately and knowingly violate that doctrine. However this article is not intended as a dissertation on the subject of states' rights but as a discussion of the power of taxation with particular reference to the protection afforded by the constitution against unreasonable or arbitrary classification of the subjects to be taxed.

Putting aside the rather questionable policy of deliberately invading the rights of the state in a matter judicially determined to be within their exclusive province by the highest court in the land, it is of interest to note the

were entitled to have defendants restrained from appropriating plaintiffs' news in the way that this had been done. The *ratio decidendi* was that the defendants had unfairly competed with the plaintiffs in the business in which the parties were rivals.

In arriving at this conclusion the court did not find it necessary to come to any decision on the abstract questions as to whether news could be the subject of property, or what amounts to publication within the meaning of copyright law. The decision is based on a strict regard to the circumstances of the case and the relative positions of the parties. Thus, it was held that in a sense to both parties alike news was property: "However little susceptible of ownership or dominion in an absolute sense, it is the stock-in-trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who will pay money for it, as for any other merchandise." And further on it is said that news, from this point of view, "has all the attributes of property necessary for determining that misappropriation of it by a competitor is unfair competition." On the question of any property in the news being abandoned on publication, it was held that the obvious intention of the plaintiffs was not to abandon their rights the moment the news appeared in a newspaper, for this would nullify their efforts to gain the commercial advantages attached to collection and early distribution. The ratio of the judgment is very clearly shown in the following passage: "The view we adopt does not result in giving to the complainant the right to monopolize either the gathering or the distribution of news, or, without complying with the Copyright Act, to prevent the reproduction of its news articles, but only to postpone participation by the complainant's competitors in the processes of distribution and reproduction of news that it has not gathered." The actual order made was that defendants should be restrained from taking or using the plaintiffs' (or "complainant's") news from bulletins issued by the complainant "until its commercial value as news to complainant and all its members has passed away."

This American case goes further, in more than one direction, than any English case yet reported. Nevertheless, it is believed that the decision would, under similar circumstances, be followed in England. There are at least three well-known cases in the English reports on the subject of the right to some protection for news specially collected and distributed. These relate to particular kinds of news—Stock Exchange, horse-racing, and cricket—but the principal of each would apply to news in general. Each is, however, based on the common law right of an author to unpublished literary matter, and the American reference to unfair competition in business constitutes a distinct advance on the English case law. That news is in a sense property is recognized in these English cases quite as much as by the Supreme Court of the United States.

Exchange Telegraph Company v. *Gregory* (74 L. T. Rep. 83; (1896) 1 Q. B. 147) related to Stock Exchange news. The plaintiffs were a telegraphic news agency supplying the Stock Exchange "tape prices" to their subscribers, the latter being under agreement not to sell or communicate the news so received to non-subscribers. Defendant was a non-subscriber, and induced a subscriber to furnish him with the plaintiffs' tape prices. Defendant was restrained from "printing or multiplying copies" of the plaintiffs' copyright information as published in their newspaper and tapes, and also from obtaining such copies from the plaintiffs' tapes. The case was thus in part based on statutory copyright. It was, however, distinctly laid down in the Court of Appeal that the plaintiffs had a common law right of property in the information collected and supplied, though this was treated as unpublished literary matter. Thus, Lord Esher said: "This information—this collecting together of materials so as to give knowledge of all that has been done on the Stock Exchange—is something which can be sold. It is property, and being sold to the plaintiffs it was their property."

Exchange Telegraph Company v. *Central News* (76 L. T. Rep. 591; (1897) 2 Ch. 48) related to horse-racing, and has more resemblance to the American case, since the parties were rival news agencies. There was no question of statutory copyright, but the defendants by some means managed to obtain information which the plaintiffs had incurred expense in collecting. An injunction was granted restraining defendants from surreptitiously obtaining or copying from the plaintiffs' tapes, &c., information collected by the plaintiffs. Mr. Justice Stirling said: "By the expenditure of labor and money the plaintiffs had acquired this information, and it was in their hands valuable property in this sense—that persons to whom it was not known were willing to pay, and did pay, money to acquire it."

The third of the three cases referred to is *Exchange Telegraph Company* v. *Howard* (1906, 22 Times L. Rep. 375). This related to cricket news, and was a contest between rival news agencies. An injunction was granted as in *Exchange Telegraph Company* v. *Central News* (*sup.*). Mr. Justice Buckley (now Lord Wrenbury) said: "The knowledge of a fact which is unknown to many people may be the property of a person, in that others will pay the person who knows it for the information as to that fact; in unpublished matter there is at common law a right of property, or there may be in the circumstances of the case. The plaintiffs sue here, not in copyright at all, but in respect to their common law right of property in information which they had collected, and which they were in a position to sell. Their case is that the defendant has stolen their property; that he has surreptitiously obtained that which belonged to them and now is in rivalry with them."

It will be noticed that these English cases go quite as far as the American case in laying down the position that news may be the subject of property. Though not so strongly stated, it is also plainly implied in the English cases that supplying information to subscribers is not such a publication as to constitute an abandonment of the news agency's property in the news. The great point of difference between the American case and the English cases cited is that in the former the absence of statutory copyright protection is treated distinctly as unimportant, and the common law right is extended beyond the point in time when publication has taken place—on the ground that it is not a case of copyright or unpublished literary matter at all, but a case of unfair competition in a rival business.

Apparently no English case has yet decided that matter printed in a newspaper may still be considered as not having been published so as to destroy the author's or owner's proprietary rights in unpublished matter. The principle under which information supplied otherwise than by newspaper to subscribers is not considered to be "published" for all purposes might well be extended to the case of the printing of the same information in early editions of newspapers. The intention of the owners of the news or information in issuing early editions of newspapers is precisely the same as in furnishing the information by tape or similar means to a number of individual subscribers. Publication or no publication is a question of intention, as may be seen by the case of a book printed "for private circulation only." The question of intention is well put in one passage of the judgment of the Supreme Court of the United States in the American case referred to above: "The contention that news is abandoned to the public for all purposes when it is published in the first newspaper is untenable. Abandonment

is a question of intent, and the entire organization the Associated Press negatives such purpose." The principle as thus stated might well be accepted in the English courts.—Law Times.

Cases of Interest

Right of Compensated Surety to Subrogation.—It seems that the fact that a surety is compensated for becoming such does not affect his right to be subrogated to the rights of the creditor in case he pays the debt. It was so held in Wasco County *v.* New England Equitable Ins. Co., 88 Oregon 465, 172 Pac. 126, reported and annotated in Ann. Cas. 1918E 656, wherein the court said: "The fact that the insurance company is a compensated surety does not affect its right to claim the benefits of subrogation. It is true that the rule of strictissimi juris, which is generally available to those who are sureties without compensation, is usually relaxed when applied to a paid surety. In this jurisdiction the rule is that a hired surety must show that his rights have been injuriously affected before he can defeat his contract of suretyship. Neilson *v.* Title Guaranty, etc., Co. 81, Ore. 422, 427, 159, Pac. 1151. A court of equity grants the right of subrogation because the surety has paid the debt of the principal, and the right of subrogation is not dependent upon whether the surety was or was not paid to sign the bond. It is enough that the surety was obliged to pay and did pay the debt: Lewis *v.* U. S. Fidelity, etc., Co. 144, Ky. 425, 138 S. W. 305, Ann. Cas. 1913A 564; National Surety Co. *v.* Berggren, 126 Minn. 188, 148 N. W. 55."

Power of Municipality to Engage in Business of Furnishing Fuel to Its Inhabitants.—In Jones *v.* City of Portland, 245 U. S. 217, 38 S. Ct. 112, reported and annotated in Ann. Cas. 1918E 660, the United States Supreme Court affirmed the judgment of the Supreme Judicial Court of Maine, in holding that a municipality may operate a yard for the sale of wood and coal to its inhabitants at cost and may raise by taxation the funds necessary for the establishment of such a yard. Mr. Justice Day said: "The authority to furnish light and water by means of municipally owned plants has long been sanctioned as the accomplishment of a public purpose justifying taxation with a view to making provision for their establishment and operation. The right of a municipality to promote the health, comfort and convenience of its inhabitants by the establishment of a plant for the distribution of natural gas for heating purposes was sustained, and we think properly so, in State *v.* Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L. R. A. 729. We see no reason why the state may not, if it sees fit to do so, authorize a municipality to furnish heat by such means as are necessary and such systems as are proper for its distribution. Heat is as indispensable to the health and comfort of the people as is light or water. In any event we are not prepared to say that when a state authorizes a municipality to tax with a view to providing heat at cost to the inhabitants of the city, and that purpose is declared to be a public one, the property of a citizen who is taxed to effect such purpose is taken in violation of rights secured by the Constitution of the United States."

Levy of State Income Tax on Income Produced by Interstate Commerce.—A state income tax may, it seems, be levied on income of a domestic manufacturing company derived from goods shipped to a branch office in another state and there sold. In so holding, the United States Supreme Court, in United States Glue Co. *v.* Oak Creek, 247 U. S. 321, 38 S. Ct. 499, reported and annotated in Ann. Cas. 1918E 748, said: "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the Federal Constitution because they happen to be engaged in commerce among the states. And so we hold that the Wisconsin income tax law, as applied to the plaintiff in the case before us, can not be demed to be so direct a burden upon plaintiff's interstate business as to amount to an unconstitutional interference with or regulation of commerce among the states. It was measured not by the gross receipts, but by the net proceeds from this part of plaintiff's business, along with a like imposition upon its income derived from other sources, and in the same way that other corporations doing business within the state are taxed upon that proportion of their income derived from business transacted and property located within the state, whatever the nature of their business."

Right to Stock Dividend as Between Life Tenant and Remainderman.—In Poole *v.* Union Trust Co., 191 Mich. 162, 157 N. W. 430, reported and annotated in Ann. Cas. 1918E 622, it was held that where a stock dividend represents not accumulated earnings but an enhancement of the value of the corporate assets, it is to be regarded as accruing to the corpus and belongs to the remainderman instead of to the life tenant. Said the court: "The courts in this country have not been able to agree on a rule for the division between life tenant and remainderman of unusual and extraordinary distributions, in the form of stock or cash, made from earnings, though the majority favor, and the tendency is toward, the Pennsylvania rule, which apportions them according as they were earned before or after the commencement of the life estate, rather than the Massachusetts rule, which is thus stated in Minot *v.* Paine, 99 Mass. 101, 108, 96 Am. Dec. 705: 'A simple rule is, to regard cash dividends, however large, as income, and stock dividends, however made, as capital.' They do seem, however, to be agreed on the principle that such distributions belong to the corpus of the estate, not the income, when they represent a reduction of capital, or a change of its form, or an enhancement of the value of the capital assets from causes other than the accumulation of earnings. Kalbach *v.* Clark, 133 Ia. 215, 110 N. W. 599, 12 L. R. A. (N. S.) 801, 12 Ann. Cas. 647; Miller *v.* Payne, 150 Wis. 354, 136, N. W. 811; Thayer *v.* Burr, 201 N. Y. 155, 94 N. E. 604, approved in In re Osborne, 209 N. Y. 450, 103 N. E. 723, 823, 50 L. R. A. (N. S.) 510, Ann. Cas. 1915A 298; Ex. p. Humbird, 114 Md. 627, 80 Atl. 209; 5 Thompson on Corporations (2d

ed.) § 5414; Holbrook *v.* Holbrook, 74 N. H. 201, 66 Atl. 124, 12 L. R. A. (N. S.) 768, and note; and note in 35 L. R. A. (N. S.) 563. And this principle is not intrenched upon by those decisions (*e.g.*, Bryan *v.* Aiken, 10 Del. Ch. 446, 86 Atl. 674; Boyer's Appeal, 224 Pa. St. 144, 73 Atl. 320; Smith *v.* Dana, 77 Conn. 543, 60 Atl. 117, 69 L. R. A. 76, 107 Am. St. Rep. 51), which give to the life tenant stock dividends which represent accumulations of earnings invested in improvements or extensions. Such decisions view the distribution as one of earnings essentially though their form has been changed by the corporation." Referring to the dividends involved in the case at bar, the court continued: "Instead of representing transmuted earnings, these stock distributions, according to the only evidence in the record, seem to represent merely an enhancement in value of the corporate assets, from causes other than the accumulation of earnings, apparently due to good management and the growth of trade. . . . The trial judge was therefore correct in holding that under the showing made in this record the stock dividends should be considered as part of the corpus of the estate, rather than as income."

Nursing as Practice of Medicine.—In Frank *v.* South, 175 Ky. 416, 194 S. W. 375, reported and annotated in Ann. Cas. 1918E 682, the court held that a duly licensed, experienced, and trained nurse, employed by a licensed physician and surgeon to administer anesthetics under his personal direction and supervision, was not engaged in the practice of medicine within the meaning of the Kentucky statute on that subject, it appearing that the nurse in question had never opened an office or announced to the people her ability to treat the sick, and had never held herself out to be a physician. In the course of a long and interesting opinion, it was said: "It is, however, contended that the trained nurse, who administers an anesthetic, must, at some time, exercise her own judgment and thus bring her within the definition of 'to practice medicine,' in this, that the surgeon is engaged with his duties in performing the operation, and it may become necessary to apply another anesthetic, instead of the one being used, the fact, that she observes the symptoms, which would make the change necessary and gives notice to the physician, who may then direct her further action. Whether such cases as this arise, which cannot be provided for beforehand is a matter peculiarly within the knowledge of the surgeons, but if such a contingency should arise, does it amount to the practice of medicine as defined by our statutes, according to the popular sense in which the language to treat any human ailment or infirmity by any method whatsoever was used, and in the sense in which the lawmakers intended? If a physician makes a diagnosis and discovers the ailment of the patient, who is attended by a nurse, and prescribes certain medicines to be given, when the medicine already given shall affect the patient in a certain way; to determine when the medicine should be given requires the exercise of some degree of judgment by a nurse; or if physician should direct the nurse to administer a certain potion when the pulsation of the patient should be quickened or when his temperature should arise, or if he should direct her to bathe the patient to allay a fever, if it should arise, in all these contingencies, the nurse would have to exercise some degree of judgment, but to hold that such would constitute her a practitioner of medicine and prohibit her from the rendition of such services, it would have the effect, as said in Nelson *v.* State Board of Health, supra, 'to deprive the people of all services in sickness, other than those which are gratuitous, except when rendered by a licensed physician.' The practice of surgery is one method of the 'practice of medicine,' and consists of an attempt to cure or alleviate a bodily infirmity or ailment by surgical means, that is, to treat the ailment or infirmity by applying manual operations or instrumental appliances, or by the use of the surgical knife. To enable the patient to bear the operation with a greater degree of safety and to recover from the effects of it more surely and rapidly, oftentimes, his general physical condition is improved by the administration beforehand; he is bathed and certain portions of the body specially sterilized to prevent infection of any kind, and anesthetics administered to deaden the pain of the operation. The duties are performed by assistants selected by the surgeons, and who perform them under his direction and supervision, and when performed by them, as directed, without diagnosis of the disease or prescribing the remedy, or the medicines to be used, or making use of the surgical means to cure or alleviate the disease, but only act as the hands of the surgeon, have never, in the popular sense, been considered as practicing surgery, or treating a disease or ailment by surgical means."

Fact that Woman Contracts Marriage with Intent Not to Assume Marital Relation as Ground for Annulment.—In Millar *v.* Millar, 175 Cal. 797, 167 Pac. 394, reported and annotated in Ann. Cas. 1918E 184, it was held that the secret determination of a woman on contracting a marriage to refuse from the outset to permit marital intercourse by the husband, and her consistent adherence to such refusal at all times after the marriage, constitute such fraud as will warrant an annulment of the marriage. Said the court: "Marriage is defined by our Civil Code as 'a personal relation arising out of a civil contract, to which the consent of parties capable of making that contract is necessary.' (Section 55.) As we have seen, our law provides that when such consent on the part of either party is obtained by 'fraud,' the marriage may be annulled at the suit of the other, unless the fraud is waived by free cohabitation after discovery; in other words, such marriage is voidable at the instance of the injured party. As was said in Sharon *v.* Sharon, 75 Cal. 1, 8, 16 Pac. 345, while the contract is simply that the parties forthwith enter into the relation of marriage, 'the rights and obligations of that status [relation] are fixed by society in accordance with the principles of natural law.' These principles of natural law are perfectly understood, certainly in so far as the particular matter here involved is concerned. The obligation of the relation in this behalf is such, to use the language of the supreme judicial court of Massachusetts in Smith *v.* Smith, 171 Mass. 404, 68 Am. St. Rep. 440, 41 L. R. A. 800, 50 N. E. 933, as to be 'essential to the very existence of the marriage relation,' a proposition as to which there appears to be no dissent in the authorities. . . . As said in Martin *v.* Lawrence, 156 Cal. 194, 103 Pac. 913: 'Where a defendant makes a promise touching a substantive part of the consideration moving to the plaintiff in bad faith and without intent to perform the promise, it constitutes a species of fraud well recognized in equity and in terms denounced by the code.' We can see no good reason why this is not true with regard to the marriage relation. It may readily be conceded that a court should not annul a marriage on the ground of fraud except in extreme cases, where the particular fraud goes to the very essence of the marriage relation, and especially is this true where the marriage has been fully consummated and the parties have actually assumed all the mutual rights and duties of the relation. In such a case considerations of public policy intervene, and courts are loath to annul a marriage. (See Smith *v.* Smith, 171 Mass. 404, 68 Am. St. Rep. 440, 41 L. R. A. 800, 50 N. E. 933.) But no consideration of public policy precluding relief exists under such circumstances as are established by the findings in this case, and the authorities generally recognize that in such

cases the marriage should be annulled for fraud. . . . That the law provides for the dissolution of the relation of marriage by divorce for specific violations after marriage by one party of duties appertaining to the relation, including the particular obligation here involved, is altogether immaterial. Such subsequent violations in no way go to the original validity of the marriage. The alleged fraud in this case is not based upon any mere violation of any duty of the marriage relation, but upon a fraudulent misrepresentation made by plaintiff at the time of the marriage, by which the consent of Millar to enter into the marriage was obtained, a matter, as we have seen, which goes to the original validity of the marriage, and renders it, at the suit of the injured party, void *ab initio*."

Power of State to Compel Railroad to Build Sidetrack.—In Ochs *v.* Chicago, etc., R. Co., 135 Minn. 323, 160 N. W. 866, reported and annotated in Ann. Cas. 1918E 337, it was held that "the state under its police power may empower a public service commission to require a railroad company to provide such sidetrack facilities to industries adjacent to its tracks as shall be found to be necessary and reasonable under all the circumstances, and may apportion the necessary expense therefor between the company and the industry in such manner as shall be found to be reasonable." The court said: "The principal contention of the company, however, is that it cannot be compelled to bear any part of the expense of constructing the proposed sidetrack without infringing the constitutional inhibition against taking private property for public use without compensation. The question is whether the state under its police power may require the company to provide such sidetrack facilities to industries adjacent to its tracks as shall be found to be necessary and reasonable under all the circumstances, and may apportion the necessary expense therefor between the company and the industry in such manner as shall be found to be reasonable, without compensation to the company other than the enhancement in the value of its property which will follow from the sidetracks becoming a part of such property and from the additional business brought to the company. That the additional business brought to the company will be of a substantial amount in this case appears from the fact that complainant paid the company more than $10,000 in freight charges during the year preceding the initiation of these proceedings and that the addition to the plant will more than double its output. The necessity for the sidetracks, if complainant is to operate its plant successfully, is not questioned; and, if the expense therefor may be apportioned between the industry and the railroad, the reasonableness of the apportionment is not questioned. The position of the company is that it cannot be required to bear any part of such expense. The company relies largely upon the decision of the United States Supreme Court in Missouri Pac. R. Co. *v.* Nebraska, 217 U. S. 196, 30 S. Ct. 461, 54 U. S. (L. ed.) 727, 18 Ann. Cas. 989. The statute under consideration in that case required the railroad company to construct sidetracks at its own expense, when application was made therefor, without any opportunity whatever for a hearing as to the necessity or reasonableness of the proposed expenditure. Under our law the company cannot be required to construct a sidetrack until the commission, after a full hearing and a consideration of all the circumstances, has determined that its construction is necessary, and that the part of the expenditure therefor apportioned to the company is reasonable. If dissatisfied with the determination made by the commission, the company may have the entire matter reviewed by the courts. We think there is a wide difference between the question involved here and those decided in the case cited. Complainant relies upon the decision of this court in State *v.* Chicago, etc., R. Co., 115 Minn. 51, 131 N. W. 859. The facts involved in that case were so nearly like the facts involved in the present case that we think the decision in that case determined the controlling questions in the present case. The same constitutional objection to the proceeding made in the present case was urged without avail in that case, and the doctrine of that case leads to an affirmance of the judgment in this case. The final solution of such problems rests with the Supreme Court of the United States, and we shall unhesitatingly apply the rule which that court shall establish, but we do not understand that that court has held that a state, in the exercise of its police power, may not require a railroad to provide necessary sidetrack facilities to an industry adjacent to its tracks upon such terms as shall be found to be reasonable under all the circumstances and after a full hearing, although such terms may impose a part of the expense therefor upon the railroad."

Validity of Stock Voting Agreement.—While an agreement by the holders of the majority of the stock of a corporation to co-operate in a certain corporate policy is valid, an agreement of that kind which contemplates that one of the parties shall have the sole control of the corporation, and that directors and officers shall be elected who will surrender their official powers wholly to him, is against public policy. It was so held in Manson *v.* Curtis, 223 N. Y. 313, 119 N. E. 559, reported and annotated in Ann. Cas. 1918E 247, wherein the court said: "The respondent asserts and argues that the agreement before us contravenes a statutory provision and the policy of the state, because in intent and effect it withdraws from the directors of the corporation that control and direction of the corporate affairs and business which the statutes and the law will vest in and confine to them. . . . The prerogatives and functions of the directors of a stock corporation are sufficiently defined and established. The affairs of every corporation shall be managed by its board of directors (General Corporation Law [Cons. Laws, ch. 23], section 34), subject, however, to the valid by-laws adopted by the stockholders. (Section 11, subd. 5; Stock Corporation Law [Cons. Laws, ch. 59], section 30.) In corporate bodies, the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke those powers. They are derivative only in the sense of being received from the state in the act of incorporation. The directors convened as a board are the primary possessors of all the powers which the charter confers, and like private principals they may delegate to agents of their own appointment the performance of any acts which they themselves can perform. The recognition of this principle is absolutely necessary in the affairs of every corporation whose powers are vested in a board of directors. (Hoyt *v.* Thompson, 19 N. Y. 207, 216.) All powers directly conferred by statute, or impliedly granted, of necessity, must be exercised by the directors who are constituted by the law as the agency for the doing of corporate acts. In the management of the affairs of the corporation, they are dependent solely upon their own knowledge of its business and their own judgment as to what its interests require. (Beveridge *v.* New York El. R. Co., 112 N. Y. 1, 19 N. E. 489, 2 L. R. A. 648.) While the ordinary rules of law relating to an agent are applicable in considering the acts of a board of directors in behalf of a corporation when dealing with third persons, the individual directors making up the board are not mere employees, but a part of an elected body of officers constituting the executive agents of the corporation. They hold such office charged with the duty to act for the corporation according to their best judgment, and in so doing they cannot be controlled in the reasonable exercise and performance of

such duty. As a general rule, the stockholders cannot act in relation to the ordinary business of the corporation, nor can they control the directors in the exercise of the judgment vested in them by virtue of their office. The relation of the directors to the stockholders is essentially that of trustee and cestui que trust. The peculiar relation that they bear to the corporation and the owners of its stock grows out of the inability of the corporation to act except through such managing officers and agents. The corporation is the owner of the property, but the directors in the performance of their duty possess it, and act in every way as if they owned it. (People *v.* Powell, 201 N. Y. 194, 94 N. E. 634.) Directors are the exclusive, executive representatives of the corporation and are charged with the administration of its internal affairs and the management and use of its assets. (Pollitz *v.* Wabash R. Co., 207 N. Y. 113, 100 N. E. 721.) Clearly the law does not permit the stockholders to create a sterilized board of directors. Corporations are the creatures of the state and must comply with the exactions and regulations it imposes. We conclude that the agreement here is illegal and void and its violation is not a basis for a cause of action."

New Books

A Treatise on Federal Taxes. By Henry Campbell Black, LL.D. Fourth Edition. Kansas City, Mo.: Vernon Law Book Company. 1919.

This work is already well known by virtue of its three previous editions and the professional reputation of its author. The fourth edition just published shows a considerable revision of the previous edition on account of the insertion of the new Revenue Act enacted in February, 1919. The new edition includes a consideration, not only of the income tax, but also of the estate tax, the war profits and excess profits tax, the capital stock tax on corporations, the excise taxes on various occupations, the taxes on transportation, communication, and insurance, the stamp tax, and the excise, commodities, and miscellaneous taxes laid by the act of 1919, as well as general chapters on the assessment, payment, and collection of internal revenue taxes, and on the refunding and recovery of taxes illegally exacted. The full text of the income-tax provisions of the new law is set forth verbatim in an appendix. The other titles of the statute, dealing with the other forms of taxation which it imposes, are quoted at length, by sections or paragraphs, in the several chapters in which those forms of taxation are discussed.

News of the Profession

Alabama Bar Association.—The annual meeting of the Alabama Bar Association will be held at Selma, July 4 and 5.

North Carolina Jurist Dead.—Judge N. H. Justice of the North Carolina superior court died early in February.

Assistant United States Attorney General Quits.—G. Carroll Todd has resigned as Assistant United States Attorney General.

County and Probate Judges of Illinois Meet.—The annual meeting of the state association of county and probate judges of Illinois met at Springfield the latter part of February.

Galesburg Illinois Lawyer Dead.—Colonel Clark E. Carr of Galesburg, Illinois, a practicing lawyer in that city for many years, and minister to Denmark from 1889 to 1893, died February 28.

Judge of Iowa Supreme Court Dead.—Judge John C. Sherwin of the Iowa Supreme Court died in February. He was on the supreme court for 18 years and on the district court for over 10 years.

Nebraska Bar Association.—Stephen S. Gregory of Chicago, former president of the American Bar Association addressed the Nebraska Bar Association in the Creighton Institute of Law, Omaha, on February 26.

Michigan Circuit Court Change.—Judge Alfred J. Murphy of the Michigan Circuit Court has resigned and his successor is John H. Goff, who was appointed by the governor to fill the unexpired term of Judge Murphy.

Change in Pennsylvania Judiciary.—After serving seventeen years as judge of the Fairfield common pleas court John G. Reeves has retired. His successor is Brooks E. Shell. Both are residents of Lancaster.

Omaha Bar Association.—Judge Martin J. Wade of the United States district court of Iowa recently delivered an address under the auspices of the Omaha Bar Association on the subject of the reconstruction period.

Aged New York Jurist Dead.—Judge A. J. Dittenhoefer of New York, the last one of President Lincoln's electors, is dead at the age of 82. It is said that he introduced the late Theodore Roosevelt in politics.

Death of New Jersey Jurist.—Judge John N. Bogert, seventy-nine years of age, and for twenty-four years on the New Jersey Court of Errors, retiring four years ago, died February 13, at his home in Hoboken, N. J.

Ex-Congressman Appointed United States Attorney in Missouri.—W. L. Hensley whose term as Congressman from St. Louis ended March 4, has been appointed United States attorney for the St. Louis district succeeding Arthur L. Oliver.

Death of Dean of Southern Law School.—Judge Nathan Green, dean of the law college of Cumberland University at Lebanon, Tennessee, died February 18. He was the oldest teacher in the state, being at his death ninety years of age.

Renomination of United States Attorney for District of Minnesota.—Alfred Jaques, formerly of Duluth, Minnesota, but now of St. Paul, has been renominated to be United States attorney for the district of Minnesota.

Southeastern Minnesota Bar Association.—The first annual meeting of the Southeastern Minnesota Bar Association will be held in Red Wing the first Tuesday in August. The Association was organized at Rochester, Minn., the first of March.

Kansas Bar Association.—In an address before the Kansas Bar Association at Topeka, Senator A. M. Keene of Fort Scott told the lawyers that 193 Kansas attorneys were in the army during the recent war, and that 121 were officers.

American Bar Association.—New London, Connecticut, has been chosen as the place where the next annual meeting of the American Bar Association will be held. It is to begin September 2. The association has never met in Connecticut.

Women's Bar Association of Illinois Meets.—The annual banquet of the Women's Bar Association of Illinois was held at the Hotel La Salle in Chicago, March 7. Justice Clyde E. Stone of the Illinois Supreme Court and Dr. Anna Howard Shaw were among the speakers.

New Assistant Attorney General in Nebraska.—Former County Judge Ralph Wilson of Lincoln, Nebraska, who was appointed an assistant attorney general of Nebraska while in France with the American army, has returned to Lincoln and taken up the duties of his office.

Texas Judicial Changes.—H. C. Hughes of Galveston has succeeded Judge Clay Stone Briggs as judge of the tenth district court, and T. D. Cobbs of San Antonio, has succeeded Judge P. H. Swearingen, deceased, as one of the judges of the fourth court of civil appeals.

President of American Bar Association Made United States Circuit Judge.—George T. Page of Peoria, Illinois, president of the American Bar Association, has been appointed by the President a United States circuit judge, succeeding the late Judge Christian C. Kohlsaat of Chicago.

Appointment of Attorney General of United States.—A. Mitchell Palmer of Pennsylvania, heretofore alien property custodian, becomes Attorney General of the United States to-day, succeeding Thomas Watt Gregory of Austin, the first Texan to quit President Wilson's Cabinet. Mr. Palmer is a native of Stroudsburg, Pa., and since 1912 a member of the Democratic National Committee. He served three terms in the House as Representative from the Twenty-sixth Pennsylvania District.

Joint Meeting of Georgia and South Carolina Bar Association.—Preparations are being made for the annual meeting of the South Carolina Bar Association at Tybee, near Savannah, the last of May or the first of June. The Georgia Bar Association will be in session at the same time and a joint meeting of the associations is planned.

Ohio Judicial Changes.—Judge Thomas M. Bigger of the common pleas court of Ohio, has been succeeded by Thomas J. Duncan. Judge Bigger served for nearly twenty-five years. Judge Wade Cushing, who resigned from the same court because of his election to the appellate court has been succeeded by Edward T. Dixon of Cincinnati.

Assistant General Counsel of United States Railroad Administrator Appointed.—Sanford H. E. Freund, assistant general counsel of Great Northern Railroad, has been made assistant general counsel of the United States railroad administration, with headquarters in Washington. For the last year Mr. Freund has been on leave from the Great Northern, serving as director of the clearance division of the federal employment service and representative of the war labor policies board in the facilities division of the war industries board.

New United States Attorney in Texas.—D. E. Simmons who for more than two years was an assistant United States attorney for the Houston, Texas, district, has been appointed United States attorney by Judge J. C. Hutchison of the United States District Court to fill the place, made vacant by the resignation of John E. Green, Jr., pending an appointment by the President.

Texas Bar Association.—A committee of five members of the Texas State Bar Association has been appointed by Cecil H. Smith, president, to encourage the organization and maintenance of county bar associations to co-operate with the State association, and to have representation at the meetings of the State association. The following have been appointed: Judge Walter Monteith of Houston, Marshall Hicks of San Antonio, Wendel Spence of Dallas, Judge A. H. Carrigan of Wichita Falls and John W. Gaines of Bay City. The State Bar Association will meet in Galveston July 1-2.

Former United States Judge for Porto Rico Dead.—Judge William H. Holt, former United States district judge in Porto Rico under President McKinley's administration, died recently at his home near Louisville, Kentucky. He was 76 years old. After practicing law for several years he was elected to the Kentucky Court of Appeals, serving until his appointment to the federal bench.

The Minnesota Bar Association is preparing to take an active part in Americanization work throughout the state. The executive board of the association's Americanization committee has voted to extend the committee organization into every county of Minnesota and to co-operate with other agencies interested in Americanizing the foreigner. Support of the Moon bill to make English the basic language of instruction in schools, and of bills prohibiting the publication of legal newspapers in foreign languages, was voted by the committee.

English Notes*

Opening the Doors to Women.—Although the result of the General Election in respect to the admission of women to Parliament has followed the experience of the Dominions, where sanction has been given to their entrance to the legislative assemblies, no doubt further demands will be made for the opening to them of hitherto closed doors. On the subject of women as members of the Legal Profession there is an informing article by Mr. Justice Riddell, of the Canadian Supreme Court, in the new number of the Journal of the Society of Comparative Legislation. He gives particulars of the legislation in the Dominions and the United States, and sums up the result of his experience and inquiry as follows: "It has done some good, and no harm, while all prophecies of ill results have been falsified; that its effects on the profession and practice of law have been negligible, and that it is now regarded with indifference and as the normal and natural thing by Bench, Bar, and the community at large." In this connection it may be noted that the Society of Comparative Legislation have recently appointed Mrs. Hugh Campbell to be in constant attendance at their chambers in 1, Elm-court, which by the generous co-operation of the Masters of the Bench of the Middle Temple have now been secured as a permanent home for the society.

"Cowper and the Law."—With all its reputed dryness, the law has nevertheless attracted to its study a remarkable number of men who have won a distinguished place in imaginative literature. Dramatists, novelists, and poets in plenty have studied the law and entered one or other branch of the Profession, many of them finding no incompatibility in the joinder of legal practice and the pursuit of *belles lettres*. In connection with this, it is interesting to learn that a paper on "Cowper and the Law" is being prepared by Mr. Wilfrid Hooper for this year's meeting of the Cowper Society, and although the gentle poet's active participation in legal work was slight, despite the fact that he

*With credit to English legal periodicals.

was for a time a commissioner of bankrupts, his connection with the law has several points of interest. His association with it was hereditary. His grandfather, Spencer Cowper, rose to be a judge of the Common Pleas, after having had the singular experience of being tried for, but, of course, acquitted of, the murder of a young Quakeress of Hertford; while his great-uncle, William Cowper, first Earl Cowper, was the first Lord Chancellor of Great Britain. But distinguished though these members of the family were, their fame has been completely overshadowed by that of the gentle poet, whose graceful verses and the "divine chit-chat" of his letters have made the whole English-speaking world his debtors. No mention of Cowper and the law would be complete which did not recall his youthful association with Edward Thurlow, the strong-minded and coarse-tongued Chancellor. The two spent their legal apprenticeship in the office of a solicitor named Chapman, although it is said that a good deal of their time was more pleasantly devoted to "giggling and making giggle" with Cowper's three fair cousins, the daughters of Ashley Cowper, who lived in Southamptonrow. It was in those days that Thurlow promised that if he ever became Lord Chancellor he would provide for his fellow-pupil. No doubt the promise was playful, but one could wish that when in the fullness of time Thurlow reached the Woolsack he had not so completely forgotten Cowper, not even acknowledging the poet's lines, "On the promotion of Edward Thurlow, Esq., to the Lord High Chancellorship of England." It is true that many years later, when Thurlow had retired, the two exchanged letters on the comparative merits of rhyme and blank verse for a translation of Homer. As Campbell points out, Thurlow's attitude to Dr. Johnson and his generosity towards the poet Crabbe showed that he could appreciate literary excellence, but this circumstance only makes the neglect of his old fellow-pupil the more to be regretted. No doubt it matters little now when Cowper's name is more widely known than that of the Chancellor, but we should have entertained more kindly feelings towards the great lawyer had he spared a thought in the day of his power for the retiring poet.

Uncorroborated Evidence in Divorce Proceedings.—It is the general practice in matrimonial causes for the court not to act on and grant relief on uncorroborated evidence of adultery. That was clearly pointed out by Mr. Justice Bargrave Deane in Curtis *v.* Curtis (21 Times L. Rep. 676). But, as his Lordship was careful to add, there is no absolute rule, either of practice or of law, that precludes the court from acting on such uncorroborated evidence. As regards uncorroborated confessions of adultery, the test to be applied is whether the whole of the circumstances of the case are such as to convince the court that the confession is true. It is not necessary, if the court is of opinion that the confession is made in good faith and can be relied on, that there should be any independent corroborative evidence of the adultery forthcoming. Such was the view expressed by Mr. Justice Bucknill in Getty *v.* Getty (98 L. T. Rep. 60; (1917) P. 334). And the same was adopted in its entirety by Sir Samuel Evans, P., in the subsequent case of Weinberg *v.* Weinberg (27 Times L. Rep. 9). With these three authorities as a guide, Mr. Justice Coleridge had an easier task than would otherwise have been presented to him in deciding the novel question whether, in the recent case of Riches *v.* Riches and Clinch, uncorroborated evidence should be accepted in the following circumstances: A husband petitioned for the dissolution of the marriage with his wife on the ground of her adultery, he having discovered her in bed with the co-respondent. That was the sole evidence in support of the petition. And it cannot be denied that it was a strong case in which such uncorroborated evidence could alone be acted on. The evidence of the one person whose interest in the petition proving successful was paramount was sought to be made available. Obviously, this was a far more notable step in the direction of utilizing uncorroborated evidence than was observable in Getty *v.* Getty (ubi sup.) and Weinberg *v.* Weinberg (ubi sup.). For in both of those cases it was a wife's confession of adultery by her that had to be taken advantage of—evidence presumably against the interest of the party by whom it had been given. In the present case, the husband was in nowise supported in his statement that he had seen his wife in bed with the co-respondent. But notwithstanding that it was in favor of his own divorce proceedings that that statement should be acted on, all he had to rely on were confession of adultery authorities. And those would be cases where the confession would be contrary to the interest of the person by whom it was made. When one considers, however, the point of view from which Mr. Justice Coleridge regarded the question that called for his decision, it is seen that his Lordship did no violence to the "general practice in matrimonial causes." The law as to corroboration, he said, being the same in all courts, and there being no statutory enactment making corroboration essential in such a case as the present, the court was entitled to determine from the evidence generally whether the husband's uncorroborated evidence was to be believed. And the conclusion arrived at by the learned judge was that it could. In similar circumstances the court is consequently not debarred by the general practice from acting likewise.

The Passage of Belligerent Troops Over Neutral Territory.—The conduct of the Dutch Government in permitting German troops to traverse Dutch territory on the day after the conclusion of the armistice, these troops being in possession of arms and military material and carrying off with them the proceeds of their exactions in Belgium, is scarcely consistent with the continuing friendship of Holland as a neutral to the allied Powers. The attempt to justify such conduct by the assumption that the armistice is virtually a peace is scarcely worthy of the school of Dutch jurists, who have made many notable contributions to the exposition of the doctrines of international morality. An armistice, as distinguished from the conclusion of peace, is described as suspending military operations by mutual agreement between the belligerent parties, and if its duration is not defined—and the duration of the present armistice has been defined and subsequently extended for a precisely limited term—the belligerents may resume operations at any time, provided always the enemy is warned within the time agreed on in accordance with the terms of the armistice. The distinction between an armistice and peace has since the present armistice been markedly drawn by the attitude of the allied Powers to the Central Powers, which is an attitude of severe aloofness, devoid of any approach, however distant, to relations of reconciliation or amity. The Dutch Government were bound by virtue of the second article of the Hague Convention of 1907 to intern German troops admitted into Dutch territory. The German army by their retreat through Limberg, which was permitted by the Dutch Government without any previous consultation with the allies, and accordingly without their consent, has been placed in a position to resume hostilities in the event of the failure of the armistice to secure peace. The passing of belligerent troops through neutral territory is wholly opposed to the practice of international morality in its recent developments. To give a few illustrations of cases in which the passage of belligerent troops over neutral territory was refused in circumstances much less objectionable than the circumstances attending the passage of the German army through Dutch Limberg: In 1870 the Govern-

ment of Switzerland refused to permit bodies of Alsatians enlisted for the French army to cross her frontiers, although they were traveling without arms or uniforms, whereas the German retreating army in their passage through Dutch Limberg had both arms and uniforms. Again, in the same year, Belgium thwarted an attempt of the Germans to send their wounded home over their railways even when the privilege was asked in the name of humanity. Subsequently assent was given at the Brussels Conference to article 55 of the military code then drawn up, providing that "the neutral State may authorize the transport acr ss its territory of the wounded and sick belonging to the belligernt armies provided that the trains which convey them do not carry either the personnel or matériel of war." How different from the case of a German army, not of wounded but of healthy men, crossing the Dutch Limberg—neutral territory—the personnel and matériel of war being unmistakably in evidence!

Novation of Contract by Raise of Wages.—"Novation" is a term derived from the civil law, as was said by Lord Selborne, L. C., in Scarf *v.* Jardine (47 L. T. Rep. 259; 7 App. Cas. 345, at p. 351). It will be found dealt with by Justinian in his Institutes (iii, 29, 30) under the title of Novatio. And it was thus explained by Lord Selborne: "There being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties; the consideration mutually being the discharge of the old contract." On the ground that the employees in the recent case of Meek *v.* Port of London Authority (119 L. T. Rep. 196) had entered into new contracts with their employers, they were held by the Court of Appeal, affirming the decision of Mr. Justice Astbury, to be debarred from claiming what they did in that case. It appeared that there had been a practice of the employers to pay, in addition to the salaries or wages of their employees, the income tax for which the employees became liable. Acceptance by the latter of promotion to a higher class of employment, with full knowledge of the employers' intention to discontinue the practice of paying the income tax payable by such employees as were assessable thereto, was considered by the two courts to constitute a new contract of service disentitling the employees to claim such an amount as would be equivalent to the income tax which they would have to pay in respect of the increased remuneration which they received. The Master of the Rolls (Swinfen Eady) delivered what was practically the judgment of the three learned judges of the Court of Appeal. For the two junior members merely expressed their concurrence in what the presiding judge had to say. His Lordship pointed out that if an employee by the terms of his contract was entitled to receive remuneration at a progressive rate, on each occasion when his salary was thus increased there was not a new contract entered into. The increase was by virtue of his old pre-existing contract. Obviously, that must be the true view to be taken of that state of affairs. It is the method universally adopted of remunerating employees. And no one of them would ever be so foolish as to imagine that a mere "rise in salary" meant a new contract of service. The learned judge went on, however, to say that when the increase was not an increase automatically under an existing contract, but it was an increase owing to the position of the employee being changed owing to the employers voluntarily promoting him to a higher grade, then the position was altogether different. This clear distinction it will be well for every employee to bear prominently in mind, since in many instances his original contract of service may have, in certain respects, been more advantageous to him than under the novation. Taking that line as his *ratio decidendi*, the Master of the Rolls had occasion to deal with another aspect of the case which apparently impressed Mr. Justice Astbury somewhat strongly. His lordship was of opinion that a trade usage of this character could not be annexed to a contract of service unless the servant was aware of it on entering the employment; and there was no evidence that the employees in the present case had that knowledge. The practice of dock companies to pay income tax in addition to salaries was not so notorious as all that, it would seem.

The Opinions of the Attorney General.—The announcement that in the forthcoming volume on the Treaties of 1785, 1799 and 1825 between the United States and Prussia, which has been edited for the Carnegie Endowment for International Peace by Dr. J. B. Scott, the distinguished American jurist, full use is to be made not only of the diplomatic correspondence between the two states, but also of the opinions of the American Attorney Generals, is a reminder that a very different attitude has prevailed among our kin beyond sea from that which obtains in this country regarding the publication of the law officers' opinions, says the *Law Times*. Every few years a substantial volume of the Opinions of the Attorney General of the United States is issued, and, although such a work is technically lacking in that authority which attaches to judicial decisions, it furnishes much valuable information difficult to obtain elsewhere, and, as expressing the views of great lawyers, it is entitled to the highest respect. Very different has in general been the official attitude of the publication of the opinions of the English Attorney General. Boswell long ago complained of "the mysterious secrecy of office" which precluded him from even publishing in his Life of Johnson the opinion of Attorney General Murray (afterwards Lord Mansfield) on the case submitted to him by the Commissioners of Excise as to the libelous nature of Johnson's definition of "Excise" in his Dictionary as "a hateful tax levied upon commodities, and adjudged not by the common judges of property, but by wretches hired by those to whom excise is paid." Many years later, it is true, Croker, the much-maligned editor of Boswell, obtained permission to publish the opinion of Murray, who took the view that the definition constituted a libel, but at the same time he dissuaded proceedings, at all events till the Doctor had an opportunity of altering the objectionable explanation. Since Boswell's day there have been two collections published of the Opinions of the English law officers. The first was in 1814, by George Chalmers, the Scottish antiquary, which, notwithstanding various defects, was found of considerable utility, and was at a later date reissued in America. The second and more important collection was that published in 1869, by William Forsyth, Q. C., standing counsel to the Secretary of State for India, and the author of numerous works, including "Hortensius," an interesting study of the development of advocacy, and a History of Trial by Jury. In the compilation of his work Forsyth met with differing treatment from the various Government departments. From the Colonial Office, then under Earl Granville, he received liberal permission to examine the archives and to publish the opinions of the law officers on colonial questions; from the Treasury he received the like permission; but to his application to the Foreign Office no response was vouchsafed. It was considered inexpedient to publish any opinions of a later date than 1856, and, as he said in his preface, this obliged him "to exclude the official opinions of that distinguished lawyer and jurist, Sir Roundell Palmer." Since 1856 the development of constitutional and international law has not stood still, and there must be numerous opinions in the archives of the various departments given by the various holders of the office of Attorney General which might with advantage be made available for the profession and for students of those important questions. Sir Frederick Smith, the present Attorney General,

who has long taken an active interest in questions of international law, might well consider whether a volume supplemental to that of Forsyth might now, or in the near future, be brought out.

Consent of Crown to Royal Marriages.—The recent announcement in the Court Circular of the betrothal of H. R. H. Princess Victoria Patricia of Connaught to Commander the Hon. Alexander Ramsay, R. N., is accompanied with the statement that the King and Queen have received the "gratifying intelligence," and that the King "has gladly given his consent to the union." The consent of the Crown to this marriage, couched in words which convey the most cordial approbation, is not a mere gracious formality. It is an essential condition precedent to such a marriage under the provisions of the Royal Marriage Act 1772, which was a measure most strenuously opposed on constitutional grounds and productive of momentous results. On March 24, 1772, the Royal Marriage Act was passed; the powers were characterized by Lord Chatham as "tyrannical," while Horace Walpole said "never was an Act passed against which so much and for which so little was said." The Act provides that no descendant of George II. (except the issue of princesses married into foreign families) should be capable of contracting matrimony without the King's previous consent signified under his sign manual and declared in Council, and that any marriage contracted without such consent should be null and void. There is a proviso, however, enabling members of the Royal Family who are twenty-five years of age to marry without the King's consent after having given twelve months' previous notice to the Privy Council, unless in the meantime both Houses of Parliament should signify their disapprobation of the marriage. It also provides that any person solemnizing or assisting or being present at the celebration of such prohibited marriages should incur the penalties of praemunire. Attempts have since been made to repeal this law, notably by Lord Holland in 1820, but without success. The consequences of this Act were far-reaching. In 1785, George IV., when Prince of Wales, contracted a clandestine marriage with Mrs. Fitzherbert, a Roman Catholic. This marriage, being without the King's consent, was invalid. He was consequently saved from the forfeiture of his succession to the throne, which, under the provisions of the Bill of Rights, would have been the legal result of a valid marriage with a Roman Catholic. The Duke of Sussex was twice married without the consent of the Crown—first in 1793 to Lady Augusta Murray, and later in life to Lady Cecilia Underwood. Both marriages were absolutely null and void. On the death of the Duke of Sussex in 1843, Sir Augustus d'Este, his eldest son by his first marriage, claimed the dukedom. The marriage had been solemnized at Rome in 1793 according to the rites of the Church of England by a clergyman of that establishment, and would have been a valid contract were it not for the restrictions of the Royal Marriage Act, and it was contended before the House of Lords that the operation of the Act could not be extended beyond the British dominions. But it was the unanimous opinion of the judges—in which the House of Lords concurred—that the prohibition of the statute was personal and followed the persons to whom it applied out of the realm and beyond the British jurisdiction. (XI Clark and Finnelly, pp. 85-154.) Sir Erskine May thus comments on this enactment, for whose modification the changes produced by the war supply grounds: "The arbitrary character of the Act was conspicuous. It might be reasonable to prescribe certain rules for the marriage of the Royal Family, as that they should not marry a subject, a Roman Catholic, or the member of any Royal House at war with this country, without the consent of the King; but to prescribe no rule at all, save at the absolute will of the King himself, was a violation of all sound principles of legislation. Again, to extend the minority of princes and princesses to twenty-five created a harsh exception to the general law in regard to marriages."

Legacy Payable on Legatee Attaining Majority as Vested or Contingent.—It is perhaps singular that, until the recent decision of Mr. Justice Sargant in Re Kirkley; Halligay *v.* Kirkley (119 L. T. Rep. 304), there appears to be no precise authority as to the effect of a legacy to a person or class of persons "to be paid to them respectively if and when they shall respectively attain the age of twenty-one years." No doubt the general rule is well settled, namely, that if there is a direct gift to legatees, a direction for payment when they shall attain a certain age will not prevent the vesting of the legacy, and therefore that the personal representative of a legatee dying under such age will be entitled (see the judgment of Lord Cottenham, C., in Re Bartholomew, 1 Mac. & G. 359). The case most in point is that of Knight *v.* Cameron (14 Ves. 389). There a testator gave a legacy to A to be paid to the legatee as soon as she should attain twenty-one; and in case she should live to attain that age, and not otherwise; or on her marriage with consent of the executors, and not otherwise. But in case she should die before she should have attained twenty-one, or be married without such consent, then over. It was decided that, as the legatee had married under age, without consent, the case was reduced to a single contingency of the legatee attaining twenty-one; and the court declared that, as she had not attained the age of twenty-one at the time of the application to the court, she was not then entitled—which declaration would imply her title at the age of twenty-one. It will be observed that the word "if" was not used in that case, but there were words equivalent thereto. In Re Kirkley the gift, by a codicil, was "£250 to my grandson J. M. Ockleshaw and £250 to each of three grandchildren who shall be born in my lifetime to be paid to them respectively if and when they shall respectively attain twenty-one, with interest at the rate of 4 per cent. per annum from my decease." It was held by Mr. Justice Sargant that the legacies were not vested, but contingent on the grandchildren respectively attaining the age of twenty-one years. It was conceded by counsel that, if the direction as to payment had been "when" the legatees attained twenty-one, the legacy would have been vested; but the condition as to attaining twenty-one, introduced by the word "if," in the direction as to payment, was not merely personal to the legatee, but affected the original bequest of the money. His Lordship also thought that the gift of interest did not make the legacy vested. It was not a gift of interest in the meantime, but a gift of interest contingently on the happening of the same event as that on which the principal sum was payable. Accordingly he directed the executors to set aside and invest such a sum as would represent the total amount of the legacies, plus interest at 4 per cent. on each legacy, for every year of the minority of the respective legatees. In this connection it may be useful to remind practitioners of the case of Lodwig; Lodwig *v.* Evans (114 L. T. Rep. 881; (1916) 2 Ch. 26). There the facts were shortly as follows: A testator gave his residuary real and personal estate to trustees upon trust for sale and conversion, and out of the proceeds to pay a weekly sum to his daughter-in-law, K. L., until the youngest of her children by his son should attain the age of thirty years; and directed that, after the youngest of his said grandchildren should attain that age, the trust funds should be divided between K. L. and her said children in equal shares, and, in the event of any of his said grandchildren dying, leaving lawful issue him or her surviving, the share of the parents so dying should be divided between his or her children. It was

held by the Court of Appeal (affirming the decision of Mr. Justice Sargant) that there was nothing to make the gifts to the grandchildren contingent merely because there was to be a postponement of the division until the youngest attained the age of thirty years. It will be remembered that in Leaming *v.* Sherratt (2 Hare 14), where the direction was to pay and divide "so soon as my youngest child shall attain the age of twenty-one unto and equally amongst my children share and share alike," Vice Chancellor Wigram said: "The testator having postponed the division of the residue until his youngest child attains that age, I think that no child who did not attain that age could have been intended to take a share therein." That, however, as observed by the Court of Appeal in the Lodwig case, was only a dictum and did not establish any general principle.

Obiter Dicta

ANOTHER WORLD WAR.—All *v.* All, 250 Fed. 120.

A CIRCUS ROW.—Showalter *v.* Spangle, 93 Wash. 326.

HOTLY CONTESTED.—Furnace *v.* State, 79 Tex. Crim. 59.

WE ARE OF THE BUNCH.—Bunch *v.* Dunning, 106 S. Car. 300.

ADVICE TO A STATESMAN.—"Human language is a living thing, and not an unyielding mummy cloth in which thoughts are enwrapped."—Per Dickinson, J., in De Ganay *v.* Lederer, 239 Fed. 572.

NOT THE PART OF WISDOM.—In Wisdom v. Wisdom, 24 Neb. 551, a decree of divorce was set aside, after the remarriage of the successful party, because of the fraud practised by him in procuring the decree.

A POOR GUESS.—In Guess *v.* W. U. Tel. Co., 102 Miss. 691, the defendant kept the plaintiff guessing by failure to deliver a telegram to him. But when it came to the matter of getting damages, the plaintiff was able to tell the defendant to guess again.

THERE ARE BOOKKEEPERS AND BOOKKEEPERS.—"There is nothing magical in bookkeeping; it does not create facts; it only records them."—Per Denison, J., in Doyle *v.* Mitchell Bros. Co., 235 Fed. 692. But the race-track bookkeeper is a wizard just the same.

THE LEAST OF OUR TROUBLES JUST NOW.—"It is a matter of common knowledge that nothing is more provoking and distressing than to have to wait for a corkscrew when a burning and consuming thirst is raging within."—Per Mayes, C. J., in McComb *v.* Hill (Miss.), 56 So. 346.

INEPT.—In Bank of Union *v.* Redwine, 171 N. Car. 574, Mr. Chief Justice Clark, arguing for the right of women to hold public office, said: "The modern republican conception is that the qualification for office is not physical strength, but mental capacity and character." True, and that is the very reason why the militant suffragist of to-day should not hold office.

AFTER THE LAWYERS GET THEIRS.—"If, as they say in the brief, they find themselves out of pocket on account of this suit, and their decree is 'una vittoria morale, niente piu,'—a moral victory, nothing more—they may find some measure of comfort in the suggestion that this is not an infrequent result of a lawsuit."—Per Powers, J., in Stefanazzi *v.* Italian Mutual Benefit Society (Vt.), 101 Atl. 1010.

NOT FOR US.—"The utmost latitude should be allowed for fair, full, and free review by the press and individuals of decisions of the courts. Just criticism may assail the opinions, expose the fallacies, and warn of the errors. The opinions of courts are not solemn edicts to be blindly assented to, but are subject to calm and fearless strictures, and all right-minded judges invite, indeed welcome, such criticisms."—Per Hill, C. J., in the case of In re Fite, 11 Ga. App. 694. This may be true, but we don't intend to indulge in any such "fearless strictures" unless we have in our pockets the price of a good-sized fine.

A SAMPLE SOP.—Some day, if we ever have the time and the exact amount of inspiration, we hope to make and publish a collection of the sops thrown by the courts to indignant attorneys whom they have just thrashed soundly. This proposed invaluable contribution to English literature is suggested to us at this time by the following effusion in the recent case of Johnson *v.* State, 104 Misc. (N. Y.) 211: "Although the court is constrained to differ from the conclusion urged by the claimant's counsel, we feel bound to acknowledge the sedulous care and marked erudition which characterize the briefs submitted by them. They are such as only lawyers of marked scholarship in the law of real estate could formulate."

THE PATRON SAINT OF THE LAW.—An exceedingly interesting anecdote told in an old Georgia case (Neal *v.* Crew, 12 Ga. 96) which has recently been brought to our attention serves to remind us of the rather low esteem in which the lawyers of olden times were held. For instance, one of Shakespeare's many quips at the expense of lawyers is found in the 5th Act of *Hamlet*, as follows: "Why may not that be the skull of a lawyer? Where be his quiddities now, his quillets, his cases, his tenures, and his tricks?" So in Robert Burton's *Anatomy of Melancholy*, a work contemporaneous with many of the Shakespearean plays, it is remarked: "Our wrangling lawyers . . . are so litigious and busy here on earth, that I think they will plead their clients' causes hereafter—some of them in hell." This latter anathema leads very naturally to the anecdote we are about to quote. The court in the case cited was speaking of the general exclusion of Sunday from the periods of time prescribed for various steps in legal procedure but remarked that, as an exception to the rule, Sunday was counted as one of the days in a notice to plead and as one of the four days in a rule to plead. Continuing, the court said: "Mr. Chitty makes this singular comment upon this exception to the general rule: 'Special pleaders are supposed to be less observant of the Sabbath than the rest of mankind.' 3 vol. Gen. Pr. p. 105 (note). As a key to this opinion, I shall be pardoned, perhaps, notwithstanding the gravity of the subject I am treating, for introducing in this place, an anecdote from Wynne's *Eunomus*, one of the most attractive and instructive books that has been published concerning the laws of England. St. Evona, a famous lawyer of the olden time, was piqued for the honor of the Robe, that his profession should have no Saint to patronize it. The physicians

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had St. Luke; the champions St. George; music and painting, and every other employment had its tutelar Saint. To Rome the good old man went, and requested the Pope to give the lawyers of Britain a patron Saint. His Holiness could recollect none that was not already disposed of. The dilemma was distressing; to own his incapacity would never do; to palm off upon the veteran lawyer a Saint that had already been appropriated, would be equally futile; he proposed therefore, to St. Evona, to go round the Church of St. John de Lateran blindfold; and after he had said so many Ave Maria's, the first Saint he laid hold of should be his patron. The task was willingly undertaken; when he had finished his Ave Maria's, he stopped short and embraced the first image he came to, crying out with joy—'This is our Saint, let this be our patron.' But when the bandage was taken from his eyes, what was his astonishment to find that though he had stopped at St. Michael's altar, he was hugging to his bosom, not St. Michael, but the figure under St. Michael's feet! the same with which the archangel contended, when disputing about the body of Moses. Jude, 9. The story says that Evona died soon after, of a broken heart. Whether he had authority to act for his brethren, and whether he should be deemed to have accepted of the patron, may still be considered open questions, notwithstanding the fling of Mr. Chitty."

A River of Doubt.—Doubtless the real origin of the famous "Show me!" slogan from Missouri may be traced to the author referred to in the following excerpt from the opinion in Maw *v.* Bruneau, 37 S. Dak. 75. Thereby enlivening what would otherwise have been an exceedingly dry discussion, McCoy, J., said: "The defendant claims title by and as accretion to riparian lands owned by him in the state of Nebraska. These lands in dispute are what are sometimes termed 'bottom lands,' and at different times within the last sixty years have been on both sides of the main channel of the Missouri river, a part of the time being in the territory and state of South Dakota, and a part of the time in the state of Nebraska, due to the shifting and changing of the bed and main channel of the river. A noted humorous author, in relation to the habits and eccentricities of the Missouri river, among other things, has most aptly written: 'It is a perpetual dissatisfaction with its bed that is the greatest peculiarity of the Missouri. It is harder to suit in the matter of beds than a traveling man. Time after time it has gotten out of its bed in the middle of the night, with no apparent provocation, and has hunted up a new bed, all littered with forests, cornfields, brick houses, railroad ties, and telegraph poles. . . . Then it has suddenly taken a fancy to its old bed, which by this time has been filled with suburban architecture, and back it has gone with a whoop and a rush, as happy as if it had really found something worth while. Quite naturally this makes life along the Missouri a little bit uncertain. Ask the citizen of a Missouri river town on which side of the river he lives, and he will look worried, and will say: "On the east side when I came away." Then he will go home to look the matter up, and, like as not, will find the river on the other side of his humble home, and a government steamboat pulling snags out of his erstwhile cabbage patch. It makes farming as fascinating as gambling, too. You never know whether you are going to harvest corn or catfish. The farmer may go blithely forth of a morning with a twine binder to cut his wheat only to come back at noon for a trout-line; his wheat having gone down the river the night before. These facts lead us naturally to the subject of the Missouri's appetite. It is the hungriest river ever created. It is eating all the time, eating yellow clay banks and cornfields, eighty acres at a mouthful, winding up its banquet with a truck garden, and picking its teeth with the timbers of a big red barn. Its yearly menu is 10,000 acres of good, rich farming land, several miles of railroad, a few hundred houses, a forest or two, and uncounted miles of sand bars. This sort of thing makes the Missouri valley farmer philosophical in the extreme. The river may take away half his farm this year, but he feels sure that next year it will give him the whole farm of the fellow above him. But he must not be too certain. At this point the law steps in and does a more remarkable thing than the river itself may hope to accomplish. It decrees that so long as there is a single yard of an owner's land left—nay, even so long as there is a strip wide enough to balance a calf upon—he is entitled to all the land that the river may deposit in front of it. But, when that last yard is eaten up, even though the river may repent and replace the farm in as good order as when it took it, the land belongs to the owner of the land behind it.' "

Correspondence

TAKING THE CASE FROM THE JURY.

To the Editor of Law Notes.

Sir: Your editorial note in the last issue entitled, "Taking the Case from the Jury," raises a point that I have long wondered about.

The American and English Encyclopædia of Law, on the subject of contributory negligence as a question of fact for the jury, says: "If more than one inference can be fairly drawn from them as to the want of care of the plaintiff, the question of contributory negligence is for the jury."

Many courts say that where men of ordinary intelligence might reasonably differ on the proposition, it must go to the jury. Let us see what frequently happens. The trial court takes the view that men of average intelligence, that is, the jury before him, could not reasonably differ on the question of want of care, and directs a verdict for the defendant. The case is appealed. The appellate court, by a vote of four to three, or five to two, upholds the judgment of the trial court.

It would seem to almost anyone that Justices of the Supreme Court are men of ordinary intelligence, and that their opinions are reasonably formed. It would appear, then, that the dissenting minority reasonably differed from the majority. The humor of it does not appear to have occurred to any of the dissenting Justices, at least, I have not seen any mention of it in any of the dissenting opinions. But, in effect, the majority say to the minority, either that they are not men of ordinary intelligence, or that their differing with the majority is unreasonable.

It seems to me that the mere fact that there is a dissent by even one Justice, in such a case, proves that it is a question upon which men of ordinary intelligence might reasonably differ, and that, therefore, the question should go to the jury under the rule. In other words, ought this not to be the rule of all courts: Wherever, on this proposition of contributory negligence, even one Justice believes the question should have gone to the jury, the case should be reversed and sent to the jury? Am I not right?

Hutchinson, Kan. F. Dumont Smith.

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Law Notes

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Information Wanted.

IN *Arce v. State,* 202 S. W. 951, it was held that the killing of a corporal in the United States army by soldiers of the Carranza Government was not murder for the reason that the United States was at war with Mexico —not with Villa or Zapata or any other bandit but with the good Carranza himself. The court enforces its view with an opinion of Gen. Crowder in which he states that "a state of war exists so far as concerns the operations of the United States troops in Mexico." Accepting the conclusion thus announced by authority both judicial and military, some interesting questions arise. Is that war over? If not, the "trading with the enemy act" applies in all its rigor to commerce with Mexico, contracts with Mexican subjects are void, partnership and agencies are at an end. If the war is over, who won it? Chauvinistic history credits the United States with winning the war of 1812; doubtless the next generation of German children will recite the glorious triumph of the Kaiser's arms in 1918, but if we were defeated the spirit of the American people will not be broken by a knowledge of our downfall and the terms which were imposed by the conqueror. It was said of Lord Kitchener that he would have made no announcement until the Great War was over and then merely "we won" or "we lost," but even this terse bulletin is denied to us. Just for a guess, the war probably "petered out." War may terminate by a mere cessation of hostilities (*Freeborn* v. *The Protector,* 12 Wall, 700) though such a termination has rarely occurred in the past century, the Civil War being the most notable instance, and in that case a presidential proclamation was made. Perhaps the League of Nations will devise some means of notifying the inhabitants of a country when they are at war and when the war is over.

Private Organizations to Combat Sedition.

CONDITIONS arising during the war led to the formation of various organizations for the patriotic purpose of bringing to justice spies and seditious agitators, and since the close of hostilities these bodies have acted on the belief that there remains ample need for their activities. Attorney General Palmer has however issued a statement in which, while paying tribute to the patriotic intent of such societies, he states that he has instructed the officials of his department not to enter into relationship with them. The reason for his action he states as follows:

"Espionage conducted by private individuals or organizations is entirely at variance with our theories of government, and its operation in any community constitutes a grave menace to that feeling of public confidence which is the chief force making for the maintenance of good order. Furthermore, on reflection it must be obvious to every one that for a Government agency to maintain any relationship whatever with private bodies engaged in this work would in the end result in impairing the confidence of the public in disinterestedness and impartiality of Government investigations."

While there is undoubtedly something to be said in favor of the Attorney General's position, it is to be feared that it sacrifices much of possible efficiency in the enforcement of the law. If the Attorney General is to avoid criticism for declining the assistance thus proffered to him, it will be necessary for his office to enter into very prompt and vigorous "relationship" with the fomenters of the sedition now prevalent in the United States. Some little speculation might also be indulged as to the meaning of the reference to the "disinterestedness and impartiality of government investigations." Is it the function of government to be disinterested and impartial as between the seditious and those who seek to suppress sedition? The excellent work done by Attorney General Palmer in his capacity as Custodian of Alien Property forbids any suspicion that his administration will be otherwise than vigorous and patriotic. But the task of building up a spirit of true Americanism which will stem the wave of anarchy which is spreading over the world is one too great for any official to perform, and it seems a mistake to rebuff intelligent and nonpartisan co-operation.

War Indemnities.

"ONCE upon a time" there lived in a quiet and law-abiding neighborhood a man named Heine. By thrift and industry he became very wealthy, and finally, devoured by avarice, he could not endure the thought that any one else should own property in the country. Thereupon he and his hired men seized the fields of his neighbors, burned their crops and tore down their buildings. John, Jean, Albert, Ivan, and Antonio at once brought suit for an injunction. Sam, being peaceably inclined, refused at first to join, but after repeated acts of depredation on his property by Heine he filed a bill and was joined as a plaintiff. The litigation was long and expensive.

Every device of perjury and bribery was resorted to by Heine to defeat the action. Sam's faithful wife discharged her servants and went to work in the kitchen; his sons and daughters sacrificed their savings to lend him money for the expenses of litigation; he mortgaged his property to raise money to hire attorneys. At last the right prevailed and the court announced that a permanent injunction against Heine would be granted. "There remains," said the judge, "only the assessment of damages and the taxation of costs." Supposing at this juncture the leading counsel for Sam arose and said: "Your honor, I have long entertained a theory that the awarding of damages for tort has a pernicious tendency to encourage litigation, and thus disturb the tranquillity of the neighborhood. I have not taken the time to consult with my client on this subject but I am confident that he will agree with me, and that he desires only a moral victory. On behalf of Sam I waive all claim to damages and costs in this case." Query: What would poor debt burdened Sam say when the lawyer presented his bill?

Settlement of Workmen's Compensation Claims.

One of the greatest abuses in the field of personal injury litigation has been the unfair and inadequate settlements often made with injured men. Apparently the provision for amicable settlement contained in many of the workmen's compensation laws has opened the door for the nefarious activities of the claim agent, and the fact that settlements must be approved by the commission has not always been sufficient to prevent abuses. An investigator recently appointed by the Governor of New York, after going over the facts of hundreds of direct settlements, reports that "the existing conditions are so shocking as to require immediate remedial legislation." After citing in detail a number of instances he concludes:

"I have no hesitation in reporting that the amendment to the compensation law authorizing direct settlements is a total failure. In the great majority of cases it is an absolute impossibility for the commission to determine whether the report of the agreement is in accordance with the provisions of the act. I can take any twenty-five cases at random from the files of the commission and convince any one of this fact. I, therefore, recommend an amendment to the workmen's compensation law abolishing direct settlements and requiring the commission to pass upon all cases."

A large share of the liability imposed by the compensation acts is carried by insurers, and this condition, once the right to make direct settlement is admitted, results in the advent of the professional adjuster, an individual who has filled the reports with instances of fraud practiced on the unfortunate. The provision for an approval of settlements is obviously futile, since the inadequacy of a settlement can be disclosed only by a full inquiry into the nature and extent of the injury. It is not as if the amount of compensation was a matter of judgment or discretion. Once the extent of the disability is ascertained, the amount of compensation is fixed by the statute, and justice and fairness require that the ascertainment should be judicially made in every instance.

Conviction of the Innocent.

A striking instance of miscarriage of justice has recently occurred in Alabama. One Wilson was accused of the murder of his wife and baby and was convicted, the proof of corpus delicti consisting of evidence of the finding of the bones of a woman and an infant. The conviction, which carried a sentence of life imprisonment, was affirmed on appeal. See *Wilson* v. *State,* 191 Ala. 7. After he had served three years, the supposedly murdered wife appeared on the scene and a pardon was of course granted. It is reported that bills have been introduced in the Alabama legislature to make compensation to Wilson and to abolish capital punishment in cases of circumstantial evidence. The absence of any provision for compensation to persons unjustly convicted is a standing reproach on our law, and the present instance illustrates it dramatically. By pure mischance and coincidence an innocent man was compelled to endure the strain of a trial for his life, followed by three years of incarceration. Incidentally it is said in the press reports that his body is scarred by the lash which in a few jurisdictions still stimulates industry in prison camps. Yet for all this suffering he is without remedy unless the legislature as a matter of pure grace chooses to allow him compensation. The case is far from unprecedented. It is only a few months since the innocence of one Stielow was discovered in New York, after he had lain under a capital sentence and had been saved by a reprieve which arrived twenty minutes before the hour fixed for execution. Other instances less sensational but no less grievous to the victim are reported from time to time. No reproach can justly be laid at the door of the courts or the law. Human justice must of necessity be fallible. But, recognizing that fallibility, full provision should be made for the award of such reparation as may be possible to its innocent victims. The case of Beck led the British Parliament to provide for compensation to persons unjustly imprisoned. If the more grievous case of Wilson does not make a like impression on American legislators we are in a poor position to pose as the humanitarian leaders of the world.

Circumstantial Evidence.

It is not surprising that such a case as that of Wilson should produce an agitation against capital punishment; indeed it is hard to understand how any man who knows of such an instance can ever as a juryman vote for the death penalty, or ever as a citizen hear of an execution without a fear that an innocent man has been put to death. But most experienced lawyers will agree that it is a mistake to select circumstantial evidence as the culpable agent. Circumstantial evidence is fallible because the frailties of human reason may lead to an erroneous conclusion from a train of circumstances. But direct evidence is just as unreliable for the reason that an alleged eyewitness may from honest mistake or by sheer perjury testify falsely. Taking for illustration two well-known cases from the same jurisdiction, compare the Carlisle Harris case (136 N. Y. 423) with the Patrick case (182 N. Y. 131). In the former case, the guilt of the accused was shown by circumstantial evidence to a certainty which cannot be humanly transcended. In the latter there was the direct testimony of an alleged accomplice, yet the reading of the report of the evidence will leave the average man involved in doubt, and because of the uncertainty as to the guilt of the accused the sentence was never executed. In the Leo Frank case, which became the subject of nationwide discussion, the evidence was in a strict sense circumstantial, but the whole controversy turned on the credibility of the

testimony of the negro Conley. (See *Frank* v. *State,* 141 Ga. 243.) Comparing two celebrated California cases, few doubt the guilt of Durant, who was convicted on circumstantial evidence, while the guilt of Mooney has become a subject of national controversy, the advocates of his innocence claiming that the alleged eyewitness was perjured. It is one of the peculiarities of the human mind that men, who in their private affairs do not believe all they hear, fall in with the popular superstition that circumstantial evidence is something vague and fanciful and not at all to be compared to the testimony of an "eyewitness."

The Cost of Administering Justice.

A RECENT discussion of an increase in the number of judges of the New York Court of General Sessions has evoked a publication of the following salary list of that court as now constituted:

Seven judges at $17,500	$122,500
One clerk at $5,000	5,000
Fourteen deputy clerks at $4,000	56,000
One assistant clerk at $4,000	4,000
Nine record clerks at $3,000	27,000
Six stenographers at $3,600	21,600
Five interpreters at $3,000	15,000
Two wardens at $2,000	4,000
Seven clerks to judges at $3,500	24,500
One crier at $2,100	2,100
Seven chief attendants at $2,100	14,700
Forty-eight attendants at $2,100	100,800
Seven attendants to judges at $2,100	14,700
Total	$411,900

The salaries listed are doubtless much higher than those paid to judges and officers of courts of equivalent jurisdiction in most states, but they are in no way exorbitant, the expense of metropolitan life being considered. Clerks to judges and attendants to judges would doubtless be considered a luxury in most communities, but the lawyer with a large practice habitually keeps a clerk and a messenger, and a judge who uses these aids wisely undoubtedly gains for the public more than the amount of their salaries in added efficiency. But, adding to these salaries jury fees and the like, we reach a total exceeding half a million dollars annually as the expense of maintaining a court of seven judges. And, since the court has a jurisdiction exclusively criminal, witness fees aggregating many thousand dollars must be added to this impressive total. From one point of view the expense seems staggering. But every nation shows its true character by that which it buys, and no prouder showing can be made for a community than that it willingly spends a fortune annually in the effort to procure, not pomp for its rulers, not luxury for its favored few, but honest and impartial justice for all its citizens.

An Object Lesson in Prohibition.

ONE of the claims of the prohibitionist is that where prohibition reigns jails are empty and sheriffs spend their time conducting prayer meetings. No state boasts more of its "bone-dryness" than Oklahoma, and it may in all fairness be taken as an illustration. In that state there is a court whose sole function is the hearing of appeals in criminal cases. The opinions rendered by that court between Jan. 24, 1917, and Sept. 17, 1917, make up a volume (vol. 13) of reports, no mean record for one of the smallest populations in the Union. Of these cases no less than sixty-five were for violations of the prohibition law. As every lawyer knows, only a small proportion of cases of this class find their way to the appellate courts, particularly where the court is as inhospitable toward technical objections as is that of Oklahoma. So these sixty-five appeals doubtless indicate that hundreds of liquor cases were tried during the preceding year—and this after years of prohibition. Nothing is more clear than that a situation wherein the people remain divided as to the merits of a law and the courts are constantly filled with prosecutions for its violation is a most unhealthy one. The expense bears heavily on the taxpayers, and distrust and ill will run riot through every neighborhood. Of course the man with a hobby cannot see this, but every serious student of public affairs must be led to wonder whether the laws which produced such a condition are worth the cost.

Local Self-Government.

IN a recent address Mr. Charles E. Hughes pointed out that local self government is of the essence of the American ideal of liberty. That thought has of late been largely lost to view. Persons obsessed with a hobby, be it prohibition, woman suffrage or what not, finding a community in which their demands did not meet with favor, instead of endeavoring to counteract the adverse opinion have turned their attention to procuring from some larger governmental unit legislation to force on the obdurate locality something which it does not want. Every one will admit that chronologically legislation is good or bad according to its adaptation to the times; that some of the best measures of the last decade would have been ill advised a hundred years ago. It should be equally plain that the same differences exist geographically; that each community represents a particular situation with its own needs. The principle of self government demands that the people living in that situation shall determine what is best for their own interests so long as their decision does not directly affect other communities. If that principle is violated by a superior power it is of no moment whether the power resides in a king or in the people of other localities. The state of New York has recently taken a long step forward by enacting that the legality of Sunday baseball and Sunday motion pictures shall be determined by local option. In these and a hundred similar matters the majority of the persons directly affected should have the power to decide for themselves. If any person is desirous of having it otherwise, let him address himself directly to the people concerned; if he can convince them well and good, if he cannot let him submit to the will of the majority or move to a place where people are more of his way of thinking. The moment decision by the majority of the persons directly affected is abandoned, tyranny results. We have heard much of late about self determination for small nations. Our sincerity in adhering to that most excellent principle would be more apparent if we were a little more consistent in allowing self determination to small communities. In our newly assumed role of guardian of Europe it would be well if we took serious

thought of the ancient saying anent the mote and the beam.

The Cure of Insularity.

Our well edited contemporary the *Canada Law Journal* says on a page devoted to matter of semi-jocular nature: "There is much solemn discussion in some of the American legal journals as to whether the President of the United States may leave his own country. It does not strike those whose rulers can go where they like without restraint as of much consequence whether he ought or ought not to do so. He has done it, and he cannot be turned out of office for taking the jaunt. Whether his going out of the United States has been beneficial to the Allies some have doubted, but however that may be, we shall all be glad if England's toil of centuries to protect the freedom of the seas may ensure his safe journey. It is to be hoped that the precedent set by Mr. Wilson in going abroad will be followed by his successors, as there is nothing like travelling in foreign countries to cure insularity and enlarge the vision." The principle embodied in the concluding sentence might well be extended. The American bar at least is not unmindful of our debt to the legal minds of other nations. Starting as heirs of the common law of Britain, we have borrowed our workmen's compensation laws from the same nation, and our ballot laws and title registration laws from one of her colonies. If the debt has never been paid in kind, it is not because we have been unwilling to lend or because we have nothing worth borrowing. While the United States is not free from insularity it disclaims any monopoly therein. Such as we have is in large part due to the fact that Europe has sent us as emigrants its least desirable citizens and by these we have largely judged the civilizations whence they came. Whether travel is a cure for insularity remains to be settled. As against the view of our contemporary may be cited the authority of Horace: "Caelum non animum mutant qui trans mare currunt." But, waiving that objection, we would welcome gladly any king who wishes to try the experiment. By the way, is it merely a coincidence that the primary significance of the word "insular" relates to an island?

The Profession in England.

There is in progress a considerable discussion in the Law Society, the organization of the English solicitors, with respect to the fusion of the two branches of the legal profession. The expression of the members present at a meeting reported in the *Solicitors Journal* of Feb. 8, 1919, was strongly in favor of the proposed fusion, the existing division being termed "artificial" and "archaic," doing injustice to the solicitors and imposing unnecessary expense on clients. The mover of the resolution for fusion referred to the American system as a great improvement on that of England in this respect. The bar will naturally oppose the proposed encroachment on their privileges and a protracted discussion will doubtless ensue. Speaking with due diffidence, as one afar from the situation in question, it would seem that so far as prominent lawyers and large cases are concerned, fusion would make little difference. A similar division has in the larger law firms tacitly grown up in the United States, and there are many prominent attorneys who never go into court and rarely have a personal interview with a client. But with respect to small business it certainly seems a hardship that two lawyers must be employed when the one first consulted could dispose of the whole matter in the time required to prepare a brief on which to obtain the opinion of the other. Either the expense to the client is doubled or the remuneration of the attorney is halved. In this as in many other matters of procedure an elasticity which will yield to the needs of an occasion is better than a rigid system which must be conformed to in every instance.

LIMITATIONS ON THE RIGHT OF FREE SPEECH.

"Congress shall make no law . . . abridging the freedom of speech or of the press." U. S. Constitution, First Amendment. A similar declaration appears in the organic law of probably every one of the states of the Union. 1 Stim. Am. St. L. 12. The foregoing constitutional guaranty is rivaled only by that securing the right of jury trial as an object of oratorical eulogy. Courts have contributed their quota, a recent decision for example declaring that "freedom of speech and freedom of the press have always been supposed to be the very corner stones of Anglo-Saxon democratic institutions." *State* v. *Pierce,* 163 Wis. 615.

Deserved as these encomiums may be, they express a half truth only, and being widely proclaimed without their counterbalancing limitations they have produced an effect on the popular mind which is not altogether wholesome. The impression is quite wide spread that an unrestricted right of speech is preserved by the Constitution. To that contention, made before the Supreme Court of the United States in a recent case arising under the espionage act, Justice Holmes tersely responded: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schenck* v. *U. S.*, 39 Sup. Ct. 247. Of course nothing more pernicious than an unrestricted right of speech could be imagined, as may be seen readily from some of the contentions which have been made and overruled. It has been seriously contended that the constitutional protection of freedom of speech prevents civil or criminal responsibility for defamation (*Edwards* v. *Publishing Co.*, 99 Cal. 431; *Detroit Daily Post* v. *McArthur,* 16 Mich. 447; *Aldrich* v. *Press Printing Co.*, 9 Minn. 123; *People* v. *Croswell,* 3 Johns. Cas. (N. Y.) 337; *Timberlake* v. *Cincinnati Gazette,* 10 Ohio St. 548); that it permits unlimited abuse of the courts (*State* v. *Morrill,* 16 Ark, 384; In re Hayes, 72 Fla. 558; *State* v. *Shepherd,* 177 Mo. 205; *Burdett* v. *Com.*, 103 Va. 838); that it prevents the prohibition of the advertisement of lotteries through the mails (Ex parte Jackson, 96 U. S. 727; In re Rapier, 143 U. S. 133); and that it invalidates a statute making it an offense to use profane language in a public place (*State* v. *Warren,* 113 N. C. 683). The climax of forensic ingenuity was reached in Ex parte Warfield, 40 Tex. Crim. 413, wherein it was contended that the guaranty of free speech forbade interference with the petitioner's effort to alienate the affections of another man's wife. So far as the reports disclose, no contention has ever been made that a man has a constitutional right to incite a single

private murder, but advocates of wholesale murder have asserted vociferously that the makers of the Constitution provided for their immunity. For example in 1901, a "made-in-Germany" reformer published in New York City in a newspaper bearing a German name the following: "Let murder be our study; murder in every form. In this one word lies more humanity than in all our theories. The greatest of all follies in the world is the belief that there exists a crime against despots and their myrmidons; they are in human society what the tiger is among animals, to spare them is a crime; as despots permit themselves everything, betrayal, poison, murder, etc., in the same way, all this is to be employed against them. Yes, crime directed against them is not only right, but it is the duty of everyone who has an opportunity to commit it, and it would be a glory to him if it was successful." On his behalf it was contended by an attorney who has since risen to prominence in socialistic circles that the right of free speech would be outraged if his conviction was permitted to stand. *People* v. *Most,* 171 N. Y. 423. It is therefore obvious that some limitations must be implied in the constitutional guaranty or civilization could not endure for a decade. "The tongue is an unruly member; see what a fire a little matter kindleth."

With respect to the general definition of these limitations, the courts are well agreed. In *Robertson* v. *Baldwin,* 165 U. S. 275, it was said: "The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case." Mr. Justice Story defined the phrase of the Constitution to mean that "every man shall have a right to speak, write and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property or reputation; and so always, that he does not thereby disturb the public peace, or attempt to subvert the government." (Story's Commentaries on the Constitution, § 1874.)

In *People* v. *Most,* 171 N. Y. 423, it was said: "It does not deprive the state of the primary right of self-preservation. It does not sanction unbridled license, nor authorize the publication of articles prompting the commission of murder or the overthrow of government by force. All courts and commentators contrast the liberty of the press with its licentiousness, and condemn as not sanctioned by the constitution of any state, appeals designed to destroy the reputation of the citizen, the peace of society or the existence of the government."

In *State* v. *McKee,* 73 Conn. 18, the court said: "The liberty protected is not the right to perpetrate acts of licentiousness, or any act inconsistent with the peace or safety of the State. Freedom of speech and press does not include the abuse of the power of tongue or pen, any more than freedom of other action includes an injurious use of one's occupation, business or property."

In Ex parte Harrison, 212 Mo. 88, the rule was stated as follows: "The constitutional liberty of speech and of the press grants the right to freely utter and publish whatever a citizen may desire and to be protected in so doing, provided always that such publications are not blasphemous, obscene, seditious, or scandalous in their character so that they become an offense against the public and by their malice and falsehood injuriously affect the character, reputation or pecuniary interest of individuals."

The power of the legislature to punish the use of seditious language was authoritatively declared in *Schenck* v. *U. S.,* 39 S. Ct. 247, and *Debs* v. *U. S.,* id. 352.

It is not merely for the defense of the very existence of the state or for the protection of the rights of individuals that freedom of speech may be restricted. Thus in *State* v. *Pioneer Press,* 100 Minn. 173, upholding a statute which forbade the publication of details of a hanging, the court said: "If the constitutional provision has reference to restricting the publication by newspapers of unwholesome matter, as in *State* v. *McKee,* 73 Conn. 18, 46 Atl. 409, 49 L. R. A. 542, 84 Am. St. 124, and In re Banks, 56 Kan. 242, 42 Pac. 693, or the use of the United States mails for the distribution of obscene literature, as in *United States* v. *Harmon* (D. C.) 45 Fed. 414, or the publishing of anarchistic doctrines, as in *People* v. *Most* (Sup.) 75 N. Y. Supp. 591, upon the ground that it is in the interest of public morals, then for the same reason the right of restriction applies to publishing details of criminal executions."

So, in place of a constitutional guaranty of unrestricted speech, the bald fact is that there is no definite constitutional provision which will prevent a court from sustaining almost any restriction on the right of speech. By this no reference is intended to mere judicial usurpation—a possibility so remote that it may be ignored. What is asserted is that there is practically no restriction which a judge may not, in full honesty, with a sincere conviction that he is acting within the limits of his duty, sustain without departing from the general path marked out by the precedents. If there is an implied limitation as to words "injurious to public morals" (*Robertson* v. *Baldwin,* 165 U. S. 275) or which "injure the vital interests of society" (*People* v. *McKee,* 73 Conn. 18) the determination of what is thus injurious must, like all questions involving the exercise of the police power, rest largely on the legislative discretion, and its review must inevitably be controlled by the personal view point of the judges. If a legislature of prohibition tendency and a bench of the same proclivity sincerely believed that agitation for the repeal of the 18th Amendment was directed to subverting the health, happiness and morality of the land (and most prohibitionists do so believe), what authority could be produced to convince them that the right of free speech was infringed by a law prohibiting such agitation? If a precedent was produced, they could respond in the words of the court in *Coleman* v. *McLennan,* (Kan.) 98 Pac. 281: " 'Liberty of the press' is still an undefined term, and like some other familiar phrases of constitutional law must remain undefined. Certain boundaries are fairly discernible within which the liberty must be displayed, but precise rules cannot be formulated in advance to govern its exercise on particular occasions. In the decision of controversies the character, the organization, the needs and the will of society at the present time must be given due consideration."

The supposition is not an impossible one. It is but two years since the advance of liberty in England broke the long entrenched power of the religionists who would for-

bid the most decent and scholarly discussion of the truth of their tenets. *Bowman* v. *Secular Society,* [1917] A. C. 406, Ann. Cas. 1917D 761. There are probably courts in the United States to-day which would not render as liberal a decision, and certainly many citizens who would resent it bitterly if they did. But quite apart from the possibility of any restriction which the pharisaical element may seek to impose, and that in the light of recent events is not to be ignored, the political and economic situation is one wherein the limitations of the right of speech present grave problems. On the one hand we are confronted with an anarchistic propaganda, which must be curbed. On the other, whatever restrictions are imposed for the protection of the nation, office holders will seek to use to protect their own acts from criticism. In this situation it is well for the profession to realize that the fathers did not leave to us an automatic and infallible protection of the freedom of speech which is essential to the life of a republic and the growth of a free people. If it is to be protected we must protect it ourselves. It is not enough to lay down sound general principles. For instance it is well settled that criticism of a judge as an individual officer or candidate is not contempt.. But a reader of the contempt cases will find that a maligned judge is almost always of the opinion that this particular criticism was leveled not at his individual self, but at the judicial ermine, and the excellent general rule is small consolation to the respondent. Some considerable conflict is inevitable in the next few years, both in the legislatures and in the courts, between those who would license verbal incitement to crime and those who would restrain criticism of official measures and official conduct. The triumph of one or the other of these extremes can be prevented only by the utmost patriotism, vigilance and good sense of the American bar.

The restriction of sedition in all its forms is of a propriety as unquestionable as its legality. The words of a writer in Law Notes (June, 1918, p. 45) in respect to the Sedition Act of 1918 are equally applicable to legislation needed in time of peace:

"The prohibition against uttering, printing, writing or publishing any disloyal, profane, scurrilous, contemptuous or abusive language about the form of government has given rise to apprehensions that the Government is setting up a doctrine of *lèse-majesté.* But the provision has nothing to do with the conduct of the Government, it has nothing to do with the manner in which the President, his cabinet, or Congress execute the Constitution and laws of the United States. It does not make legitimate criticism of any officer or any department of the Government in the execution of the laws or in the prosecution of the war a crime. The fundamentals of our Government, its form and its Constitution, no one should be permitted contemptuously to vilify and traduce."

But while no fault can be found with any exception which has thus far been imposed on the constitutional guaranty, there is a potentiality of error in the dictum in *Robertson* v. *Baldwin,* 165 U. S. 281, that the constitutional provision merely embodies an immunity inherited from our English ancestors. In England, at least prior to the American Revolution, the King ruled by divine right. His grant to his subjects of a limited power to discuss the affairs of the realm did not affect that relation. In fact more than one King proceeded on the theory of Frederick the Great, who said that he got along well with his people since they said what they pleased and he did what he pleased. In the United States the people rule; officers and laws are of their creation. Therefore it would seem to follow that, absent the complication of foreign war, what a majority of the people may lawfully do, any person may for just and lawful motives endeavor to persuade them to do. In other words, language addressed to the people of the United States is comparable to language addressed to the King of England. Since the people make their laws and constitutions, so long as the advocacy is in fact as well as in theory addressed to the end of producing orderly and constitutional action, no matter how radical the proposition may be, the right of free speech is infringed by its suppression. Since the people choose their officers, no officer should be placed beyond the most searching criticism. But when the criticism of institutions turns from construction to destruction and is addressed not to constitutional reform but to the fomenting of a spirit of lawlessness; when criticism of officers abandons its just purpose of aiding the people in the exercise of their franchise and becomes a covert attack on all government, then liberty has been exceeded and license inaugurated. "Immunity in the mischievous use [of free speech] is as inconsistent with civil liberty as prohibition of the harmless use." *State* v. *McKee,* 73 Conn. 18.

The line of demarcation is narrow and difficult and calls for the exercise of the utmost of patriotic determination and the utmost of discrimination. In case of doubt the counsel of Gamaliel (Acts v., 35-39) may be read with profit. The court which held (*George* v. *Braddock,* 45 N. J. Eq. 757) that a single tax propaganda was not contrary to public policy was admonished to tolerance by a case (*Jackson* v. *Phillips,* 14 Allen [Mass.] 539) wherein it was contended that public policy forbade the circulation of anti-slavery literature, and the present generation may learn from the same decision that it is possible to mistake an ulcer on the body politic for a vital organ of our civilization.

W. A. S.

THE PROHIBITION AMENDMENT AS AN ENCROACHMENT ON THE INHERENT RIGHTS OF STATES.

The people of the United States are to-day about to enter on a new era, which, if the Eighteenth Amendment is sustained, will result in a restriction on the rights of the states to control their own internal affairs and will, if further action along the same line is taken, be one of constitutional dictation of personal conduct and an abridgment of personal rights, individual freedom of action, and also of state powers.

It is not the purpose of the writer to discuss the merits of prohibition. The evils of the liquor traffic are well known, and have been continually recognized by the courts and by law-making bodies in the form of local legislative restraint and control. That it may be thus restricted is unquestionable, and even its prohibition may have beneficent results both mentally, morally, physically and financially.

The question, however, is not to what extent this traffic shall be controlled or whether it shall be prohibited. Con-

ceding even that prohibition may be the real solution yet can it be brought about by a federal constitutional amendment? If so, then the assertion of our forefathers in the Declaration of Independence that "we hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness," is simply an aphorism of the past, so far as the people of the United States are concerned. And the declaration in the Articles of Confederation that "each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States in Congress assembled," is to be regarded merely as a view which the people then entertained as to the basis of a confederacy of the states. Yet to both of these documents resort may be had in construing the Constitution, in which latter instrument we also find the promise in article IV, section four, that "The United States shall guarantee to every state in this Union a republican form of government." (See 11 Fed. St. Ann. [2d ed.] 303.) In this connection it does not seem amiss to note that the word republican has been defined as that which is consistent with the principles of a republic, and that Madison said in the Federalist that a republic may be defined as "a government which derives all its powers directly or indirectly from the great body of the people." See Century Dictionary. And the United States Supreme Court has said in this connection: "By the Constitution a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves." *In re Duncan,* 139 U. S. 449, 461, per Mr. Chief Justice Fuller. And again: "The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended. The guaranty necessarily implies a duty on the part of the states themselves to provide such a government. All the states had governments when the Constitution was adopted. In all, the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were." *Minor* v. *Happersett,* 21 Wall. (U. S.) 162, 175, per Mr. Chief Justice Waite. Therefore if the constitutional guaranty of a republican form of government is to be thus interpreted, then each state has the right to determine for itself what laws it will enact and in what manner it will handle the perplexing problem of the liquor traffic, and others of a similar character. But let us go beyond this. Let us also pass by the provision of the Tenth Amendment that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people" (11 Fed. St. Ann. [2d ed.] 523), which was inserted at practically the same time the Constitution was adopted as a part thereof, and as an express declaration of the scope and purpose of our dual form of government.

Let us consider the character of this government, state and national, and see wherein can be found any power so to amend the Constitution as to deprive the people of each state of their fundamental rights, those rights which exist independent of and even superior to the Constitution itself, and are vital to the existence of the Union. As has been said by the United States Supreme Court: "It must not be forgotten that in a free representative government nothing is more fundamental than the right of the people through their appointed servants to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that in our peculiar dual form of government nothing is more fundamental than the full power of the state to manage its own affairs and govern its own people, except so far as the Federal Constitution expressly or by fair implication has withdrawn that power. The power of the states to make and alter their laws at pleasure is the greatest security for liberty and justice." *Twining* v. *New Jersey,* 211 U. S. 78, 106, per Mr. Justice Moody.

It is true that by the terms of the Constitution the power to amend is given but does this power go to the extent of destroying rights inherent in each and every state of the Union to decide and determine for itself matters purely of internal concern? The national government is one of enumerated powers, and so zealous were our forefathers in their desire to prevent an encroachment by that government upon the inherent right of the states to control their own affairs that, at almost the same time as the adoption of the Constitution, they passed the first ten amendments, which were a limitation not on the power of the states but of the United States. As to these it was said by Chief Justice Marshall:

"But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments." *Barron* v. *Baltimore,* 7 Pet. (U. S.) 243, 250.

And in another case the Supreme Court in an opinion rendered by Mr. Justice Daniel declared:

"To every person acquainted with the history of the Federal Government, it is familiarly known that the ten amendments first engrafted upon the Constitution had their origin in the apprehension that in the investment of powers made by that instrument in the Federal Government, the safety of the states and their citizens had not been sufficiently guarded. That from this apprehension arose the chief opposition shown to the adoption of the Constitution. That, in order to remove the cause of this apprehension, and to effect that security which it was

feared the original instrument had failed to accomplish, twelve Articles of Amendment were proposed at the first session of the first Congress, and the ten first articles in the existing series of Amendments were adopted and ratified by Congress and by the states, two of the twelve proposed amendments having been rejected. The amendments thus adopted were designed to be modifications of the powers vested in the Federal Government, and their language is susceptible of no other rational, literal, or verbal acceptation." *Withers* v. *Buckley,* 20 How. (U. S.) 84, 89.

That this was the situation when the Constitution was framed and that the first ten amendments were adopted to protect the states in their rights of controlling local matters has furthermore been continually recognized by the Supreme Court.

Thus it will be seen that there was a strong and earnest desire to create a dual form of government, reserving to each state entire power to regulate and control its internal affairs, in a manner which it believed to be most consistent with its own interests. And the wisdom which led to the adoption of this plan became more and more manifest as the number of states increased, with, in many cases, widely diverging local interests requiring peculiarly local regulation. In other words, having in view this condition, the national government was given certain enumerated powers while the states separately, and the people thereof, were deemed the proper judges of what legislation best fitted their own internal government. The rights reserved were *fundamental rights independent of and superior to the Constitution.* The rights surrendered were *enumerated and limited.* It was upon the basis of such a reservation, independent of the Constitution, that the Union was formed and the Constitution accepted by the several states.

So Mr. Justice Marshall said in *Sturges* v. *Crowninshield,* 4 Wheat. (U. S.) 122, 192: "It must be recollected that, previous to the formation of the new Constitution, we were divided into independent states, united for some purposes, but, in most respects, sovereign. These states could exercise almost every legislative power. . . . When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed *not from the people of America, but from the people of the several states* [italics mine], and remain, after the adoption of the constitution, where they were before, except so far as they may be abridged by that instrument."

And Mr. Chief Justice Chase also said in a later opinion:

"The perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." See *Texas* v. *White,* 7 Wall. (U. S.) 700, 725.

And in 1910 the United States Supreme Court again declared through Mr. Justice Harlan that there are certain fundamental principles which prior cases decided by that court recognize, and which are not open to dispute, and said in this connection: "Briefly stated, those principles are: That the Government created by the Federal Constitution is one of enumerated powers, and cannot, by any of its agencies, exercise an authority not granted by that instrument, either in express words or by necessary implication; that a power may be implied when necessary to give effect to a power expressly granted; that while the Constitution of the United States and the laws enacted in pursuance thereof, together with any treaties made under the authority of the United States, constitute the Supreme Law of the Land, a State of a Union may exercise all such governmental authority as is consistent with its own constitution, and not in conflict with the Federal Constitution; that such a power in the State, generally referred to as its police power, is not granted by or derived from the Federal Constitution but exists independently of it, by reason of its never having been surrendered by the State to the General Government; that among the powers of the State, not surrendered—which power therefore remains with the State—is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote the public convenience and the common good; and that it is with the State to devise the means to be employed to such ends." *House* v. *Mayes,* 219 U. S. 270, 281.

Again in a very recent case it is said: "The maintenance of the authority of the state over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the federal Constitution. In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local self-government. And to them and to the people the powers not expressly delegated to the national government are reserved. . . . The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government." *Hammer* v. *Dagenhart,* 247 U. S. 251, 275, per Mr. Justice Day.

Thus it will be observed that the framers of the Constitution as representatives of the people of the several states acted with the view that certain rights were inherent in the states, and were to be retained by them, and the Constitution was adopted in this belief. And in one unbroken line of decisions from the time of Chief Justice

Marshall, that great interpreter of constitutional rights and powers, down to the present there has been a unanimity of opinion on the part of the United States Supreme Court to the effect that the states only surrendered those powers to the national government which were expressly enumerated, and that all others were retained as inherent and not by virtue of any constitutional declaration. It therefore follows that if these rights were reserved to the several states, that if they formed, as they unquestionably did, the inducement to the adoption of the Constitution, then they were reserved to each individual state. If this be true, then by what power can they be taken away? Can three-fourths of the states say to the remaining one-fourth, we, by legislative decree termed a constitutional amendment, refuse to permit you longer to exercise rights which you possess though independent of any constitution? On the other hand, would it not seem that, if they are thus reserved, not even one state can be deprived of them by any action of all the others, and that any radical departure from our dual form of government by which such rights are taken away can be done only by the unanimous action of all the states, and not by way of a federal constitutional amendment?

It could never have been the intention of the people of the several states in adopting the Constitution to permit an infraction by way of amendment on those rights for the recognition of which they had so earnestly fought. Furthermore, if the rights reserved were inherent and independent of the national constitution, then any proposed action which takes away from the people of those states the right of controlling matters of purely internal concern is not a matter of amendment but is revolutionary in its nature, in that it is a proposition to change entirely the dual form of our government, the maintenance of which is essential to the liberty of the people and the preservation of our national and state organizations. It would be but a step to further encroachments, one of which has already been suggested by certain reformers, that is, prohibition of the use of tobacco. True, the movement as to the latter is only in its infancy, and may be said to be impossible of attainment. Yet one who suggested the prohibition of liquor by constitutional amendment a quarter of a century ago, and even much later, would have been the object of ridicule. If acts of this character may be done by way of amendment then what is to prevent further encroachments? Is there to be a distinction in degree between amendments which are slightly revolutionary and those which are radically so? Is there to be a classification of those which are claimed to be beneficial and of those which are not? It would not seem so. If, however, we recognize the slight infraction we open the door for the greater and must accord recognition to that. If we recognize a revolutionary change as beneficial, on what ground can we deny life to that which is not so? In other words, there can be no distinction as to degrees. If this slight encroachment on the police power and the inherent rights of the states can be sustained then the several states may by the same means be deprived of their entire police power in every respect, and the control of all matters within the scope of its exercise be centralized in the federal authorities, thus revolutionizing our scheme of government. Of course such a situation seems at present beyond the realm of possibility. But the prohibition amendment is a step in that direction, and who can foresee what the future may develop. In all cases changes of such a kind as tend to restrict or encroach on the powers of the states are matters which require serious consideration. As was said by Mr. Justice Moody in a somewhat recent case: "Whenever a new limitation or restriction is declared it is a matter of grave import, since, to that extent, it diminishes the authority of the state, so necessary to the perpetuity of our dual form of government and changes its relation to the people and to the Union." *Twining* v. *New Jersey,* 211 U. S. 78, 92. Changes of this character which affect the police power, and deprive a state of its inherent rights whether the change be slight or great, for the principle is the same, were never contemplated to be made by constitutional amendments. Such an encroachment is a change of the basic plan of our government and should require the consent of every state to render it binding, since matters of this character require unanimity of action in order to ensure a perpetuation of the Union. Preservation of the rights of the states and a proper regard for the personal liberty of the citizens of each state is as essential to the continued life of the nation as is the safeguarding of the powers of the federal government.

In conclusion, not as bearing on the question before discussed but as showing the opinion of the United States Supreme Court a century ago as to the proper mode for considering the adoption of the Constitution, and which is equally applicable to amendments thereto, the following extract from an opinion by Chief Justice Marshall, delivered in 1819, in the case of *McCulloch* v. *State of Maryland,* 4 Wheat. (U. S.) 316, 403, is of value: "The convention which framed the Constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might 'be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the convention, by Congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention."

Might it not be well, in view of the sensational disclosures relating to the action of legislative bodies, in ratifying the prohibition amendment, to follow along the lines suggested as to the adoption of the original instrument? Furthermore is it not advisable to take away from the state legislatures any power of ratification and repose it entirely with the people of the states? And if such an amendment is proposed let it also be acted on by the people themselves. Let the matter of the ratification of amendments to our national Constitution be determined by the people of each state and not by legislatures, members of which are coerced to act in a certain way by threats of defeat and who stand before their constituents on issues which ignore the very question as to which they may be bound by secret pledges to insure the support of a certain element or faction of the electors.

HOWARD C. JOYCE.

WOMEN AS PRACTITIONERS OF LAW.

By William Renwick Riddell, LL.D., F. R. S., Can., *Justice of the Supreme Court of Ontario.*

A little more than a quarter of a century ago a flutter of what in a less dignified body would have been called excitement went through the Convocation Room at Osgoode Hall, Toronto, at a meeting of the Benchers of the Law Society of Upper Canada—a woman had applied to be admitted on the books of the Law Society, a thing without precedent in the century of the Society's existence.

From 1797, the legal profession in this Province has been master in its own house: in that year the Provincial Legislature of Upper Canada passed an Act [1] which authorized all the persons then admitted to practice and practicing at the Bar to form themselves into a Society, the "Law Society of Upper Canada," which Society was to prescribe rules and regulations for students and call to the Bar, and generally to have control over the profession. Since the organization of that Society, no one has been or could be allowed to act as barrister in any of our Courts unless and until he was called to the Bar by the Society.[2]

While there has since 1797 been a distinction between the barrister and the attorney (or solicitor),[3] there has never been any objection to the same person filling both positions; and from the beginning most barristers were called attorneys and *vice versa*.[4] While the Law Society does not admit the solicitor (to use the present nomenclature), the duty was cast upon it by the Act of 1857 [5] to examine and inquire touching the fitness and capacity of an applicant to act as an attorney or solicitor: and ever since, the Law Society examines the candidate and gives a "Certificate of Fitness," on the presentation of which the Court admits him. Without such a certificate the Court cannot admit any one, just as without a call to the Bar by the Law Society the Court cannot hear any counsel. It is necessary before he can obtain a certificate of fitness or be called that the applicant for admission as a solicitor or for call to the Bar must have been on the books of the Society for five years (in the case of a graduate of a British University, for three years).

At the time the disturbing application was made (as now) the Governing Body, the Benchers (who were in fact the real corporation) were mainly elected by the barristers of the Province—a few Benchers *ex officio* being the exception. An election is held every five years, so that the Benchers fairly well represent the sentiment of the profession at large, perhaps the more conservative sentiment.

It was to this body met in Convocation that the petition of Miss Clara Brett Martin to be admitted on their roll was presented. There was immediate opposition; true the applicant was a modest, self-respecting young woman, well-born, well-bred, and well-educated—but she was a woman.

Ontario.—After a little discussion, on June 30, 1891, Convocation decided that they had no power to admit a woman upon their books.[6] Thereupon the Legislature of Ontario at the instance of Sir Oliver Mowat, the Prime Minister,[7] passed an Act [8] in the following terms: "The Law Society may in its discretion make rules providing for the admission of women to practice as solicitors."

Convocation by a bare majority [9] directed the Legal Education Committee to frame regulations, and on their report being adopted a rule was passed December 27, 1872, to become effective at Hilary Term of the following year.

Miss Martin was duly articled—the regulations for the admission of women as solicitors did not differ from those prescribed for men. She was not satisfied with the lower branch of the profession; but there was no statute permitting her to be called to the Bar.

In 1895, the Ontario Legislature (again at the instance of Sir Oliver Mowat) passed the Act [10] which amended the previous Act by giving the Law Society discretion to call women to the Bar. In the following May, Miss Martin wrote to Convocation, expressing her desire to be called to the Bar; and after a good deal of discussion a rule was passed substantially the same as that for men [11] under which she was called to the Bar, February 2, 1897: she was admitted as a solicitor on the same day.

Since that time there have been seven other women admitted as solicitors and called to the Bar—of the eight, the pioneer and five others practice their profession (one in another Province).[12]

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[1] (1797) 37 Geo. III. c. 13 (U. C.).

[2] Those interested will find a full historical account of the Law Society of Upper Canada in my work published by the Law Society of Upper Canada in 1916, *The Legal Profession in Upper Canada in its Early Periods.*

The Law Society of Upper Canada was incorporated in 1822 by the Provincial Act 2 Geo. IV. c. 5 (U. C.); but its function to call to the Bar was not interfered with.

[3] The attorney practiced in the Common Law Courts, the solicitor in Chancery. We had (after 1794) only Common Law Courts for a time and consequently our practitioners in "the lower branch of the profession" were then attorneys (or to use the time-honored orthography "attornies"); but in 1837, the Provincial Act, 7 Geo. IV. c. 2 (U. C.) instituted a Court of Chancery; and thereafter, till the coming into force of the Judicature Act in 1881, a member of this branch was an "Attorney-at-Law and Solicitor-in-Chancery." The Judicature Act of 1881 abolished the name attorney, and now these are all solicitors.

[4] From a recent examination which I have made of the Rolls I find that of the practitioners of law in Ontario, all but 4 per cent are barristers, and all but 2½ per cent solicitors.

[5] 20 Vic. c. 63 (Can.).

[6] The same decision was come to by the Bar of Montreal a few months ago; and the Courts declined to interfere.

[7] Sir Oliver Mowat, although through all his long and useful life he called himself a Reformer or a Liberal, was quite generally by both political friend and foe (he had none but political foes) believed to be and not infrequently called a Tory or Conservative of the most Conservative type. In the matter now under discussion he was a Radical.

[8] (1892) 55 Vic. c. 32 (Ont.).

[9] The mover was Sir Oliver Mowat (who was a Bencher *ex officio* as being Attorney-General of the Province), the seconder Hon. S. H. Blake (who was a Bencher *ex officio* as being an ex Vice-Chancellor): the vote was 12 to 11 and would have been a tie, had it not been that one Bencher was on his feet in Court and did not reach Convocation Room until the vote was just being taken. His objection was that the Province cast upon the Benchers of the Law Society the duty of deciding in their discretion what should have been decided by the Legislature as a matter of public policy. Most if not all of those who voted "Nay" were opposed to the principle of admitting women altogether. The Minute Books of the Law Society for 1892, pp. 544, 550, and 551, contain the proceedings of Convocation.

[10] 58 Vic. c. 27 (Ont.).

[11] In Easter Term, May 18, 1896, her application was received; June 5, a motion to direct the Legal Education Committee to frame regulations was voted down by a vote of 9 to 6; June 30, Charles Moss, C. C. (afterwards Sir Charles Moss, Chief Justice of Ontario), gave notice (for Sir Oliver Mowat) that he would renew the motion on the first day of the following Term. In Trinity Term, September 14, the motion passed by a vote of 8 to 4; September 25, the regulations were reported and a Rule framed and read. In Michaelmas Term, November 17, a motion to rescind the Resolution of September 14 was lost, and the following day the Rule received its second and third reading and was passed.

Minute Book, No. 5, pp. 19, 738, 768, 775.

Minute Book, No. 6, pp. 10, 13, 26.

[12] I give the list as furnished me by the Secretary of the Law Society—it will be noticed that three have married barristers:

LIST OF WOMEN LAWYERS.

Name.	*Address.*	*When Called.*	*Remarks.*
1. Clara Brett Martin	Toronto	H. 1897	Practicing.
2. Eva Maude Powley	Port Arthur	E. 1902	Practicing.
3. Geraldine Bertram Robinson	Toronto	T. 1907	Married E. W. Wright, Barrister of Toronto; pays Bar fees.
4. Grace Ellen Hewson	Toronto	E. 1908	Married, not practicing.

It would appear that the number will somewhat increase in the immediate future. There are now four women students in the Law School in the third year, five in the second year, and eleven in the first year, while there are seven matriculants waiting for their time to come to the Law School, four entitled to attend in 1918 and three in 1919; of those in the second and third years in the Law School two have obtained honors and two honors and scholarships; eleven in the Law School have a degree in Arts, ten B. A.'s and one M. A.[13]

	Name.	*Address.*	*When Called.*	*Remarks.*
5.	Jean Cairns	Huntsville	T. 1913	Married P. R. Morris, Barrister of Hamilton, practicing at Hamilton, Ontario, with her husband.
6.	Edith Louise Paterson (*a*)	Vancouver	E. 1915	Practicing in Vancouver, B. C.
7.	Mary Elizabeth Buckley (*b*)	Toronto	E. 1915	Married H. V. Laughton, Barrister of Toronto, practices a little.
8.	Gertrude Alford	Belleville	15 June, 1916.	Practicing in Trenton, Ontario.

(*a*) Obtained honors and Scholarships.
(*b*) Obtained honors.

[13] As has been said, the Rules of the Law Society require every applicant for Call or Admission to have been five years on the Books of the Society (three years in case of a Graduate of a British University); the last three years, he must attend the Law School at Osgoode Hall (which is entirely supported, controlled, and managed by the Law Society).

The following are the rules respecting women:

Rules for the Admission of Women to Practice as Solicitors and Barristers-at-Law.

178. (1) Any woman who is a graduate in the Faculty of Arts in any university in His Majesty's Dominions empowered to grant such degrees, and any woman being competent as a student within the requirements of Rules 103 or 104, shall upon compliance with the following Rules, be entitled to admission to practice as a solicitor pursuant to the provisions of The Law Society Act, s. 43 (2), provided that:

(*a*) She has been entered upon the books of the Society in the same manner and upon the same conditions as to giving notice, payment of fees and otherwise, as are provided for admission of Students-at-Law of the graduate and matriculant class respectively;

(*b*) She has been bound by contract in writing to serve as a clerk to a practicing solicitor for a period of three or five years from the date of her entry upon the books of the society, according as she shall have been entered on the books as a graduate or matriculant;

(*c*) She has actually served under such contract for such period of three or five years, as the case may be;

(*d*) She has complied with the conditions of the statutes and the Rules of the Society with regard to execution and filling of such contract, and any assignment thereof, and with every other requirement of the Society with regard to Students-at-Law, including attendance upon lectures in the Law School, passing of examinations, payment of fees, and every other matter or thing compliance with which by a Student-at-Law is a prerequisite to admission to practice as a solicitor.

(2) The fees payable by such woman upon receiving a Certificate of Fitness to practice shall be the same as those payable by other Students-at-Law.

(3) Upon admission to practice, such woman shall become subject to all the provisions of the statutes and the Rules of the Society with regard to solicitors, and non-compliance with or failure to observe the same or any of them shall subject her to all the disabilities and penalties imposed upon other solicitors.

179. Every woman seeking admission to practice as a Barrister-at-Law under the provisions of the Statute in that behalf shall furnish proof that:

(*a*) She has been entered upon the books of the Society pursuant to the Rules for admission of women to practice as solicitors, and has remained on such books for a period of three or five years, according as she shall have been entered as a graduate or matriculant.

(*b*) She has actually and *bona fide* attended in a barrister's chambers, or has served under Articles of Clerkship for a period of three or five years as the case may be.

(*c*) She has complied with the conditions of the statutes and every requirement of the Rules of the Society with regard to Students-at-Law, including attendance at lectures in the Law School, passing of examinations, payment of fees, and every other matter or thing compliance with which by a Student-at-Law is prerequisite to Call to the Bar.

180. The fees payable by such woman upon admission to practice as a barrister-at-law shall be the same as those payable by other Students-at-Law.

181. (1) Upon admission to practice as a barrister-at-law such woman shall become subject to all the provisions of the statutes and the Rules of the Society with regard to barristers-at-law, and non-compliance with or failure to observe the same, or any of them, shall subject her to all the disabilities and penalties imposed upon other barristers-at-law.

(2) Every such woman appearing before Convocation upon the occasion of her being admitted to practice as aforesaid shall appear in a barrister's gown worn over a black dress, white necktie, with head uncovered.

Scarcely half of 1 per cent of the practitioners in Ontario are women; the profession of law makes by no means the same appeal to them as medicine.

Women as Practitioners.—The women who practice law are not "wild women"; they are earnest, well-educated women who ask no favors but are quite willing to do their share of the world's work on the same conditions as men.

While occasionally one of them has been known to take the brief at a trial, this is not usual; they generally retain counsel for such work and confine themselves to chamber practice. Occasionally a woman takes a Court or chamber motion, but as a general rule her work is that of a solicitor. In my own experience, as in that of judicial brethren whom I have consulted, when she appears in Court or chambers, she conducts her case with dignity and propriety, exhibiting as much legal acumen, knowledge of the law, and sound sense as her masculine *confrère*, and she does not trade upon her sex.

The admission of women to the practice of law has had in Ontario no effect upon the Bar or the Courts; the public and all concerned regard it with indifference; while no one would think of going back to the times of exclusion, no one would make it a matter of more than passing comment that a woman lawyer was engaged in the conduct of legal business. It has prevented any feeling of injustice, sex oppression, or sex partiality—it has made the career open to the talents. Otherwise it has no conspicuous merits and no faults. So far as I can find out, there has never been a charge of dishonesty or unprofessional conduct made against a woman practitioner of law in Ontario (or indeed elsewhere); it is certain that no such charge has ever been brought before the Courts.

Admission in the Other Canadian Provinces.—Of the nine Provinces of Canada, Quebec refuses women the right to practice law:[14] while the question has not arisen in Prince Edward Island, presumably the decision would be that they are excluded, as there is no special legislation. Of the other Provinces, Alberta admits them under general legislation; British Columbia under a special act,[15] which provides that "women shall be admitted to the study of law and shall be called and admitted as barristers and solicitors upon the same terms as men." Manitoba has also a special statute,[16] which amends the Law Society Act by providing that "the expression persons includes females." New Brunswick in 1906 passed an act[17] in the same terms as the British Columbia Statute above mentioned, and Nova Scotia in 1917 passed a similar Act expressly stating that it was declaratory of the existing law.[18] Ontario we have seen calls and admits under two Statutes —now combined in Revised Statutes.[19] Saskatchewan has a special Statute, the Statute Law Amendment Act 1912-13,[20] which by s. 27 provides: "The Benchers may in their discretion make rules for the admission of women to practice as barristers and solicitors."

The question as to the admission of women to the Bar has not yet come up in the Yukon Territory.[21]

[14] A proposal to grant the right to women has been defeated for two successive years in the Quebec Legislature: a Bill for that purpose has been introduced during the present month (December, 1917).

[15] (1912) 2 Geo. V. c. 18.

[16] (1912) 2 Geo. V. c. 32, s. 2.

[17] 6 Ed. VII. c. 5.

[18] 7 & 8 Geo. V. c. 41.

[19] (1914), c. 157, c. 1-3 (2).

[20] 3 Geo. V. c. 46.

[21] Probably it would be held that they would not be admitted. See *Con-*

The whole number of women practicing law in Canada is very small, perhaps a dozen in all—*e.g.* Alberta has called only one and she got married, Saskatchewan only two; the numbers may be expected to increase, but not rapidly. I do not think that the most fervent advocate of women's rights could claim that the admission of women to the practice of law has had any appreciable effect on the Bar, the practice of law, the Bench, or the people. It is claimed that it was a measure of justice and fair play, that it removed a grievance and has had no countervailing disadvantage. That claim may fairly be allowed: in other respects, the admission of women is regarded with complete indifference by all but those immediately concerned.

United States.—In the United States women have joined the profession in somewhat larger numbers than in Canada—there are now about 1200.

They are admitted to practice before all the Federal Courts of the United States and all the State Courts except those of Arkansas, South Carolina, and Virginia. Generally they are admitted under general legislation, but in some instances special legislation has been passed—sometimes by reason of adverse decisions of the State Courts, occasionally (it may be) *ex abundanti cautelâ*.[22]

As in Canada, no one in the United States would now think of excluding women when once they were admitted. It cannot, I think, be fairly said that their admission has had any marked effect upon the Bar or the practice of law; their influence on legislation for the protection of women and children is considerable, but not more than that of an equal number of women who have not joined the profession—what influence there is has been, I think, uniformly good. They have sustained a good reputation in their practice: no charge of impropriety, dishonesty, or unprofessional conduct has ever been laid against them so far as the Court records show.

Their Position as Lawyers.—The remainder of the Bar were slow to accept woman as a lawyer; where she has made her appearance, the Bar seems to have gone through the stages of amused curiosity turning to real and well-grounded respect. No doubt the conservative part of the profession will always look upon the woman lawyer as unladylike, unwomanly, recreant to her natural position, overturning the laws of God, what not? That is inevitable: but the great body of the profession is beginning—has indeed progressed some distance on the way—to treat her as a desirable and useful part of the profession and the body politic. "The Courts have invariably treated women practicing before them with the greatest courtesy and kindness."[23] On inquiry, I find that the Bench can discover no

solidated Ordinances of Yukon Territory, cap. 50: "The Legal Profession Ordinance."

[22] In the United States the entry of women into the sacred circle was not always easy: the Courts were in some instances adverse, adhering to the beloved "Common Law of England." Where that was the case, the Legislature was attacked with the result stated in the text. I add here a partial account of the course of the campaign.

Mrs. Myra Bradwell was the first woman to meet a rebuff in the State Courts, so far as I have seen in the Reports: she in 1869 applied to the Supreme Court of Illinois for a license to practice law, but failed. The Court thought itself bound by the Common Law of England to refuse the application unless "the Legislature shall choose to remove the existing barriers and authorize us to issue licenses equally to men and women." *In re* Myra Bradwell, (1869) 55 Ill. 535. The Supreme Court of the United States refused to interfere, (1872) 16 Wall. 130. No long time elapsed before such authority was given. On March 22, 1872, an Act was approved "to secure to all persons freedom in the selection of an occupation, profession, or employment" which by s. 1 enacted "that no person shall be precluded or debarred from any occupation, profession or employment (except military) on account of sex" (see Hurd's *Rev. Stat.* 1915-16, cap. 48, par 2). In 1874, a further Act was passed "to revise the law in relation to attorneys and counsellors"; and that by s. 1 provided "No person shall be refused a license under this Act on acount of sex" (Hurd, *ut supra*, cap. 13, par. 1).

One of the Federal Courts was equally hostile. Mrs. Belva A. Lockwood in 1873 applied to be admitted as attorney and counsellor-at-law of the Court of Claims at Washington, a Federal Court of the United States. The Court held that the responsibilities of such a position were inconsistent with the holding of an office by a woman, and "a woman is without legal capacity to take office of Attorney." *In re* Mrs. Belva A. Lockwood, exp. 9 Ct. of Cl. (Nott & Hop.) 346: sustained in the Supreme Court, 154 U. S. 116. Shortly afterwards the Supreme Court of the United States (October Term, 1876) refused to admit Mrs. Lockwood to practice in that Court "in accordance with immemorial usage in England and the law and practice in all the States until within a recent period." (See 131 *Mass. Rep.* at p. 383).

Very shortly thereafter Congress acted: the Act of Congress, February 15, 1879, chap. 81 (20 Stat. L. 292) provides "Any woman who shall have been a member of the bar of the highest Court of any State or Territory or of the Supreme Court of the District of Columbia for the space of three years and shall have maintained a good standing before such Court and who shall be a person of good moral character shall on motion and the production of such record be admitted to practice before the Supreme Court of the United States." Under that statute, Mrs. Lockwood was admitted to practice in the Supreme Court. She was also admitted to practice in the Supreme Court of the District of Columbia and in certain of the State Courts, but her application was rejected in Virginia. The Supreme Court of the United States gave her no relief, (1893), 154 U. S. 116—and Virginia is still joined to its idols.

Miss R. Lavinia Goodell was no more successful in the Wisconsin Court in 1875; the Chief Justice, Ryan, thought that "reverence for all womanhood would suffer in the public spectacle of woman so engaged"; and in the absence of a statute her application was refused. *In re* Goodell, (1875), 39 Wis. 232.

Massachusetts then spoke to the same effect. Miss Lelia J. Robinson was refused admission as an attorney and counsellor of the Supreme Court—she was not a "citizen" or a "person," and without "clear affirmative words in a Statute" the Court's hands were tied. *Re* Lelia J. Robinson, (1881) 131 Mass. 376.

The "clear affirmative words" soon came: on April 10, 1882, a statute was approved, c. 139, "The provisions of law relating to the qualification and admission to practice as attorneys-at-law shall apply to women." A similar decision in Oregon, *In re* Leonard, (1885), 12 Oregon 93, refusing admission to Mary A. Leonard led to the passing in 1885 of the statute, "Hereafter women shall be entitled to practice law as attorneys in the Courts of this State upon the same terms and conditions as men." See Lord's *Oregon Law*, s. 1079.

Tennessee in 1893 refused admission as a Notary Public to Miss F. M. Davidson in a decision which was considered to indicate that a woman could not be an attorney—the Act of 1907, chap. 69, made the law clear—"Any woman of the age of twenty-one years and otherwise possessing the necessary qualification may be granted a license to practice law in the Courts of this State." (See Thompson's Shannon's Code of 1917, s. 5779, a, 6.)

Some other like decisions in the State Courts led to special legislation; but in most States, the Courts interpreting general legislation took a different view. The first admission was in a State in the middle West. Iowa in 1869 admitted Mrs. A. A. Mansfield under a statute providing that "any white male person" may be admitted because the affirmative declaration did not by implication deny the right to women. Missouri came next—the Court admitted Miss Barkalow; Maine admitted Mrs. C. H. Nash in 1872. To make the matter absolutely clear, chap. 98 of the Public Laws of 1899 enacts "No person shall be denied admission or license to practice as an attorney-at-law on account of sex." In the Federal Court, District of Columbia, Miss Charlotte E. Ray was admitted about 1873; and in 1874 Miss Hewlett was admitted by the Federal District Court (Illinois); and the Federal District Court (Iowa) also admitted a woman. See 39 Wis. at pp. 238, 239.

In New Hampshire, in 1890 the petition of Mrs. Marilla M. Ricker, a widow, to be admitted to practice law was granted, the well-known Chief Justice Doe writing an elaborate opinion with a wealth of learning more or less applicable. He came to the conclusion that a woman was a "citizen" and a "person"; and an attorney not taking an official part in the government of the State (for which women are disqualified by the Common Law) there was no reason why a woman could not be an attorney. *In re* Riker's Petition, (1890), 66 N. H. 207.

Colorado took the same view in 1891 when Mrs. Mary S. Thomas was admitted to the practice of law; she was a "person" and an attorney did not occupy any "civil office." *In re* Thomas, (1891), 27 Pac. Rep. 707, 16 Colo. 441.

Indiana held the same way in 1893—*In re* Petition of Leach exp., (1893), 134 Ind. 665.

The Connecticut Court of Errors *in re* Mary Hall, (1882), 50 Conn. 131, had gone back to the legislation of 1750 in the attempt to interpret the more recent legislation, and holding that Mary Hall was a "person" admitted her to practice—one learned Judge differing from his three brethren.

[23] I quote from a letter from Mrs. Mussey, President of the Women's Bar Association of the District of Columbia, to whose kindness I owe some of the facts in the text. The position of women in the District of Columbia is peculiar in that they are admitted to the Bar of the District, but not to the Bar Association and therefore not to the American Bar Association. A prominent member of the Bar Association somewhat maliciously says that this "will suggest a distinction which still exists in the minds of men lawyers." However, the women have their own apparently prosperous Bar Association in the District of Columbia.

difference in the ability and acumen in man and woman; it is the individual talent and industry which tell, not the sex. While there are exceptions, the rule is that women do not take trial briefs; as in Ontario, they mainly confine themselves to chamber practice. The number of women lawyers is increasing slowly if at all, and there seems to be no more fear of man losing his lead in law than in the sister profession of medicine—indeed the competition is not so great as in medicine.

If I were to sum up in a sentence the results of the admission of women to the practice of law from my experience and inquiry, I would say that it has done some good, and no harm, while all prophecies of ill results have been falsified; that its effects on the profession and practice of law have been negligible, and that it is now regarded with indifference and as the normal and natural thing by Bench, Bar, and the community at large.—*Journal of Comparative Legislation and International Law.*

Cases of Interest

LIABILITY OF PUBLIC OFFICER FOR ACT OF ASSISTANT.—In State v. Kolb, (Ala.) 78 So. 817, reported and extensively annotated in 1 A. L. R. 218, it was held that neither a public officer nor his bondsman is, in the absence of a statute imposing liability, or of negligence on his part in appointing or supervising an assistant, liable for the default or misfeasance of an assistant appointed by him under statutory authority. The court stated the general principles applicable to such a case as follows: "The general proposition that an officer is not liable for the defaults and misfeasances of his clerks or assistants, even though they are appointed by him and are under his control, in the absence of allegation and proof that the officer was negligent or at fault in failing to exercise proper care and prudence in selecting the assistant or clerk, or in failing to properly supervise and superintend the acts and services of such employee in the work for which he was so selected, the doing or failure to do which caused the loss or injury or damage, is well settled. In such cases, in the absence of a special statute or law to the contrary, the assistant or clerk, and his bondsmen, if any he have, are liable, but not the officer or his bondsmen. This has been repeatedly decided by this and most other courts. See the case of Raisler v. Oliver, 97 Ala. 710, 38 Am. St. Rep. 213, 12 So. 238, where the authorities are collected and cited, and 31 Cyc. 980-984, and note. also collecting the authorities. Of course, for this rule to apply, the law must authorize the appointment of such clerk or assistant, so that by virtue of the law and of the appointment the clerk or assistant became in a sense an officer himself. If the superior officer, on his own account and without authority of law, should appoint or employ such aid, the former would be liable, the doctrine of respondeat superior applying."

VALIDITY OF LEGISLATION DIRECTED AGAINST CRIMINAL SYNDICALISM.—In State v. Moilen (Min.) 167 N. W. 345, reported and annotated in 1 A. L. R. 331, it was held that the Minnesota statute (Laws 1917, ch. 215) declaring and defining the crime of criminal syndicalism, and prohibiting the advocacy or teaching of sabotage or other methods of terrorism as a means of accomplishing industrial or political ends, was not obnoxious to either the state or Federal constitution, and no rights thereby secured or protected were in any way impaired or abridged. Said the court inter alia: "The contention that the statute violates rights granted and secured by the Federal Constitution is without special merit. The design and purpose of the legislature in the enactment of the statute was the suppression of what was deemed by the lawmakers a growing menace to law and order in the state, arising from the practice of sabotage and other unlawful methods of terrorism, employed by certain laborers in furtherance of industrial ends and in adjustment of alleged grievances against employers. The facts surrounding the practice of sabotage, and like in terrorem methods of self-adjudication of alleged wrongs, are matters of common knowledge and general public notoriety, of which the courts will take notice. That they are unlawful, and within the restrictive power of the legislature, is clear. Sabotage, as practiced by those advocating it as an appropriate and proper method of adjusting labor troubles, embraces, among other lesser offensive acts, the wilful and intentional injury to or destruction of the property of the employer, in retaliation for his failure or refusal to comply with wage or other kindred labor demands. It amounts to malicious mischief, and is a crime at common law as well as by statute. The methods of terrorism referred to in the statute have close relation to sabotage, and are practiced for the purpose of intimidation, and to coerce employers into a compliance with labor demands. Methods of that sort are equally unlawful and open to legislative condemnation. It is the exclusive province of the legislature to declare what acts, deemed by the lawmakers inimical to the public welfare, shall constitute a crime, to prohibit the same, and impose appropriate penalties for a violation thereof. With the wisdom and propriety thereof, the courts are not concerned. State v. Shevlin-Carpenter Co. 99 Minn. 158, 108 N. W. 935, 9 Ann. Cas. 634; Clark & M. Crimes, § 41. Judicial consideration of enactments of the kind is limited to the inquiry whether the constitutional rights of the citizen have been invaded or violated. If such rights be in no wise infringed or abridged, the statute must stand, however harsh it may seem to those who run counter to its commands. It requires no argument to demonstrate that the subject matter of this statute was and is within legislative cognizance, vesting in that body the clear right to prohibit the advocacy or teaching of the iniquitous and unlawful doctrines which it condemns."

REFUSAL OF NATURALIZATION FOR VIOLATION OF LAW.—In United States v. Gerstein, 284 Ill. 174, 119 N. E. 922, reported and annotated in 1 A. L. R. 318, it was held that a saloon keeper who had habitually violated the Sunday Closing Law of Illinois would be deprived of naturalization, although the law was not enforced and it was necessary to keep his place of business open in order to retain his trade. The court said: "The requirement of the Federal statute is that an alien applying for admission to citizenship shall show that, for five years previous, he 'has behaved as a man of good moral character, and well disposed to the good order and happiness' of the country. How can it be said that appellee placed himself within these requirements, when it is admitted that, for a period of several years, he had knowingly violated the law, and had only ceased doing so three months before filing his petition, when notified the public authorities would enforce the law thereafter? It is immaterial that a large public sentiment did not favor obeying the law. It was enacted by the legislature, by virtue of its constitutional powers, and whether it was approved by public sentiment as a good law, or whether it was considered a bad law, affords no criterion for determination by citizens and residents whether it should be obeyed. Whatever may influence persons to whom a law applies to violate and disregard it, courts are bound to enforce a valid law, though the law be disapproved by public sentiment. It must be apparent to everyone that the binding force and effect of a law, and the duty of persons to obey it and of courts to enforce it, cannot be made to depend upon the

public sentiment as to its wisdom or unwisdom, or on the opinion of a court whether it is a good or bad law. If it is a law, persons are bound to obey it and courts to enforce it. If public opinion disapproves, the legislature may be applied to to repeal it, but, until repealed, it is binding on the people, and must be obeyed. That public officers charged with enforcement of the law do not do so cannot change the effect upon the moral character of a man who wilfully and habitually violates it. Aliens asking admission to citizenship in the United States are asking a favor—the greatest within the gift of the government. It ought to be appreciated by the recipient, and Congress has thought wise to prescribe certain qualifications, which must be possessed by the applicant for the priceless boon of citizen of the United States of America. It is required the applicant shall be worthy of the great privilege of citizenship, and one of the elements required to show worthiness is that he has been, for five years, a man of good moral character, and well disposed to the good order and happiness of the country. . . . It should be understood that admission of aliens to the blessings of citizenship in this country is not a mere matter of form, but that the great privilege, with all the benefits that flow from it, will be conferred only on those who show themselves to possess the qualifications required by our naturalization laws."

Liability of Municipality for Sickness Due to Condition of Street.—Illness of an abutting owner, caused by a municipality's permitting water to pond in a highway, is not within the statute giving a right of action to any person who shall receive bodily injury or damage in his person or property through a defect in the street. It was so held in Triplett *v.* Columbia, (S. Car.) 96 S. E. 675, reported and annotated in 1 A. L. R. 349, wherein the court said: "Where an individual has suffered injury as the result of a wrong done, natural justice calls for some remedy, and the courts have ever been alert to provide one; hence the boast of the law, which is often pressed upon the attention of courts, that for every wrong there is a remedy. But there is another axiom of practical wisdom equally important to be observed—hard cases make bad law. Not infrequently the hardship of a particular case leads to the strained, if not incorrect, application of sound principles to fit the facts, so as to afford a remedy; and when the same principles are invoked in similar cases, it is discovered that they lead to results that are exceedingly inconvenient, if not so illogical that they cannot be justified on settled principles of legal liability. And the consequence is that the previous decision must be distinguished, modified, or overruled. The courts are not invested with the power to make laws. They should and do keep pace with the progress and development of society by the application of settled principles to new relations and conditions, but in doing this the point is sometimes reached when the power of the court ends and the duty of the legislator begins. If the plaintiff, who has been injured by disease, superinduced by the negligence of defendant, can maintain her action for damages, why may not every other member of the family, or of the community, or, indeed, of the entire city, who has suffered a like injury from a like cause, maintain such an action? The fact that the exciting cause of the disease was in a street, and the result of negligence in failing to keep it in proper repair, is an immaterial incident. The consequences would have been the same if the nuisance has been created or allowed to exist on a private lot. Upon what principle could the court justify the allowance of the action in one case and deny it in the other? A moment's reflection will disclose innumerable evils that would result from the allowance of such an action. Municipalities, the agencies of government, would become liable for epidemics of typhoid fever and other diseases caused, actually or supposedly, by negligence in water supplied to the people, the disposition of sewerage and refuse matter, and on other grounds which will readily be suggested. The floodgates of litigation would be thrown wide open, and the funds that are raised by taxation for public improvements would be dissipated in tort suits. Such liability could not be sustained under the principles of the common law; and it is perfectly clear that it was never contemplated by the legislature in the enactment of § 3053."

Considering Fraction of Day in Computing Per Diem Compensation of Public Officer.—In State ex rel. Greb *v.* Hurn, (Wash.) 172 Pac. 1147, reported and annotated in 1 A. L. R. 274, it was held that under a statute fixing a per diem compensation for every day that an official court reporter is in actual attendance upon the court, he is entitled to the compensation named for every day on which he performs substantial service, although the time actually consumed is merely a fraction of the day. The court said: "If the official reporter is only in attendance a portion of the day, shall his per diem, fixed by the statute, be split or prorated? In this state there is no statute which fixes the length of time that the court shall be in session each day. The session of the court may consist of any number of hours, within the limit of twenty-four, between two successive midnights. In Smith *v.* Jefferson County, 10 Colo. 17, 13 Pac. 917, the supreme court of Colorado had before it a statute which provided for the compensation of the county superintendent of schools as follows: 'For the time necessarily spent in the discharge of his duty he shall receive five dollars per day. . . .' The question there was: Under this statute, what would constitute a day's service for the superintendent? Answering this question it was said: 'We answer, the law does not recognize fractions of days; and, when it provides a per diem compensation for the time necessarily devoted to the duties of an office, the officer is entitled to this daily compensation for each day on which it becomes necessary for him to perform any substantial official service, if he does perform the same, regardless of the time occupied in its performance.' In White *v.* Dallas County, 87 Iowa 563, 54 N. W. 368, the supreme court of the state of Iowa construed a statute which fixed the compensation of commissioners of insanity 'at the rate of $3 per day, each, for all the time actually employed in the duties of their office.' It was there held that the commissioners, when employed in the duties of their office on a given day, were each entitled to $3 per diem, fixed by the statute, regardless of the number of hours of such employment on a particular day. See also McIntosh County *v.* Whitaker—Okla.—158 Pac. 1136, and Robinson *v.* Dunn, 77 Cal. 473, 11 Am. St. Rep. 297, 19 Pac. 878. Other authorities might be cited, but it is useless to multiply citations, where all of the authorities, as far as we are advised, support the view that, where the statute fixes an officer's compensation at a certain sum per day, such officer, performing any substantial service on a particular day, has a right to the per diem for that day. In the present case we think that, under the statute, the official court reporter is entitled to the per diem named in the statute, for every day that he is directed by the presiding judge to be in attendance upon the court, and he is, in fact, in attendance, regardless of the period of time which such attendance for a particular day may cover. In fixing salaries and fees for the performance of public services at so much per day the law does not consider fractions of such day."

Y. M. C. A. as Subject to License Tax for Conducting Restaurant.—It seems that a constitutional provision exempting public charitable institutions from taxation applies to exempt

a Young Men's Christian Association from payment of a license fee for maintaining a restaurant in its building, for the accommodation of members and those occupying rooms in the building. See Corbin Y. M. C. A. *v.* Commonwealth, 181 Ky. 384, 205 S. W. 388, reported and annotated in 1 A. L. R. 264, wherein the court said: "Whatever may be the extent of the exemption accorded to Young Men's Christian Associations in other jurisdictions . . . the exemption granted to such institutions of purely public charity, under the peculiar verbiage of our constitutional provision, includes everything that is embraced by the word 'institution;' and this we are convinced includes not only their property, but also necessarily all of their activities which are consistent with the furtherance of the purposes for which they were organized. It therefore results that our present inquiry is narrowed to the determination of whether or not the operation of a restaurant by a local branch of the Young Men's Christian Association in its building, which contains some ninety-odd sleeping rooms, for the accommodation and entertainment, not only of its members, but of whoever may apply, is consistent with the purposes and legitimate activities of such organization, and reasonably tends toward the attainment of its charitable aims. The fact that for the meals, lunches and soft drinks that are served in the restaurant charges are made, to both members and nonmembers of the organization, although the charges to the latter are possibly slightly in excess of those to the former, but without profit, merely emphasizes the purely public character of this branch of the service, and does not, in any wise, alter its charitable quality, as has been frequently decided in this and other states. If such institutions as this are liable to the payment of the license tax for operating a restaurant, then they are also liable, under the same section of our statutes, for maintaining bowling alleys, billiard rooms, and sleeping rooms, if more than twenty-five rooms are provided. It is a significant fact that no case is found from this or any other court where an attempt has been made to enforce the collection of any such fee against such an institution, although it is a matter of common knowledge that such institutions frequently, if not usually, provide billiard rooms, bowling alleys, and other forms of recreation and amusement, in addition to a gymnasium, and that, in their 'endeavor to seek out young men and bring them under moral and religious influences,' it has of late years become almost a universal practice to provide sleeping apartments for members, and nonmembers as well, which practice, under § 4224 of our statutes, and similar statutes of other states, would render them liable for a hotel license fee, unless they are exempt under a constitutional provision such as we are considering. Yet, so far as we are informed, no attempt has ever been made to collect such a fee from such an organization. . . . We are quite unwilling to hold that the operation of a restaurant in connection with the Young Men's Christian Association building is an activity inconsistent with the purposes and objects of this organization."

New Books

Handbook on the Law of Evidence. Based upon Chamberlayne's Modern Law of Evidence and edited by Arthur W. Blakemore and DeWitt C. Moore. Albany, N. Y.: Matthew Bender & Company. 1919.

This handbook so called is made up of a concise statement of the rules of evidence in civil and criminal trials based upon the five volume work on evidence of Charles F. Chamberlayne entitled "The Modern Law of Evidence." The abridgment was partially done by the late DeWitt C. Moore of the New York Bar, and upon his death it was revised and completed by Arthur W. Blakemore, of the Boston Bar.

The reason for the book is that the active practitioner is required very frequently to refer quickly to definite, clearly expressed rules of evidence, and for this purpose needs the rules themselves, with citation of leading authorities, but without elaborate discussion or extended illustrative matter.

The editors have made the abridgment with the above stated purpose always in mind, and the result of their labors warrants the belief that it will be found to be a very useful book for ready reference, but in nowise calculated to displace, for a thorough examination of the rules of evidence, the work on which it is based.

Wit, Wisdom and Philosophy. Selected and arranged by Fred C. Mullinix. St. Louis, Mo.: Nixon-Jones Printing Co. 1918.

The preface to this volume tells us that it is composed almost entirely of data selected from legal opinions written by Henry Lamm, who was first Associate and then Chief Justice of the Supreme Court of Missouri, commencing his term of office in 1905, and leaving the bench in 1916, at which time he resigned and ran for the office of Governor of Missouri, for which office he was defeated by a very small majority. Judge Lamm has been the humorist of the bench for many years, and extracts from his opinions have been widely quoted. In the small volume before us is gathered perhaps the best of his judicial utterances of an amusing nature. It can be recommended to the public generally for entertainment.

News of the Profession

THE SAVANNAH BAR ASSOCIATION has had under consideration at its recent meetings the subject of fees in title work.

THE LAW ASSOCIATION OF THE UNIVERSITY OF SOUTH CAROLINA is holding a series of smokers to honor distinguished jurists and lawyers.

DEATH OF KENTUCKY LAWYER.—Judge James B. Wilhoit of Ashland, Kentucky, is dead. He was a prominent member of the Kentucky bar for forty years.

FORMER OHIO JURIST DEAD.—John Hardy Doyle, former judge of the Ohio Supreme Court, and a resident of Toledo, died in Florida at the age of seventy-five.

THE WOMAN'S BAR ASSOCIATION OF ILLINOIS met recently in Chicago. One of the speakers, Catherine W. McCullough, spoke on "New Work for Women Lawyers."

RHODE ISLAND HAS NEW SUPREME COURT JUDGE.—Judge Elmer J. Rathbun of the Rhode Island Superior Court has been elevated to the Supreme Court of that state.

WASHINGTON, D. C., LAWYER DEAD.—Samuel Maddox of Washington, D. C., a former president of the District of Columbia Bar Association, died in that city on April 1.

CHANGE IN CALIFORNIA JUDICIARY.—Judge M. C. Sloss of the California Supreme Court has resigned and his place has been filled by the appointment of Hon. Warren Olney, Jr.

Iowa Jurist Dead.—Judge Charles Norton Hunt of Iowa was killed recently while attempting to board a troop train. He was a territorial judge in North Dakota at one time.

Illinois Bar Association.—The annual meeting of the Illinois Bar Association will be held at Decatur, May 28-29. William M. Provine of Taylorville is the president of the association.

Kansas City Bar Association.—This association was recently addressed by Edward J. White, general solicitor of the Missouri Pacific Railroad, on the subject of the proposed league of nations.

Appointment of New Judge in Indiana.—Governor Goodrich of Indiana has appointed Fred A. Heuring of Rockport judge of the recently created circuit court of Spencer and Perry counties.

New Pardon Attorney in West Virginia.—Governor Cornwell of West Virginia has appointed Harry D. Perkins of Parkersburg, W. Va., pardon clerk in place of James E. Cutlip, who resigned to practice law at Sutton.

Counsel of Federal Trade Commission Resigns.—John Walsh of Wisconsin, first chief counsel of the Federal Trade Commission, has resigned that post to resume the private practice of law in Washington.

The American Association of Law Libraries is to hold its 1919 meeting at Asbury Park, N. J., June 23. Mr. Frederick C. Hicks, Law Librarian at Columbia University, is the chairman of the program committee.

Los Angeles Bar Association.—At the annual meeting of the Los Angeles Bar Association Henry W. O'Melveny was elected president. The keynote of several important addresses was service to humanity.

Death of Former Justice of New York Supreme Court.—Roger A. Pryor, former justice of the New York Supreme Court and famous as a soldier in the Confederate Army, died recently at the age of 90. He was born in Virginia.

Woman Named Assistant Prosecutor.—Miss Florence Allen of Cleveland has been appointed assistant prosecuting attorney under County Prosecutor Samuel Doerfler. She is the first woman to hold a public office in that city.

Banquet Given Newly Appointed Federal Judge of Texas.—James C. Wilson, newly appointed federal judge for the Northern District of Texas, was recently the guest of the Dallas Bar Association at a banquet given in his honor.

General Attorney Named for Atchison, Topeka and Santa Fe Railroad.—Charles H. Woods, formerly of Chillicothe, Ohio, has been appointed general attorney of the Atchison, Topeka and Santa Fe Railroad, and will be located in Chicago.

Death of Former Chief Justice of Supreme Courts of New Mexico and Montana.—William Vincent, former chief justice of the Supreme Courts of New Mexico and Montana, fell dead in his law offices in Chicago recently. He was born in Wheeling, W. Va.

Demise of Illinois Judge.—Judge Monroe C. Crawford, one of the best known men of Southern Illinois, is dead at an advanced age. For over thirty years he was a county judge, and prior thereto he was on the circuit bench for twelve years.

Peoria Lawyers Honor Federal Judge Page.—United States Circuit Judge Page of Peoria was given a farewell banquet by the Peoria Bar Association on his leaving there to take up his work on the bench, to which he was recently appointed.

Woman's Bar Association of Missouri Meet.—The Woman's Bar Association of Missouri recently gave a dinner at St. Louis in honor of the lawyer delegates to the National American Woman's Suffrage Association convention then being held there.

California Bar Association.—The executive committee of the California Bar Association has chosen Los Angeles county as the place of holding the annual meeting of the association. The time of holding has been fixed for October 16, 17 and 18.

Montgomery Bar Association Discusses Fee Bill.—The Montgomery, Ala., Bar Association is making a proposed lawyers' fee bill the subject of luncheon talks. The proposed bill provides for a minimum scale of charges for the handling of legal matters.

Former United States Judge Dead.—John F. Phillips, former judge of the United States Court for the Western District of Missouri, died recently at Hot Springs, Arkansas. He was at one time a law partner of Senator Vest of Missouri, and served two terms in Congress.

South Dakota Judicial Changes.—Frank Anderson of Webster has been appointed judge of the fifth circuit court, succeeding Judge Bouck, deceased. Melvin J. Staven of Britton has been appointed to fill the vacancy caused by the resignation of Judge R. D. Gardner, county judge of Marshall county.

New York City Bar Association Committee on International Law.—President John G. Milburn of the Association of the Bar of the City of New York has appointed a committee of international law to deal with questions arising in connection with conventions or treaties between the United States and foreign powers.

Lord Reading Dined.—The New York Bar Association recently gave a dinner in honor of Lord Reading, Lord Chief Justice of England, and British Ambassador Extraordinary and Plenipotentiary on Special Mission and High Commissioner to the United States. The dinner was due to the fact that Lord Reading was about to resume his judicial duties in England.

Illinois Judicial Changes.—In the Fourth Supreme Court district of Illinois Floyd Thompson of Rock Island was recently elected to suceeed Judge Cooke, who resigned. His opponent was George H. Wilson of Quincy. The vacancy in the appellate court bench of the fourth district caused by the death of James C. McBride was filled by the appointment of James C. Eagleton of Robinson.

American Bar Association Committee to Investigate Courts Martial.—The American Bar Association has appointed a committee of five members to investigate the status of the present military law relating to courts martial. The committee is headed by S. S. Gregory of Chicago, and the other members are William P. Bynum of Greensboro, N. C.; Alexander Bruce of Minneapolis; John Hinkley of Baltimore, and Martin Conboy of New York.

New United States Attorneys.—D. E. Simmons has been appointed by the President United States Attorney for the Southern District of Texas. He has been filling that office under a temporary designation by Judge Hutchinson since the resignation of John E. Greene, Jr., early in March. Henry Mooney has been given a recess appointment as United States Attorney for the Eastern District of Louisiana, succeeding Joseph W. Montgomery. Walter Henley becomes United States Attorney for the Eastern District of Missouri, succeeding Arthur L. Oliver.

English Notes*

"DELIVERY AS REQUIRED."—In the case of Jones *v.* Gibbons (8 Ex. 920), decided as long ago as 1853, the buyer sued the seller for not delivering iron under a contract, whereby the iron was "to be delivered as required." The seller pleaded that the buyer did not within a reasonable time request the seller to deliver the iron. This plea was held to be bad, as the seller was bound to inquire of the buyer whether he would have the iron before he could rescind the contract on the ground that he was not within a reasonable time required to deliver it. In the recent case of Pearl Mill Company Limited *v.* Ivy Tannery Company Limited it was sought to apply that decision to a very different state of circumstances. The contract provided "delivery as requested," and the sellers delivered two-fifths of the goods by successive instalments as requested within a reasonable space of time. No request was made by the buyers for further deliveries, and no further deliveries were made by the sellers for nearly three years, when the buyers requested the delivery of the balance of the goods. The sellers replied that the contract had expired more than a year previously. The Divisional Court (Mr. Justice Rowlatt and Mr. Justice McCardie) upheld this contention of the sellers, and held that the contract had been abandoned, and, further, that the buyers were estopped from denying that the contract had terminated. The distinction between this case and Jones *v.* Gibbons (sup.) is obvious. Assume, for example, that in any particular contract "delivery as required" three months would be a reasonable time within which to require a delivery. Immediately the three months has expired the seller is not entitled to cancel the contract without notice to the buyer. That is Jones *v.* Gibbons. But when, as in the present case, an inordinate time has passed since a request for delivery, the seller is primâ facie entitled to cancel the contract on the ground that the buyer has abandoned the contract. A buyer would not, for example, be entitled to sit on the fence for several years and then to insist on the contract being performed, if after that lapse of time it appeared that its performance would benefit him.

SECRET TRIALS.—Subject to a general power of the court to exclude the public where the interests of justice require it, it is an axiom of English law that the administration of justice should be open to the whole world. Ten years ago the Legislature introduced in the Incest Act 1908 the anomalous section directing that all proceedings under that Act should be held in camerâ. Considerable interest, therefore, is attached to the recent statement of Mr. Justice Darling at the Central Criminal Court that, after hearing a great many of these cases, he is of opinion that more harm than good had been done by hearing them in camerâ. The offense is far from uncommon, and the fact that trials and sentences for it are never allowed to be reported leaves most people in ignorance of the statute. "Many in the course of proceedings before me," said the learned judge, "have protested that they did not know they had committed a crime." Unless, therefore, there are reasons of great weight against it, people should have the means of knowledge which a trial in open court affords. There are various classes of cases where the interests of justice require the exclusion of the public from the hearing. Examples of such cases are suits affecting wards, lunacy proceedings, and cases involving trade secrets, where secrecy is of the essence of the cause. A recent instance is provided by the case of Rex *v.* Governor of Lewes Prison; Ex parte Doyle (116 L. T. Rep. 407; (1917) 2 K. B. 254), where a court-martial, sitting in the midst of the Irish rebellion, was held to be justified in trying a rebel behind closed doors. But it is a very different proposition to exclude the public from court in cases of incest, a step apparently taken in the interests of public decency. As Mr. Justice Darling pointed out, cases of incest are no more indecent in their details than any other case as to carnal knowledge of women. Moreover, in indecent cases the court has power under the Children Act 1908, s. 114, to clear the court while a child or young person is giving evidence, though in this instance the Legislature has expressly provided against the exclusion of bonâ fide representatives of the Press. This anomaly in the Incest Act is contrary to the principles of English law (see Scott *v.* Scott, 109 L. T. Rep. 1; (1913) A. C. 417), and, having worked badly in practice, there seems to be no reason why it should not be repealed.

TEACHING LAW TO BOYS AT SCHOOL.—In an address recently delivered to the boys of his old school at Bangor, Mr. Justice Atkin returned to a subject which he has broached on previous occasions—namely, the advisability and practicability of teaching boys at school at least a modicum of law. As he pointed out, law, in spite of the opinion of many people, is quite a rational subject, and it is almost impossible to get a true view of English history without some knowledge of law. In a familiar passage in his celebrated speech on American taxation Burke spoke of law as "one of the first and noblest of human sciences; a science which does more to quicken and invigorate the understanding than all the other kinds of learning put together"; and it was Lord Bramwell, we believe, who was accustomed to repudiate with some vehemence the prevalent notion that law is dry and uninteresting. In England, it is true, where a knowledge of the law is to be gathered from varied and scattered sources—legislation, decisions, customs, text-writers—the difficulty of teaching law to younger students is considerably greater than in those countries where there are codes, as, for example, in France. Napoleon realized that his legal reforms would be his most enduring title to remembrance. At St. Helena he wrote: "My true glory is not in having won forty battles; Waterloo will blot out the memory of those victories. But nothing can blot out my Civil Code. That will live eternally." But not merely was the Code Napoléon an immense boon from the purely professional point of view, it has, as Mr. H. A. L. Fisher points out in his article in the Cambridge Modern History, "diffused the knowledge of law and made it comparatively easy for the ordinary Frenchman to become acquainted with the leading principles which govern the law of his own country." But while the task of the teacher of law in an English school may not be so easy as is that of his French confrère, the difficulty is by no means insuperable. The elements of the law of contracts, for instance, might well be made the subject of study by the higher forms in boys' schools. It could be made highly interesting, and it might well prove extremely valuable to the students in their after careers in business. It will be interesting to learn whether Mr. Justice Atkin's counsel bears fruit in his old school and in others throughout the country.

A COLLIER'S "AVERAGE WEEKLY EARNINGS."—The decisions of the Court of Appeal in the two recent cases of Wild *v.* John Brown & Co. Limited and Jones *v.* International Anthracite Collieries Company are of exceptional interest to workmen who are employed in coal mines. The computation of their "average weekly earnings" is essential for the purpose of ascertaining the rate of weekly payment payable to them by way of compensation in the event of their sustaining "personal injury by

* With credit to English legal periodicals.

accident arising out of and in the course of" their employment, within the meaning of section 1 of the Workmen's Compensation Act 1906 (6 Edw. 7, c. 58) or to their dependents if the injury results in death. In the first of these cases, the question was whether in computing the "average weekly earnings" of a collier, his wages merely as such were to be taken into account, or whether through his acting as a delegate and as an inspector, he had entered into "concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer." If that were so, his "average weekly earnings" would have to be computed by reference to his earnings in all three occupations, because of the provisions of sect. 2 (*b*) of the first schedule to the Act. To quote the words of the sub-section, "as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident." That is the direction to be observed in making the necessary computation. But the Court of Appeal, differing from the opinion expressed by the learned County Court judge, declined to treat receipts by the collier in his capacity of a trade union delegate or of an inspector as money obtained under a "contract of service." In the second of the two cases referred to, expenditure on blasting powder in the customary course of a collier formed subject-matter of the dispute as to whether "his average weekly earnings" should be taken at one figure or at another. The collier being provided by his employers with the powder required for blasting, as in Shipp *v.* Frodingham Iron and Steel Company Limited (108 L. T. Rep. 55; (1913) 1 K. B. 577), the learned judge of the Court of Appeal considered that the decision of that court in that case was applicable, it being on all fours with the present case. This view necessitated that their Lordships should give the go-by to the decision to the contrary effect in Scotland in M'Kee *v.* John G. Stein and Co. Limited (1910, S. C. 38; 47 Sc. L. Rep. 39). There it was held that a deduction from fixed wages of the cost of explosives does not come within the provision of section 2 (*d*) of the first schedule to the Act of 1906, as to a sum to cover "special expenses" which an employer has been accustomed to pay to a workman entailed on him by the nature of his employment. The sum so paid is not to be reckoned as part of his earnings, according to the sub-section.

What Property Can Be Subject of Donatio Mortis Causa.—It is difficult to deduce any rule or principle for determining what property can be the subject of a donatio mortis causa. This is the more surprising because as long ago as the case of Duffield *v.* Elwes (1 Bligh N. S. 497; 4 English Rep. 959) it was decided by the House of Lords that a mortgage deed and a bond could be the subject of such a gift on the ground, as stated by Lord Eldon, that the gift raised by operation of law a trust, which, being raised by operation of law, was not within the Statute of Frauds, but was a trust which a court of equity would execute. In the face of that decision, it is difficult to see why fine distinctions should be drawn, so as to prevent certain kinds of property being given as a donatio mortis causa. Thus in Re Weston; Bartholomew *v.* Menzies (86 L. T. Rep. 551; (1902) 1 Ch. 680) it was decided that a certificate of investment shares in a building society, which shares might at any time be withdrawn, was not the proper subject of a donatio mortis causa, but that a Post Office Savings Bank book might be a good subject of such a gift, and that the delivery of the book would pass the right to the money on deposit. Again, in Re Andrews; Andrews *v.* Andrews (87 L. T. Rep. 20; (1902) 2 Ch. 394) it was decided by Mr. Justice Kekewich that where a deposit was invested by the Post Office Savings Bank for the depositor in Government Stock, under the regulations contained in the deposit book, by having the stock placed on the Savings Bank investment account of the National Debt Commissioners, and credited to the depositors, the delivery of the investment certificate and the deposit book did not constitute a good donatio mortis causa of the Government Stock. A question of the kind recently came before Mr. Justice Astbury in Re Lee; Treasury Solicitor *v.* Parrott (145 L. T. Jour. 213; (1918) W. N. 253). There, Lee was entitled to a registered 5 per cent Exchequer Bond for £100, which he had acquired through the Post Office, and in respect of which he held an Exchequer Bond deposit book containing a certificate headed "Exchequer Bond Account, No. 161651," and certifying that he had been registered as the holder of bonds deposited with the Post Office to the value of £100, which certificate entitled him to delivery of the bond on demand, and on surrender of the book, but until such demand and surrender the bond did not come into existence, although interest was regularly paid thereon, the book being the only document in actual existence. It was held by Mr. Justice Astbury that Re Andrews was distinguishable, as in that case the stock was purchased or set apart for the benefit of the depositor, whereas in Re Lee the bond did not exist. His Lordship also referred to Re Dillon; Duffin *v.* Duffin (62 L. T. Rep. 614; 44 Ch. Div. 76), in which it was decided that a banker's deposit note can be the subject of a donatio mortis causa, and to Duffield *v.* Elwes, before cited. The tendency of the cases is to support gifts of the kind.

Criminal Responsibility of Kaiser's Subordinates.—The visit of the Attorney-General and the Solicitor-General to Paris for the purposes of the Peace Conference, with special reference to breaches of the laws of war by the enemy and the report on the question of the personal responsibility of the Kaiser in public law by M. Larnaude, doyen of the Faculty of Law, and M. de la Pradelle, Professor of International Law in the University of Paris, must direct attention, says the *Law Times*, to the question whether the subordinates of the ex-Kaiser are responsible for the outrages committed by the orders of their master, who is himself, according to the conclusion at which the eminent French jurists have arrived, answerable in his own person for the war and the crimes committed by the armed forces under his command. The responsibility of subordinates for the outrages committed by them in obedience to the orders of the ex-Kaiser, who, according to the report, is, "in the first place, as King of Prussia, President of the Confederation in virtue of his personal right, which is not affected by human will" and "depends solely upon God and the sword," is akin to the responsibility of a soldier, who, in obedience to the orders of his commanding officer, which he is bound by military law to obey, commits an offense against the laws of the land which is likewise an offense against the principles of humanity. Sir Fitzjames Stephen thus expounds the doctrine of responsibility for obedience to the orders of a superior, when such orders are in conflict with the law: "I do not think," he writes, "that the question how far superior orders would justify soldiers or sailors in making an attack upon civilians has ever been brought before the courts of law in such a manner as to be fully determined and considered. Probably upon such an argument it would be found that the order of a military superior would justify his inferiors in executing any orders for giving which they might fairly suppose their superior officer to have good reasons. Soldiers might reasonably think that their officer had good reasons for ordering them to fire into a disorderly crowd which to them might not appear at that moment engaged in acts of dangerous violence; but soldiers could hardly suppose that their

officer could have any good grounds for ordering them to fire a volley down a crowded street when no disturbance of any kind was either in progress or apprehended. The doctrine that a soldier is bound under all circumstances whatever to obey his superior officer would be fatal to military discipline itself, for it would justify the private in shooting the colonel by the orders of the captain, or in deserting to the enemy on the field of battle on the order of his immediate superior. I think it is not less monstrous to suppose that superior orders would justify a soldier in the massacre of unoffending civilians in the time of peace, or in the exercise of inhuman cruelties, such as the slaughter of women and children, during a rebellion. The only line that presents itself to my mind is that a soldier might be protected by orders for which he might reasonably believe his officer to have good grounds." It would seem clear, on analogous reasoning, that obedience to orders of a superior who, as in the case of "the German Sovereign, depends solely upon God and the sword," when such orders are in glaring violation of the usages of war and outrages on humanity, will entail responsibility on the perpetrators of offences against the cardinal principles of international morality under such circumstances. The affixing of responsibility on the perpetrators of atrocities, by the command of the Kaiser, repugnant to the principles of humanity will be triumph of what Mr. Bright, in resigning his seat in the Cabinet in consequence of the bombardment of Alexandria, termed "the moral law" for the government of the world quite as great as the overthrow in this country of the doctrine of the Divine right of Kings and the duty of the passive obedience of their subjects achieved by the Revolution.

Obiter Dicta

SINGING OUT OF TUNE.—Bird *v.* Key, 8 Baxt. (Tenn.) 366.

UNCONVENTIONAL JANES.—Grundy *v.* Janesville, 84 Wis. 574.

PASTURING NOT PERMITTED.—Field *v.* Goat, 173 Pac. 364.

TO SLEEP OR TO DRINK—THAT'S THE QUESTION.—Pillow *v.* Rye, 1 Swan (Tenn.) 185.

AN ARGUMENT FOR THE RECALL OF JUDGES.—A judgment for the plaintiff was affirmed in Shurtleff *v.* Right, 66 W. Va. 582.

CHRISTIAN SCIENCE?—In Hyroop *v.* State, 79 Tex. Crim. 150, it appeared that the accused gave a patient "what is termed a hot air treatment."

DELAWARE CHARTERS
IMPORTANT AMENDMENTS
TO THE DELAWARE LAW (March 20, 1917).
STOCK WITHOUT PAR VALUE
The most modern and scientific method of corporate organization. Write for full particulars of this and other important amendments.
REVISED DIGEST (5th Ed.) free to lawyers on request
CORPORATIONS ORGANIZED AND REGISTERED.
LAW AND FORMS FREE.
Corporation Company of Delaware
604 EQUITABLE BUILDING, WILMINGTON, DEL.

WHAT'S A LAWSUIT BETWEEN FRIENDS?—The case of Friend *v.* Friend, Wright (Ohio) 639, was an action by a wife for a divorce on the ground of continued desertion due to the "interference of friends" of the husband.

APPOINTMENTS GOOD AND BAD.—In 60 Cal. 311 it appeared that Greathouse was employed to assist a board charged with the erection of a public building. In 44 Barb. (N. Y.) 459 it appeared that Duntz was employed by a similar board.

AN UNVALUED JEWEL.—In State *v.* Knowles, 90 Md. 656, Pearce, J., said: "The law does not permit itself to be frightened out of its propriety by the hobgoblin of inconsistency." Evidently, our judges don't care much for jewelry.

TOO BAD!—A good joke was lost to the Obiter Dicta column when the case of State *v.* Romeo, 42 Utah 46, proved to be, on examination, merely a murder case instead of a prosecution for some violation of the law governing domestic relations.

HONI SOIT QUI MAL Y PENSE.—Some of the amusing collocations of legal titles on the backs of law books, which were recited in this column several months ago, are recalled to mind by the following heading on page 20 of the Decennial Supplement to the U. S. Supreme Court Digest, L. ed.: " 'American Girl'—Anti-Screen Law."

THE FIRST EUGENIC SCIENTIST.—"The line between permissible overreaching and punishable fraud is illy defined, and so it has been from the time Jacob demonstrated the profitable potentialities of the science of eugenics at the expense of Laban, even unto this day. Genesis xxx, 31-43."—Per Bates, J., in Peeples *v.* Georgia Iron, etc., Co., 248 Fed. 891.

SADNESS UNRESTRAINED.—"Of all sad words of tongue or pen," we are inclined to think that the following peroration from the pen of Judge Hawkins of the Texas Supreme Court, coming at the close of a dissenting opinion covering 115 printed pages, deserves at least honorable mention: "With becoming respect, though with a sad heart, I can do no more than to record here my dissent and solemn protest." (See San Antonio, etc., R. Co. *v.* Blair, 108 Tex. 434.)

MAY IT RISE FROM THE FLAMES!—Waiving the customary advertising rates, we are pleased to give publicity to the following lawyer's card recently received by the editor:

ANNOUNCEMENT.

I have resumed the practice of law and my office is Room 15 War Work Building, Phoenix, Arizona.

The I. W. W's may also establish headquarters in Phoenix. Poor Phoenix.

Fred J. Elliott.

A BIRD!—In Lukens *v.* Ford, 87 Ga. 541, Bleckley, C. J., expressed his opinion as to the importance of a case before him, as follows: "In the ornithology of litigation this case is a tomtit furnished with a garb of feathers ample enough for a turkey. Measured by the verdict, its tiny body has only the bulk of $25, but it struts with a display of record expanded into 83 pages of manuscript. It seems to us that a more contracted plumage might serve for so small a bird, but perhaps we are mistaken. In every forensic season, we have a considerable flock of such cases, to be stripped and dissected for the cabinets of jurisprudence. We endeavor to pick our overfledged poultry with judicial assiduity and patience."

Judicial Notice of Booze.—What a difference there is in judges! In State *v.* Pigg, 78 Kan. 618, the court, speaking perhaps purposely through Porter, J., approached a certain tabooed subject in this cautious and timid manner: "While its characteristics are not so widely known as those of whisky, brandy or gin, it is our understanding that a Manhattan cocktail is generally and popularly known to be intoxicating." Of course, Kansas is a prohibition state, and its judges are not supposed to know anything about the demon, but Alaska is also prohibition territory, and it is decidedly *refreshing* to find an Alaska judge (Delaney, J., in U. S. *v.* Ash, 75 Fed. 652) discourse on the same subject thus cheerfully and candidly: "This court therefore will neither stultify itself nor impeach its own veracity by telling you that it has not judicial knowledge that the liquor commonly known as 'whisky' is an intoxicating liquor, or that the drink commonly called a 'whisky cocktail' is an intoxicating drink." Judge Porter may be a native of Kansas but it is safe to bet that Judge Delaney was not born and brought up in Alaska.

Twisting the Lion's Judicial Tail.—The following item appeared in a recent issue of the London *Law Times* under the heading "Irish Notes":

"The learned County Judge of Fermanagh, Judge Johnston, had probably a unique experience in his court at Enniskillen on the 29th ult. Recently a case came before the judge at quarter sessions in the same town in which some of the parties interested resided in America, and His Honor directed that it would be necessary to have certain legal proceedings commenced in the American courts to carry out the terms of the ruling made by the court. The solicitor having carriage of the issue put things in motion, and issues were brought to a hearing before Judge Scudder, but it did not appear where this learned judge exercised jurisdiction. The points having been explained to the judge, he made an order appointing the Irish solicitor who brought the matter to trial a 'commissioner in Ireland to examine and cross-examine Judge Johnston as to what his status was, and what authority he possessed to make a ruling in the case.' When this result of the reference to an American court was produced before Judge Johnston, and the solicitor appointed declared that he was not going to act upon it, there was some amusement in court. After some discussion between the parties interested, it was decided to send the matter with a full statement of the facts to the British Foreign office, and allow it to determine what action, if any, should be taken on the refusal of the American judge to recognize a court of competent jurisdiction."

In re Quotations.—In Miller *v.* Bank of Washington, 96 S. E. 977, Chief Justice Clark of North Carolina made the following observation: "The story of the fair-haired wife of Sparta's king,

> 'Whose face launched a thousand ships
> And sacked the topmost tower of Troy'

—as told by the blind old bard, still moves the hearts of men after the lapse of thirty centuries." In Bartlett's "Familiar Quotations," the foregoing couplet is attributed to Christopher Marlowe and reads thus:

> "Was this the face that launched a thousand ships,
> And burnt the topless towers of Ilium?"

We have not the slightest desire to engage in an argument as to the authorship of these lines. But in view of the fact that there exists a diversity of opinion on the subject, our high regard for Mr. Justice Clark moves us to suggest that it might be well to approach the matter of quotations in the cautious manner occasionally followed by a certain distinguished quotationist, now, unhappily, off the bench. We refer to Judge Lamm of Missouri, and by way of illustration beg to call attention to the following extract from his opinion in the famous mule case (Lyman *v.* Dale, 262 Mo. 353): "It was Dr. Johnson (was it not?) who observed that Oliver Goldsmith had 'contributed to the innocent gayety of mankind.' (Nota bene: If, as a pundit tells me, it was Garrick, and not Goldsmith, Johnson spoke of, and if, in quoting, I misquote, then memory has played a trick upon me, and a learned bar will correct me. Time and weightier matters press me to go on and leave the 'quotation' stand.)"

"If a person were to speak in scientific terms of some of the commonest things of life, he would not merely be thought to be pedantic, but would be utterly unintelligible to many. A professor of economics would have difficulty in convincing persons who were indeed persons of intelligence that they did not have money in their pockets if they felt crisp bank notes crinkling in their fingers. The same person, if his ownership of bonds or stock was questioned, would think he had settled the dispute by producing the bonds or stock certificates. He would produce them, not as if he was bringing forth evidence of his ownership, but the very property which he owned. Laws, particularly those by which the common people are to be guided, are to be interpreted as the common speech is understood, and are not to be translated into scientific jargon."—Per Dickinson, J., in De Ganay *v.* Lederer, 239 Fed. 573.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912,

of Law Notes, published monthly at Northport, L. I., N. Y., for Apr. 1, 1919.

State of New York } ss.
County of Suffolk }

Before me, a Notary Public in and for the State and county aforesaid, personally appeared M. B. Wailes, who, having been duly sworn according to law, deposes and says that he is the President of the Edward Thompson Co., the publishers of Law Notes, and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management, etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 443, Postal Laws and Regulations, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

Name of—	Post Office Address
Publisher, Edward Thompson Co.	Northport, N.Y.
Editor, M. B. Wailes	" "
2. That the owners are:	
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3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: none.

4. That the two paragraphs, next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

M. B. Wailes, Prest.

Sworn to and subscribed before me this 28th day of March, 1919. Geo. Babcock. Notary Public [Seal]. (My commission expires March 30th, 1919.)

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Law Notes

JUNE, 1919

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Precedents for Punishment of the Kaiser.

IN connection with the decision of the Council of Versailles to try the late Kaiser before an international tribunal, the criticism has been made by lawyers, including, it is reported, some in high official station, that the proposed course is wholly without precedent. If this is true it is of little weight. A great many unprecedented things both good and bad have been done in the last few years. But the absence of a precedent is as a matter of fact due purely to the peculiar humanity with which the allied nations are proceeding. Precedent could be found readily enough if it was proposed to lead William Hohenzollern through Paris chained to the automobile of Marshal Foch, to sell him into slavery, to cast him into a den of wild beasts, or to impose on him any one of a dozen or more of the fates which once awaited conquered kings. It is the fact that it is proposed to give him a trial and an opportunity of defense which creates all the furor about lack of precedent. If it is objected that the precedents referred to were of barbaric times (though their barbarism pales into insignificance beside that for which the Kaiser was sponsor) the Council of Vienna by a mere resolution sent Napoleon into life-long exile on a guarded island. But the obvious truth is that the situation is one in which precedent plays no part at all. In the continuous execution of a fixed system of laws by persons having delegated powers, precedent is essential to the security of the citizen. But when delegated government for any reason fails and the people take over the security of their own rights, precedent is outside the question. Did the framers of the American Constitution cavil at the absence of precedent for the government they were creating? So, when, perhaps once in a century, a world war occurs and the civilized nations of the earth unite to lay anew the foundations of peace and international law, what precedents are there which can or should bind them? The Council of Versailles represents the power and the civilization of the whole world, and that it should trouble itself to find precedent in what was done by some petty kingdom at the close of a tiny war in some past day is altogether absurd. What the world wants is action which is right and just, and it is more apt to find it in the decision of that council than in any precedent which can be produced.

Peace Without Victory.

MR. ARTHUR MACDONALD, Honorary President of the International Congress of Criminal Anthropology, in a recent study of the Peace of Westphalia seeks to draw some parallels between that treaty and the one which is just being concluded. The fact that the treaty of Westphalia put an end to religious wars, the most bitter of all conflicts, he attributes to the fact that the inconclusive result of the Thirty Years' War left both parties exhausted and in a mood of mutual concession. From this he draws the conclusion that the treaty which closes the world war will result in an enduring peace only if the victors yield in generosity terms as liberal as would have resulted from an inconclusive and mutually exhausting war. Granting for the moment all that is claimed for the Peace of Westphalia as a cause of the cessation of religious war, though something might be said on that point, the analogy is far from decisive. The contestants in the Thirty Years' War each represented a measure of right; the continued existence of each was needed by the world. Protestantism and Roman Catholicism are two of the many facets which make up the perfect gem of religious truth, and there is room for mutual toleration and mutual respect between them. Between such adversaries it is obvious that nothing but good could come of a result which left neither the conqueror, and represented merely a recognition of the fact that there was no adequate cause for strife between two organizations that acknowledged a common Master and worked to establish one Kingdom of Righteousness on earth. The war which has just concluded, on the other hand, was the outgrowth of no misunderstanding; it was a war between two forces inherently and fundamentally antagonistic. If the Hun had prevailed there would have been no free people left on the face of the earth. Since the exponents of liberty have prevailed, they must enforce upon the Hun actual regeneration or perpetual impotence. In case of a misunderstanding and a protracted law suit between two good citizens, it is obvious enough that it is best that they should compromise and become friends rather than that the complete victory of one should be followed by a life-long feud. But the most humane criminologist does not advocate inconclusive conflicts and mutual concessions between the law and the criminal. He is a poor student of the history of the war who deems it a struggle between moral equals to be composed by mutual understanding. A criminal nation grew up in the world and assaulted the world's civilization. It has been captured, tried, and condemned and must suffer such punishment as will work determent if not reform.

The League of Nations.

WHILE the covenant of the League of Nations has not yet reached such a finality as to permit of intelligent comment on its details, its general outlines seem to be fairly well fixed. The provisions of greatest interest to the profession are of course those which relate to international judicature. By article XV it is provided that all international disputes between members which are likely to lead to war shall be submitted to the Council of the League, and if the members of that Council other than the representatives of the disputants reach a unanimous decision the parties agree to abide thereby. By article XVI, a refusal so to do is made an act of war against all the members of the League. In case of the failure of the Council to reach a unanimous decision "the members of the League reserve to themselves the right to take such action as they may consider necessary for the maintenance of right and justice." The requirement of unanimity was doubtless dictated by the distrust which attends every compact in which states surrender some measure of their sovereignty—e.g., the Constitution of the United States. In domestic judicature it would be an intolerable source of weakness. Imagine the result if the parties were left free to fight out their quarrel every time the appellate court was not unanimously agreed. In international practice, however, it is probable that the Council, confronted with the overwhelming necessity of averting war, will manage to reach a unanimous decision of some kind, and that it will be, at the worst, if not more just than any agreement at which the disputing parties would arrive, infinitely better than armed conflict. Another theoretical weakness is to be found in the fact that the power of arbitrament is vested in the representatives of the several powers forming the Council, rather than in a permanent international court. This gives to the whole proceeding the character of a diplomatic rather than a judicial adjustment. Of this again it can be said at least that it is better than the system which it supersedes. The legal profession will remember, though others forget, that no judicial system ever came into existence in a state of perfection. The great step in advance was taken when it was established that controversies should be determined by public tribunals and not by private feuds. After that, the development of those tribunals to greater perfection was a mere question of time. So one need not commit himself to approval of the provisions of the covenant in order to hail the establishment of an international league as a great advance toward an era of world-wide justice. Men on the whole sincerely desire that which is right. The human conscience presses steadily toward a broader and better justice. The greatest obstacle to be overcome is the fact that the lesser ideals of past generations have crystallized in forms, customs and traditions. There was a time when the belief was conventional that a man's honor suffered if he did not kill one who insulted him, and on the strength of that tradition the laws against dueling were denounced bitterly by many good citizens. The same theory of national honor still finds adherence in some quarters, but the next generation will laugh at its folly. The one outstanding fact is that the great nations of the earth have agreed that their controversies shall in the future be determined on the principle of an impartial trial of the merits and not on the principle that he may take who has the power.

A League of Justice.

THE fact that the value of the League lies in the principle which it establishes rather than in the measures which it has thus far adopted gives force to the suggestion of one of our subscribers, Mr. E. Dumont Smith, who in an address to the Kansas State Bar Association in January last protested against the use of the term "League of Peace" and advocated the title "League of Justice." The preamble of the revised covenant gives ground for this criticism, reciting that the securing of peace is the purpose of the League and relegating to a secondary position as one of the means of accomplishing that end "the maintenance of justice." Mr. Smith said:

"We lawyers are profound believers in peace. We have substituted the jury trial for the ordeal by battle and we have supplanted the old law of revenge and reprisal, an eye for an eye, a tooth for a tooth, with the orderly administration of justice; and sure and swift justice is the greatest peacemaker the world has ever known. But peace alone is not our ideal. The ideal we follow, however slowly and haltingly, is the ideal of justice, for peace without justice is a mockery, and justice is followed by peace as surely as daylight follows darkness. Justice is peculiarly the ideal of the Anglo-Saxon race. It is the lode star that we have followed through all our wanderings, our wars and conquests. Often obscured by passion, prejudice or ignorance, it emerges in the end as the guiding light of our race. Burke, in one of his sublime speeches, declared that the whole state and power of England, her King, her Lords, her Commons, her army and her navy were established and maintained for the purpose of getting twelve honest men into the jury box. At another time he declared that the English law is such that it protects the humblest Hindu on the banks of the Ganges equally with the English nobleman in his castle on the Thames. While the other nations of Europe were prostrate at the foot of thrones, stained with every crime, possessing hardly a human right, our fathers had faced their kings and wrested from them their trial by jury, a government by law, the protection of individual right and liberty. When the founders met to prepare our constitution (and a great Englishman has said of them that they were the wisest body of statesmen that ever gathered in a single chamber), what was the foreword of that constitution? its avowed object 'To establish justice and maintain tranquillity.' Justice was their ideal, justice was their object, justice was the foundation stone of this vast and enduring edifice.

"As a profession, throughout our history, we have not simply fought for our litigants in court, but we have been the constructive force in nearly all legislation. It was lawyers who wrote our constitution, and lawyers who have interpreted it. So, as lawyers, we have a profound and a constructive interest in the future of the world, and as a lawyer I propose to you as lawyers not a league of peace, but a league to enforce justice, for justice is the universal solvent."

The distinction pointed out is not a mere matter of name; it is a radical and fundamental difference in ideal. The Hun is voluble in his praises of peace, but confronted with the demands of justice his porcine squeals are heard around the world. It is the task before the world's lawyers to see that whatever name is given to the League it is in fact a league of justice, for on no other basis can it be of enduring utility.

Revoking Citizenship of I. W. W.

A DECISION of most wholesome tendency was rendered by Judge Wolverton of the U. S. District Court of Oregon in *U. S.* v. *Swelgin,* 254 Fed. 884, revoking the naturalization of a member of the I. W. W. The pledge

of that organization is set out by the court as follows: "I do solemnly pledge my word and honor that I will obey the constitution, rules, and regulations of the Industrial Workers of the World, and that, keeping always in view its fundamental principles and final aims, I will, to the best of my ability, perform the task assigned to me. I believe in and understand the two sentences, 'The working class and the employing class have nothing in common,' and 'Labor is entitled to all it produces.'" To show what are those "fundamental principles and final aims" which are always to be kept in view, the court quotes several pages from the literature of the order, the following sentences being typical: "The I. W. W. opposes the institution of the state. It holds that state or governmental control of industry would merely introduce a different form of slavery. Government implies governors and governed, a ruling and a subject class. No man is great enough or good enough to rule another. The I. W. W. is creating its own ideas of morality and ethical conduct, as opposed to the current conceptions of what constitutes 'right' and 'wrong.' . . . Towards the existence of government the I. W. W. is openly hostile. It is anti-patriotic. The kernel of evil lies in the very existence of the state, and violence is an economic factor."

Comment on the situation thus disclosed could not be more apt than that of Judge Wolverton who said: "No one can read these pamphlets and pronunciamento of the order without concluding, by fair and impartial deduction, that it is not only ultra socialistic, but anarchistic. It is really opposed to all forms of government. It advocates lawlessness, and constructs its own morals, which are not in accord with those of well ordered society. Its adherents are anti-patriotic. They owe no allegiance to any organized government. And I am unable to understand by what right such of them as come from another country can claim that they are entitled to be admitted to citizenship under the Stars and Stripes. The very oath they take, avowing their allegiance to this government, is to them a worthless ceremony, for they do not intend to submit themselves to its Constitution, laws, rules, and regulations, nor to defend it in time of insurrection, or against an aggression from abroad, or when it is at war with other nations. When, therefore, the defendant declared that he was attached to the principles of the Constitution of the United States, and was well disposed to the good order and happiness of the same, he made avowal of that which was not in his heart, and thereby deceived the court."

The decision is but another proof of what has been said frequently in LAW NOTES, that we have law adequate to deal with most emergencies, given but the common sense and courage to apply it. Now that the precedent has been made it should be followed whenever a disloyal or anarchistic naturalized alien can be found. Of course the deprivation of a few hundred of these men of their votes is of small importance. The important thing is that it makes them subject to deportation, opening a way in which the nation may rid itself of those whom a too loose administration of immigration and naturalization laws have permitted to make their way into our citizenry.

Deportation of Undesirable Aliens.

A SUBSCRIBER whose letter is published in this number takes issue with the view several times expressed in LAW NOTES that as a means of checking Bolshevism aliens of anarchistic tendency should be deported. He compares deportation under such circumstances to the practice obtaining in some municipalities of ordering undesirable citizens out of town, thereby foisting them on some other municipality where their criminal tendencies are not known. The objections to that practice may be freely conceded, but the exactness of the parallel is not so apparent. American citizenship implies a right to live in any part of the United States subject to local laws, but there is no "citizenship of the world," Emma Goldman to the contrary notwithstanding. Nations differ one from the other in the characteristics of their peoples and their civilization. The government suited to one is not adapted to another. They represent in a sense grades in a school. The higher grades should always be open to the ambitious student, but if he proves incapable his presence works to the detriment of the whole class, and he should be returned to the lower grade whence he came. Every law which must be made to curb the I. W. W. and the Bolsheviki works inevitably as a limitation on the liberties of the American people. The comparatively small number who are unable to control their appetites have brought prohibition on the moderate drinker, and on the same principle some deprivation of the rights of free speech and free assembly will be necessary if we tolerate in our midst those who pervert those rights to lawlessness. With our own problems we must deal as best we can, but we are under no obligation to import trouble or trouble makers. Moreover, so far as the "moving on" argument is concerned, we have been up to date the victims of it. Europe has more or less systematically "moved on" its most undesirable elements to us. Incidentally all the anarchists and Bolshevists who have entered the United States since March 3, 1903, came here in direct violation of an act of Congress. Deportation of alien born anarchistic agitators and total prohibition of immigration for at least ten years are the things most needed for that Americanization which will make this, in the phrase of Lloyd George, "a country fit for heroes to live in."

A Loophole in the Sherman Act.

DURING the war but little attention was paid to trade combinations except in so far as they affected the manufacture or transportation of munitions and military supplies. When the resumption of normal business activities reawakens interest in the subject, it will be found that a decision has been rendered by the federal supreme court which seems to go far toward reopening the entire controversy as to the legality of monopolistic combinations. In *U. S.* v. *United Shoe Machinery Co.*, 247 U. S. 32, 38 S. Ct. 473, 62 U. S. (L. ed.) 968, a decision which is abstracted in another column of this issue, it appeared that seven prominent manufacturers of the machinery used in making shoes were consolidated. Other plans were brought up by the consolidated corporation, and as a result practically every patent on certain kinds of machinery was controlled by the corporation. The machinery made under those patents was leased to users, with an absolute restriction against its use in conjunction with machinery made by others. The completeness of the monopoly thus obtained is indicated by the fact that of the machines of the character included there were in

use at the time of suit 20,596 manufactured by the combination and 954 manufactured by all others. The court held that this combination did not violate the Sherman Anti-Trust Act. If this decision stands (the court divided four to three, two justices not sitting) it will sanction a variety of trade combinations which have hitherto been regarded as illegal. There are a great number of large industries which are dependent in some way on a patented process, and wherein a combination of the holders of a few basic patents would control the market. It is true as the court says that a patent implies a monopoly, but just as the combination of a number of lawful small industries may create a trust, so may the combination of a number of lawful small monopolies. Another regrettable feature of the decision is the sanction which it gives to the restrictive leases of patented machinery, making it possible by a mere change of phraseology to reestablish the vicious doctrine of the Dick Mimeograph case, which the court overruled within a few years of its rendition. It was hoped that with the decisions in *Straus* v. *Victor Talking Mach. Co.*, 243 U. S. 490, 37 S. Ct. 412, 61 U. S. (L. ed.) 866; *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502, Ann. Cas. 1918A 959, 37 S. Ct. 416, 61 U. S. (L. ed.) 871, L. R. A. 1917E 1187, and *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8, 38 S. Ct. 257, 62 U. S. (L. ed.) 551, the doctrine that a patentee might by any trickery of words retain a control over the business methods of the owners of articles made under the patent had been put to rest forever. Under the doctrine of the United Shoe Machinery Co. case any patentee who calls a sale of machinery a lease and collects the price in annual instalments based on the estimated working life of the machine can control not only the use of other machines by the "lessee" but also the price at which he shall sell his product and the persons to whom he shall sell it. In the long line of decisions under the Sherman act there is none which seems to open as many loopholes to admit the very evils which the act was designed to prevent, and it is to be hoped that when the question comes before the full court it will be found that the law is otherwise.

Inequalities of Income Taxation.

A CORRESPONDENT who modestly desires that his name be not used comments on the editorial entitled "Incorporated Families" in the April issue as follows: "As between corporations and an individual earning a salary, the present income tax law does work a serious injustice to the individual, but it strikes me that you have missed the real point wherein the injustice occurs. The present law permits the individual who is married and supports a wife or family an exemption of at least $2000, which is presumed to cover his living expenses, and the amount allowed for exemption is adequate to meet the annual living expenses of the average salaried man, but the law allows a corporation to deduct its operating expenses and in addition thereto permits it to deduct an exemption of $2000, and therein lies the injustice. The individual taxpayer should be permitted to deduct his personal expenses or the corporation should be denied the right to deduct the exemption of $2000." Of course much that was said in that editorial was with morous intent which seems somewhat to have mis-

It is recognized that an all sufficient reason for not taxing a corporation on its gross income is that a large share of its expenditures are taxed as the income of the recipient thereof. But waiving the complex question of corporate taxation and taking the simplest possible case, as between a salaried man and a man owning and operating a business which he conducts without employees, there is a plain inequality. The one is taxed on his gross income and allowed an arbitrary exemption which is supposed to cover the expense of earning it. The other is taxed on his net income and allowed his actual expenses however much they may exceed $2000. It but adds to the injustice that, as our correspondent points out, the business man is allowed the same exemption out of his net income that the salaried man gets from his gross income. The theoretical economists say that the income tax is the ideal form of taxation. Perhaps they are right —in theory.

Settlements by Insurers Against Liability.

MOST policies of casualty insurance (automobile accident insurance, employer's liability insurance and the like) give to the insurer the sole power to control the settlement of any litigation against the insured on a liability covered by the policy. A recent case in New York which has not yet found its way into the courts illustrates the possible outcome of such a clause. An automobile owner insured to the extent of $10,000 caused an injury for which he was sued. He negotiated a settlement for $7500 but the insurance company refused to sanction it and insisted on defending the suit. Eventually there was a judgment for the plaintiff for $55,000, and a payment by the company of the face of its policy will leave the insured liable for $45,000. The same situation has been presented to the courts several times, and it has been held uniformly that the insured has no recourse against the insurer for the additional liability devolving on him through the refusal to compromise. *Wisconsin Zinc Co.* v. *Maryland Fidelity, etc., Co.*, 162 Wis. 39, Ann. Cas. 1918C 399, 155 N. W. 1081; *New Orleans, etc., R. Co.* v. *Maryland Casualty Co.*, 114 La. 153, 38 So. 89, 6 L. R. A. (N. S.) 562; *Rumford Falls Paper Co.* v. *Fidelity, etc., Co.*, 92 Me. 574, 43 Atl. 503; *Rosenbloom* v. *Maryland Casualty Co.*, 153 App. Div. 23, 137 N. Y. S. 1064; *C. Schmidt, etc., Brewing Co.* v. *Travelers Ins. Co.*, 244 Pa. St. 286, 90 Atl. 653, 52 L. R. A. (N. S.) 126. It is of course a most flagrant injustice that a man who has paid for insurance against a liability should by no fault of his own be subjected to a liability greater than would have resulted if he had no insurance. The situation is one in which the interest of the company is far from identical with that of the insured. The liability of the company being limited to the face of its policy, if the best possible settlement approaches that sum it will of course take the chance of litigation, though from the standpoint of the unlimited liability of the insured the settlement would be most prudent. The matter is one of which the profession should take cognizance and demand legislation making a casualty insurer who refuses a compromise liable for the full sum which is ultimately found against the insured. Until such statutes are in force, casualty insurance giving the insurer full control of the matter of settlement is of very doubtful value (its net cost to the New York man mentioned at the outset was $37,500 in addition to the

premiums) and it may be the part of prudence to advise clients against accepting an insurance policy which contains such a clause. Every form of insurance at its inception has filled its policies with provisions unfair to the policy holder. Life and to a large extent fire insurance policies have been reformed by a combination of public sentiment and statutory regulation, and it would seem that these forces should be set to work on casualty insurance without delay.

Crime Waves.

EPIDEMICS of predatory crime are a familiar phenomenon in large cities, exhibiting an irregular periodicity not unlike epidemics of disease. They differ from the latter only in the fact that they are psychological in their cause, and the method of treatment required is very analogous. The crime epidemic, like its physiological counterpart, finds its origin in an antecedent period of laxity. The number of downright criminals in any American city is small, but there is always a much larger number on the border line, working only when necessity requires and gravitating naturally toward idleness, hoodlumism and petty crime. It needs but a few months of lax or inefficient police administration to allow a considerable number of these to drift from misdemeanor to felony and a "crime wave" is in existence. It is idle to talk of the prevention of such conditions, not because the prevention is particularly difficult but because municipal government as administered in the United States is rarely consistently competent. But after the epidemic starts, intelligent action will do much. As in disease epidemics, promptness is of the essence of the situation. That is where the well-known tardiness of punitive justice works most strongly to our disadvantage. If the first few offenders could be brought to trial within a few days after their arrest, their conviction would give pause to those who are ripe for crime but have not yet gravitated into its commission, and the psychological impulse toward lawlessness would end as suddenly as it began. Every person who has ever sat in a school room knows that a sharp rebuke to the first offender will check incipient disorder, while a few minutes' neglect will allow the whole room to get into a turmoil which only severe punishment of a number of persons will suppress. There are some other elements in the problem which are habitually neglected. One is the matter of newspaper publicity. Once the existence of a "crime wave" is recognized it becomes the subject of daily headlines and comment. The prevalence of crime and the instances where it escapes detection are as thoroughly advertised as a liberty loan, with a result which any student of advertising could anticipate. Another element of increasing importance is the freedom which is allowed to the propagation of lawlessness in the guise of economics. The men who are in that large group of discontented semi-idlers who are the usual victims of the crime epidemic are told with much fervor that their misfortunes are not caused by their own idleness and dissipation but by the iniquities of the "Capitalists," a doctrine which our human nature makes very acceptable. They are told that private property is a system of robbery and that the government is in league with the oppressors of the poor. Now whatever may be the intent of the soap-box orator, this does not lead auditors of the class described to any altruistic effort at social reform. Except in rare instances it does not lead them to throw bombs or burn a courthouse. The more usual result is to make them believe that in robbing a store or holding up a well-dressed pedestrian they are only retaking that which is their own. Between the tolerance of causes which must inevitably produce crime and the leisurely and haphazard methods adopted to check it when it once manifests itself, the wonder is not that crime is so prevalent but that it is not more prevalent.

The Aeroplane and Crime.

THE automobile has become a well-recognized factor in crime, and has in many instances made possible the "quick get away" which goes so far to baffle pursuit. The great impetus which has been given by the war to aviation makes it certain that the aeroplane will soon play a considerable part in social and business life. When that time comes will it also become an instrument of the criminal? If criminals escape in an automobile, the telephone puts the police of a whole state on the look out. But if the robbers of a bank escape with their spoils in a Handley-Page bombing plane what are the authorities to do? Of course the government planes could go up in search. But, while an automobile may be traced by local reports of its passage, the air is trackless. A heavy cloud is a hiding place as impenetrable as a jungle. It is a simple matter to stop and search every automobile of a given general description, but to require every suspicious looking aeroplane to land for inspection consumes much time, the whiles the offender is speeding away. There are men in the United States who employ private bodyguards, and whose grounds are about as easy of access as the residence of the late Kaiser. Will it be necessary for them to mount anti-aircraft guns and searchlights in the yard in the interest of personal security? So far as small articles are concerned, once transatlantic flight becomes an assured fact an aviator may set the revenue laws at defiance. Customs officials on the Pacific coast have always had trouble in coping with the wily Oriental smuggler of opium. What chance will they have when this kind of contraband can be landed at an island off the coast and brought in by the air route at any point on the entire Canadian frontier? Two disadvantages will however tend to minimize the use of the aeroplane as a criminal agency unless future invention shall overcome them—its bulk and the necessity for a considerable smooth surface to start or land. An aeroplane cannot long be kept in concealment and a strict federal licensing law should be easy of enforcement. It is therefore probable that crimes by aeroplane will be frequent enough only to give point to the wild adventures with which the scenario writers will regale us.

Equity Theory and Practice.

A LAWYER who has never practiced under a system of separate equity courts sometimes grows a little disgusted with the oft repeated platitudes of those courts about the abhorrence of equity for all fraud, the vigilance with which it penetrates all disguises and reaches to the intrinsic justice of the case, etc. It needs but slight familiarity with the reports of these same courts to find decisions which "stick in the bark" as flagrantly as those

of any court of law. For example in *Eggers* v. *Anderson,* 63 N. J. Eq. 264, 49 Atl. 578, 55 So. R. A. 570, it appeared that "an old German woman living in apparent destitution" was from time to time aided by an organization of charitably inclined young women. Later, having reason to suspect that she was not as destitute as she seemed, they asked her to make a will in their favor, which she readily consented to do, and was assisted by them for the rest of her life. She made the will but promptly tore it up and made another leaving her property, which proved to be worth $3000, to relatives in Germany. The salient point is not that the Hun's word is ever a scrap of paper but that a "court of conscience" found nothing to condemn, holding that the agreement was satisfied by the making of the will and implied no obligation to keep it in force. The decision was not forced by precedent; it stands solitary and alone among reported American decisions. By way of contrast a court whose jurisdiction is not exclusively equitable said on similar facts in *Bruce* v. *Moon,* 57 S. C. 60, 35 S. E. 415: "But it is said that A. H. Moon complied with his promise to plaintiff by making his will giving her all of the property of which he died seized and possessed. This, as it seems to us, we must say, is a mere play upon the words. To say that a person has fulfilled his agreement to give to another all of his property at his death, in consideration of valuable services performed, by making his will in accordance with such agreement, and then to turn right around and annul and effectually destroy such testamentary provision by conveying away all of his property to another, leaving nothing whatever upon which the will could operate, would be 'keeping the word of promise to the ear and breaking it to the hope.'" All of which goes to show what reformers of practice are so prone to forget, that the personal equation is in the end the determining factor. What the system may be called or what platitudes may define its jurisdiction are of no moment; the judge whose mind inclines to substantial justice will render substantial justice, while the judge whose mind inclines to technical law will administer technical law.

ACTIONS AGAINST RAILROADS UNDER FEDERAL CONTROL.

THE interest which has been manifested by the profession in the article which appeared under the above title in the April issue of LAW NOTES, and the number of inquiries which have been made by readers thereof, have suggested this supplementary discussion of the suggestions which have been received and of the cases which have been decided since the preparation of the former article.

The recent decisions tend to the view that the orders of the Director General respecting the place of suing railroads under federal control are invalid. Judge Munger of the United States District Court of Nebraska held in *Rutherford* v. *Union Pac. R. Co.,* 254 Fed. 880, that order No. 50 for the substitution of the Director General as defendant was valid, but held in *Friesen* v. *Chicago, etc., R. Co.,* 254 Fed. 875, that orders 18 and 18a regulating the venue were invalid, saying on that point: "The plain meaning of the words used in this section is that the laws then existing governing the relationship of the railways as common carriers were to remain in effect except when they were inconsistent with the terms of that act of Congress or of any other act applicable to federal control or with any order of the President. Orders of the President relating to the carriers' duties and liabilities, other than as common carriers, were not authorized by this portion of section ten. The authorization of the bringing of an action at law as then provided by law, against the railway company upon a cause of action not arising against it as a common carrier, was therefore not subject to an order of the President limiting the districts in which such an action could be commenced, because of anything contained in this section of the act of Congress." Orders 18 and 18a were likewise held to be void in *El Paso, etc., R. Co.* v. *Lovick* (Tex.) 210 S. W. 283, the court saying: "How can a Director General deprive him of the right to resort to that court when Congress has said that his action might be brought as then provided by law? How can his action be stayed by an executive order when Congress has protected his right to the rendition of a judgment as it existed on March 21, 1918. In the opinion of this court that portion of section 10 above quoted protected plaintiff against executive interference with his right to resort to any court having jurisdiction of the subject matter and person of defendant and his further right to prosecute his suit to judgment. We regard the language employed as plainly indicative of the congressional intent in this respect. But if this intent and meaning of the act cannot be readily ascertained from the words used, it nevertheless becomes apparent when considered in connection with the antecedent proclamation of the President dated December 26, 1917. In this proclamation the President ordered that, except with the written assent of the Director, no attachment by mesne process or on execution should be levied on or against any of the property used by any of the transportation systems in the conduct of their business as common carriers; but that suits might be brought by and against the carriers and judgments rendered as hitherto until and except so far as the Director might, by general or special orders, otherwise determine. There are two features of the act which obviously relate to that portion of the proclamation. The first is the provision with reference to actions at law, suits in equity, and rendition of judgments. The second is: 'But no process, mesne or final, shall be levied against any property under such federal control.' It is significant that whereas, under the proclamation, suits might be brought against such carriers and judgments rendered as hitherto, until and except as the Director might, by order, otherwise determining, the act itself expressly stipulated that actions at law and suits in equity might be brought against such carriers and judgments rendered as then provided by law, and that, whereas, under the proclamation, mesne process or execution could be levied with the prior written assent of the Director, under the act of Congress it was absolutely forbidden. These features of the act manifest the interest of Congress to be that under no circumstances was the property of the carriers to be subject to levy and that the right of litigants to bring actions and have judgments rendered as such rights then existed was preserved and protected against future executive interference which was plainly forecast in the proc-

lamation of December 26th." The foregoing decision is of course in direct conflict with the earlier decision of another department of the same court in *Rhodes* v. *Tatum* (Tex.), 206 S. W. 114. In *Jensen* v. *Lehigh Valley R. Co.*, 255 Fed. 795, the court refers to an unreported case in the district court of Minnesota adverse to the validity of order No. 50. In *Sagona* v. *Pullman Co.*, 174 N. Y. S. 536, the court made the substitution of parties permitted by order No. 50 without comment on its validity, holding in that connection that a supplemental order to the Director General was not necessary. In *Jensen* v. *Lehigh Valley R. Co.*, supra, it was held that the provision that the Director General "may" be substituted in pending actions was permissive only. As bearing collaterally on the subject it was held in *Commercial Club* v. *Chicago, etc., R. Co.* (Minn.) 171 N. W. 312, that federal control did not prevent an order by a public service commission for the erection of a new depot. A contrary holding was made in *Chicago, etc., R. Co.* v. *State* (Okla.), 180 Pac. 250. In the case of Matter of New York Cent. R. Co., 105 Misc. 659, 174 N. Y. S. 682, it was held that it did not prevent the enforcement of a state law requiring the repair of bridges. In *Dickens* v. *Bransford Realty Co.* (Tenn.), 210 S. W. 644, it was held that apart from any order of the Director General a railroad under federal control was so far a government agency as not to be subject to garnishment.

The matter of the place and manner of suing a railroad company remains therefore in a most unsatisfactory condition. The decisions are about equally divided as to the validity of the orders of the Director General, and no one of them is by a court of last resort (the case passed on in *Dautzler Lbr. Co.* v. *Texas, etc., R. Co.* (Miss.), 80 So. 770, having apparently been tried before the orders of the Director General were made). On the ordinary principles of statutory construction it would seem clear beyond question that orders 18, 18a and 50 are void, yet so great is the war power (and be it remembered that legally we are still at war) that a lawyer must needs hesitate to jeopardize his client's cause of action by disregarding them. The reasons for the making of orders 18 and 18a were stated by the Director General as follows: "This order was issued because suits against carriers for personal injuries, freight and damage claims were being brought in jurisdictions far remote from the place where plaintiffs resided or where the cause of action arose; the effect being that men operating trains engaged in hauling war materials, troops, etc., were required to leave their trains and attend court as witnesses, and sometimes travel for hundreds of miles from their work, seriously interfering with their duties." Can it be denied that the emergency thus described has so far passed that it no longer warrants the continuation of the uncertainty which these orders of doubtful validity create? Whether the rules 18 and 18a are in themselves good rules is beside the question. If a reform in the existing law as to the venue of civil actions is advisable, it should come from a source of unquestioned authority.

A subscriber whose letter is published in this issue raises a question of very great importance, involving the right of recovery on any cause of action which has arisen since government control was instituted. He suggests that any statute which seeks to impose on the property of the railroad companies a liability for acts occurring when their control was wholly superseded would be invalid. If this contention is sound, persons having a cause of action arising under the government control are wholly without remedy, since neither the United States nor the Director General can be made to respond in damages. This view finds support in the only case which has passed on the point, the decision of a single judge in *Schumacher* v. *Pennsylvania R. Co.*, 175 N. Y. S. 84, decided March 29, 1919. In that case it was held that section 10 of the act of Congress of March 21, 1918, authorizing suits against carriers under federal control is unconstitutional. The court said:

"The federal government, in the control and operation of the railroad properties taken over, is in no sense the agent or representative of the railroad companies to whom the systems belong. By the twelfth section of the act the moneys and other property derived from the operation of the carriers during federal control are 'declared to be the property of the United States.' If a profit is realized from such operation, the profit belongs to the United States. By section 8 the President is given power to exercise the powers granted him with relation to federal control 'through such agencies as he may determine, and may fix the reasonable compensation for the performance of services in connection therewith.' In other words, the federal government, in the operation of the systems taken over, acts as the principal and not as the agent of the owners of the transportation system, becoming a lessee of the railroad on terms agreed upon between it and the companies. Where no agreements as to rentals are reached, and where no such formal leases are entered into, the government is to pay such a rental as may be thereafter determined reasonable and just by and in the methods prescribed. In short, the relation between the government and the carrier is nothing more or less than that of lessor and lessee; the lessee operating the road for itself and on its own account. The employees engaged in operating the various systems are for the time being at least the government's servants and agents, subject to its directions, paid by the government, and subject to dismissal by it. . . . If our view and construction of the statute in question is correct, we are face to face with the legal question whether, in so far as it authorizes actions and judgments against carriers for the negligence or default of the government or its agents, such provisions are constitutional and valid. To state the question is to answer it. We can reach no other conclusion than that in that respect Congress has exceeded its constitutional powers."

There is however much room for a contrary contention. The control of the railroads assumed by law may well be likened to the control exercised by a receiver. This was the view taken by Judge Munger who said by way of dictum in *Rutherford* v. *Union Pac. R. Co.*, 254 Fed. 880, that "the office of the Director General is analogous to that of a receiver of the railway companies." Where a railroad is operated by a receiver, as has many times happened, the railroad assets are liable for all causes of action arising out of that operation, and while a receiver may not be sued without consent of the court that consent is rarely withheld, many federal judges granting a general consent in the order appointing the receiver. The taking of a railroad from the control of its officers by a court for the benefit of its creditors does not seem to

differ in its fundamental principle from the taking of control by the federal government in aid of its temporary need of special service.

However, the question admits of enough doubt so that the railroads can litigate for years to prevent the enforcement of the liabilities which have accumulated during the period of federal control. Even if the effort is unsuccessful the superadded delay will amount in many cases to a substantial denial of justice. This inequity at least there is time to prevent. Congress should provide before the roads are returned to private control that every judgment rendered and every just claim arising by reason of their operation by the federal authorities shall be paid, leaving the question whether the burden of that payment shall ultimately be borne by the railroads or by the government to be settled later. As between the government and the railroads there are equities on both sides. The roads may urge with an appearance of justice that they should not be compelled to pay for injuries caused by the government operation. On the other hand there is plausibility in the contention of the Director General that the railroads have been saved great financial loss by the government operation. In his report for 1918 he says: "Last December the expenses of the railroads were increasing with great rapidity. They were hedged about in their efforts to obtain increased rates by the numerous and various restrictions imposed by the states, and also by the limitations imposed by the interstate commerce act. They were confronted by imperative demands for greatly increased wages and were without machinery to insure an amicable settlement of those demands. They were finding it almost impossible to borrow money on any terms to make the improvements which were indispensable to enable them to perform their public service. The operation results for the first four months of 1918 indicate that if the railroads had been under private control during that period they would have lost in operating income, as compared with the corresponding period of the preceding year, $136,116,533; and as compared with an average of the corresponding period for the three-year test period, $96,064,356. This takes no account of the wage increase subsequently made, which, nevertheless, was retroactive to January 1. These adverse conditions, coupled with the extreme difficulty of borrowing money, would probably have resulted in the failure of some of the most important railroad companies in the country to meet their obligations under private management." But however these equities may be adjusted, the holders of claims against the railroad administration should not be compelled to bear the burden of that adjustment. They have already sustained more than their share of delay and inconvenience.

One of our correspondents, taking exception to the statement in the previous article that the uncollectibility of judgments against the railroads had doubtless made it possible for railroad claim agents to secure many unfair settlements, has accused the writer of sympathy with the "ambulance chasers." Quite to the contrary his sympathy, like that of other members of the profession who are not partisan by reason of their professional connections, is wholly with the person, usually without property and dependent for a living on his power to labor, who sustains a serious personal injury by reason of negligence in the operation of a railroad and is compelled to seek redress therefor in the courts. The right of such a person to a fair trial in a forum fixed by law and the prompt payment of any recompense which the court may award for his injury rests on the plainest considerations of justice and is reinforced by the most obvious dictates of humanity. In the consideration of that right, whether he is represented by an attorney who solicited the employment is quite beside the question. The right to the full enforcement of every final judgment of a court of justice is one of the essentials of free government. The deprivation thereof is a wrong so great that nothing but dire emergency will justify it. The moment that emergency passes the right should be restored and recompense made for its temporary denial. Nothing but the existence of flagrant war will justify a condition under which an executive officer can set himself above the courts and regard or disregard at his pleasure their judgments on matters expressly placed within their jurisdiction. With these propositions it is not believed that any lawyer not influenced by a special interest will take issue.

W. A. S.

RIGHT TO TAKE AND RETAIN PHOTOGRAPHS, ETC., OF PERSONS ACCUSED OF CRIME.

THE plight of the innocent man arrested on a criminal accusation is indeed a pitiable one. He is subject to loss in finances and in reputation to say nothing of the humiliation and mental suffering. All this he must endure without redress for the general good of society. He must spend his money to employ counsel to defend him properly, or, if too poor, must accept the services of counsel assigned him by the court, generally a young and inexperienced lawyer poorly equipped to contend with the trained and experienced prosecutor employed by the state, who, unfortunately, too often thinks of adding another notch in his gun stock rather than of the real guilt or innocence of the accused. His business suffers both by his enforced absence and the loss of friends because of the taint of crime which clings to him. And even when acquitted, the injury to his reputation remains in a large measure, for such is humanity. Truly with the innocent man accused of crime it is a case of "heads I win and tails you lose." The welfare of society in general demands that the individual must submit to these things; they are unavoidable, or rather that he should submit to temporary restraint and trial is, but whether he should be deprived of all redress is questionable. However, while society cannot allow him to escape trial and apparently has fastened the accompanying hardships upon him finally, it can refrain from unnecessarily adding to these hardships, and as far as possible, consistent with the public welfare, give practical effect to the presumption of innocence with which the law envelops him.

That the modern method of preserving the identity of criminals is of great value in the prevention and detection of crime is unquestioned, but the custom of police authorities to take, before conviction, the photographs and measurements of persons merely suspected and accused of crime, for preservation in that depository of criminal records commonly known by the rather unsavory cognomen of "rogues' gallery," is questioned seriously, and the right emphatically denied by some of our courts. The detection of crime is an art according to some of our

novelists, but the modern methods of fixing and preserving the identity of criminals may be called an exact science. The photograph, the Bertillon system of measurement, finger prints, etc., have enabled the police so to fix the identity of those who violate the laws, that there can no longer be a question of who's who in the "rogues' gallery."

The right to photograph and measure the accused is unquestioned in the case of habitual or convicted criminals. It is clearly justified as an exercise of the police power. As was said in *Owen* v. *Partridge,* 40 Misc. 415, 82 N. Y. S. 248: "The duty of the police, always existing, and reaffirmed by the charter (§ 315) to 'preserve the public peace, prevent crime, detect and arrest offenders,' gives them necessarily a wide range of incidental powers to accomplish the mandate of the statute. The existence of the so-called 'rogues' gallery,' and the taking of photographs, weights and measurements, finds its authority, if anywhere, in this provision, or in the accepted pre-existing principles of which it is the expression. So far as habitual criminals are concerned, their supervision and control, no serious question could well be raised as to the propriety or legal character of the acts involved."

On the other hand there are certain rights pertaining to mankind which have their origin independent of any express provision of law and which are termed "natural rights." One of these is the right of personal liberty, which includes absolute freedom to everyone to come and go as he pleases and preserve his person inviolate from attack by another. This right has been recognized and safeguarded by the makers of our various constitutions, which provide that no one shall be deprived of his rights except by due process of law. However, this right must yield to another and higher right. The right to personal liberty and freedom must give way to the necessities of the public welfare, and the individual must submit to temporary restraint at times in order that the rights of society in general may be preserved, and so he may be held against his will when accused of crime and until such time as it can be determined whether the accusation is true or false. But this right of temporary restraint is zealously guarded and restricted, and just how far the police may go in the exercise of the right presents a nice question. Certainly to hold that a person merely suspected of crime and whose guilt or innocence remains to be determined may be measured and photographed for the purpose of preserving his identity in the criminal records would seem to be carrying police supervision to an unwarranted extent. Tiedeman in his work on State and Federal Control of Persons and Property, Vol. 1, p. 157, says on this subject: "Another phase of police supervision is that of photographing alleged criminals and sending copies of the photograph to all detective bureaus. If this be directed by the law as punishment for a crime of which the criminal stands convicted, or if the man is in fact a criminal, and the photograph is obtained without force or compulsion, there can be no constitutional or legal objection to the act, for no right has been violated. But the practice is not confined to the convicted criminals. It is very often employed against persons who are only under suspicion. In such a case, if the suspicion is not well founded, and the suspected person is in fact innocent, such use of his photograph would be a libel, for which everyone could be held responsible who was concerned in its publication. And it would be an actionable trespass against the right of personal security, whether one is a criminal or not, to be compelled involuntarily to sit for a photograph to be used for such purposes, unless it was imposed by the statutes as a punishment for the crime of which he has been convicted." He intimates that if the suspicion of guilt is well founded the police are justified in taking the measurements and photograph of one merely accused of crime. But as was said in *Owen* v. *Partridge,* supra: "But what is well-founded suspicion? Where the person photographed is not a habitual criminal, or has never been convicted of crime so that preventive measures might be justified, or where the suspicion, directed to a particular case, has not sufficient legal basis in fact to warrant some criminal proceeding—the definition of a 'suspicious person' becomes vague and shadowy, varying with the circumstances of each case, and measures like those under consideration may approach dangerously near an arbitrary interference with personal rights. In this case the arrest has nothing but suspicion to support it, and were it necessary to inquire into the foundation of the suspicion, it would, on the facts disclosed, be found to rest on hearsay merely. The sworn statement of several detectives that the plaintiff was known to them for years as a common cheat and gambler, as an associate of criminals and disreputable persons, without the disclosure of any fact showing the source of such knowledge, can hardly be deemed sufficient."

It has been said that the act of declaring what temporary invasions of the natural rights of liberty and personal immunity are necessary in the exercise of the police power for the common welfare of the community is solely a legislative act, and in the absence of specific statutory authority the measuring and photographing of persons accused of crime is an unlawful violation of those rights. *People* v. *Bingham,* 57 Misc. 66, 107 N. Y. S. 1011, wherein it was insisted by the police authorities of a city that the right to take the measurements and to photograph persons accused of crime was given them by the provision of the city charter which made it their duty to "especially preserve the public peace, prevent crime, and detect and arrest offenders." The court, however, in denying this contention said: "To subject a citizen, never before accused, to such indignities, is certainly unnecessary in order to 'detect and arrest' him, for he must have been detected and arrested before he can be so dealt with. It is unnecessary to 'prevent crime,' for the acts for which indictment have been found, if criminal, have already been committed. The 'public peace' cannot readily be disturbed by a man in the custody of the law, and his arrest will be all sufficient to accomplish that end without imposing upon him further attack upon the inviolability of his person. . . . The facts of the police department here criticised were not only a gross outrage, not only perfectly lawless, but they were criminal in character. Every person concerned therein is not only liable to a civil action for damages, but to criminal prosecution for assault (Penal Code, § 219), and also for criminal libel." And in *Schulman* v. *Whitaker,* 117 La. 704, 8 Ann. Cas. 1174, 42 So. 227, 7 L. R. A. (N. S.) 274, the court holding that a police officer had exceeded his authority in taking the picture of one arrested and ac-

cused of crime and placing it in the rogues' gallery, based its ruling on a similar ground, saying that ordinarily there is no necessity for taking the photograph before the trial and conviction of the accused, and that the photograph should not be taken unless it is evident that it is necessary for the purpose of identifying the alleged criminal or of detecting crime. These cases are supported by others from the same jurisdictions. *Hawkins* v. *Kuhne,* 153 App. Div. 216, 137 N. Y. S. 1090, *affirmed* 208 N. Y. 555, 101 N. E. 1104; *Schulman* v. *Whitaker,* 115 La. 628, 39 So. 737; *Itzkovitch* v. *Whitaker,* 117 La. 708, 42 So. 228, 116 Am. St. Rep. 215.

But there are authorities which sustain the contrary view. In *State* v. *Clausmeier,* 154 Ind. 599, 57 N. E. 541, 77 Am. St. Rep. 511, 50 L. R. A. 73, it was held that, since it was the duty of a sheriff to confine in jail and safely keep all persons in his custody awaiting trial on a charge of crime, until lawfully discharged, and if they escape, to pursue and recapture them, he had the right, provided he used no physical force, to take the photograph of a prisoner, if he considered that such action would enable him to secure the prisoner's safe keeping or would enable him to retake the prisoner more readily if the latter should escape.

In some states a distinction is drawn between taking the photograph of the accused for the purpose of identification in connection with his trial and taking it for preservation in the police records. Thus in *Schaeffer* v. *U. S.,* 24 App. Cas. (D. C.) 417, it was held that the police might take the photograph of a person who was under arrest for homicide, provided they did not use excessive force or illegal duress and that the photograph so taken could be used at the trial for the purpose of identifying him. In that case it was said: "We know that it is the daily practice of the police officers and detectives of crime to use photographic pictures for the discovery and identification of criminals, and that, without such means, many criminals would escape detection or identification. It could as well be contended that a prisoner could lawfully refuse to allow himself to be seen, while in prison, by a witness brought to identify him, or that he could rightfully refuse to uncover himself, or to remove a mark, in court, to enable witnesses to identify him as the party accused as that he could rightfully refuse to allow an officer, in whose custody he remained, to set an instrument and take his likeness for purposes of proof and identification. It is one of the usual means employed in the police service of the country, and it would be matter of regret to have its use unduly restricted upon any fanciful theory or constitutional privilege." So in *Downs* v. *Swann,* 111 Md. 53, 73 Atl. 653, 134 Am. St. Rep. 586, 23 L. R. A. (N. S.) 739, it was held to be within the power of the police authorities to photograph and take the Bertillon measurements of a person accused of crime for the purpose of identification provided the records so made were not placed in the "rogues' gallery" before conviction. The court in refusing to enjoin the police officers from photographing and measuring a prisoner said: "In our opinion, the photographing and measuring of the appellant in the manner and for the purposes mentioned and the use of his photograph and the record of his measurements to the extent set forth in the answer by the police authorities of Baltimore City would not constitute a violation of the personal liberty secured to him by the Constitution of the United States or of this State. . . . But we must not be understood by so doing to countenance the placing in the 'rogues' gallery' of the photograph of any person, not a habitual criminal, who has been arrested but not convicted on a criminal charge, or the publication under those circumstances of his Bertillon record. Police officers have no right to needlessly or wantonly injure in any respect persons whom they are called upon in the course of their duty to arrest or detain, and for the infliction of any such injury they would be liable, to the injured person, in the same manner and to the same extent that private individuals would be." And in *Mabry* v. *Kettering,* 92 Ark. 81, 122 S. W. 115, it was held that police officers had the right to take the photograph of a person in jail accused of crime for the purposes of identification. As to the allegation that the photographs were to be placed in the "rogues' gallery," the court said: "It is true that it is alleged in the complaint that the photographs were taken by the defendants 'for the avowed purpose of developing said plates into photographs, as these plaintiffs believe and allege, for the purpose of having said photographs placed in what is known as the rogues' gallery'; but they fail to state what the rogues' gallery consists of, and we cannot take judicial cognizance thereof. For aught we know to the contrary, it may be some legitimate method of identification of criminals or those charged with crime; and we have held that the photographs of accused persons may be used for such purpose." A rather astonishing assertion of judicial ignorance on the part of the court.

Conceding that it is unlawful for police officers to photograph or measure an accused person before conviction, the question arises as to the rights of one so wronged after acquittal, with respect to the return or destruction of the records. It is hard to conceive of any normal man holding any other view than that the records in such a case should be destroyed or returned to the person acquitted. And the Louisiana cases cited, supra, hold that this may be accomplished through injunction proceedings.

But in New York a rather anomalous situation is presented. While the rule is well established that it is an unlawful violation of the personal rights of a person accused of crime to take his photograph and Bertillon measurements before conviction, it is held that in case of acquittal the courts are powerless to compel their return or destruction by mandamus or injunction and the injured person is left to his remedy at law through an action for damages. In *Matter of Molineux,* 177 N. Y. 395, 69 N. E. 727, 65 L. R. A. 104, it appeared that the records were made by the superintendent of a state prison after conviction and pursuant to specific statutory authority, and it was held that although the verdict had been reversed and the accused acquitted on his second trial the courts were powerless to grant him redress for the apparent injustice of retaining his photograph and measurements among those of convicted criminals, and his only recourse must be through the legislature. But even though after the Molineux case the legislature passed an act providing that on the acquittal of a person charged with crime all photographs and plates should be returned to him, the court has declared itself powerless to compel obedience to the statute by mandamus, nor

did it suggest any form of action in which relief could be granted but rather intimated that the person wronged must rely on the legal sense of duty supposedly possessed by the police authorities. On this point it was said in *People* v. *Bingham,* supra: "It is with great regret that I have been compelled to come to the conclusion that I cannot afford the relator relief in this form of proceeding. It seems highly probable, however, that by voluntary action the police department will gladly undo the wrong that has been done. It is scarcely conceivable that a department of the city government whose acts are not only unlawful, but criminal in character, should hesitate to undo such acts when their attention is called to the character of them. It is made the duty of the police department under the charter to prevent crime. It remains to be seen whether under the pretense of doing that they shall persistently commit crime."

After reading these decisions one wonders what has become of the old maxim that "there is no wrong without a remedy." True it is that a person so wronged may bring an action for damages against the officer or officers so violating his personal rights. And in *Hawkins* v. *Kuhne,* supra, a person so wronged obtained a verdict against the police official responsible for $1788; and while money may salve his wounded feelings and a verdict for damages may afford a stimulus to that sense of duty attributed to the police in the Bingham case, it in no sense remedies the continuing wrong of keeping his record among those of convicted criminals.

The court in the Bingham case based its holding on the rule that mandamus lies only to compel one to do what ought to be done in the discharge of a public duty and not to undo what is improperly done, and this rule in the abstract finds almost universal support among the authorities. But is it not a rather strained construction of the rule to hold that it is not the clear duty of the police to return records unlawfully taken? Could any duty be plainer? And under the circumstances and in the interest of justice could not the court as easily have held that the duty to return the photographs and plates was a positive duty which ought to be done instead of the rather backward construction that what was asked was to require an officer to undo that which was improperly done? In other words, even in the absence of specific statutory commands, is it not the plain duty of police officers to return records unlawfully made? But in New York they are commanded by statute to do so and yet the court in *Gow* v. *Bingham,* supra, held that it was without authority to compel them by mandamus to return them. The story told by a lawyer who once lost a case though supported by specific statutory enactment, which the court entirely ignored in rendering its decision, is àpropos of the situation presented here. A negro preacher, having announced that in his sermon he would explain various passages in the Bible, started off smoothly, but coming to an intricate and obscure verse he stopped and said: "Dis, brederin, am a ceedingly difcult and dangerous verse and we will jes look dis verse sternly in the face and pass on." In the Bingham case the court looked the statute sternly in the face and passed on.

While the holding in other New York cases that injunction will not lie finds support in many cases which declare that equity will afford relief only when property rights are involved, and not in cases of so-called personal rights, the courts have in more than one instance granted relief when in fact no property rights were involved, though they based their decisions on the nominal existence of alleged property rights. For instance, see *Woolsey* v. *Judd,* 4 Duer 379, where an injunction was granted restraining the publication of private letters, which in reality had no property value, and the injunction was sought merely to protect the writer against pain and humiliation, yet the court based its decision on the nominal existence of a property right. And in *Edison* v. *Edison Polyform, etc., Co.,* 73 N. J. Eq. 136, 67 Atl. 392, the court in granting an injunction restraining the use of a photograph without the consent of the subject recognized the doctrine of the right of privacy but also held that there was a right of property in the photograph. In *Roberson* v. *Rochester Folding-Box Co.,* 171 N. Y. 538, 64 N. E. 442, 89 Am. St. Rep. 828, 59 L. R. A. 478, which was an action brought to restrain the use of a photograph of a young girl for advertising purposes, it was held by a divided court, four to three, that injunction would not lie and further that in the law of New York there was no such thing as the right of privacy. Relying on the Roberson case as authority it was held in *Owen* v. *Partridge,* supra, that injunction would not lie to restrain the publication and exhibition of the photograph and measurements of a person unjustly accused of crime although the complainant had suffered wrong and the injury was irreparable. In the dissenting opinion in the Roberson case it was said: "When, as here, there is an alleged invasion of some personal right, or privilege, the absence of exact precedent and the fact that early commentators upon the common law have no discussion upon the subject are of no material importance in awarding equitable relief. That the exercise of the preventive power of a court of equity is demanded in a novel case, is not a fatal objection." And in *Schuyler* v. *Curtis,* 147 N. Y. 434, 42 N. E. 22, 49 Am. St. Rep. 671, 31 L. R. A. 286, Mr. Justice Peckham in dictum said: "It may be admitted that the courts have power in some cases to enjoin the doing of an act where the nature or character of the act itself is well calculated to wound the sensibilities of an individual, and where the doing of the act is wholly unjustifiable, and is, in legal contemplation, a wrong, even though the existence of no property, as that term is usually used, is involved in the subject." After the decision in the Roberson case the legislature passed an act (Civil Rights Law, §§ 50, 51, McKinney's Consol. Laws of N. Y., bk. 8, p. 44) making it a misdemeanor to use the photograph of another for advertising purposes without his consent, and providing both for an action for damages and relief by injunction. This statute has been held to be constitutional in two instances. *Rhodes* v. *Sperry, etc., Co.,* 193 N. Y. 223, 85 N. E. 1097, 127 Am. St. Rep. 945, 34 L. R. A. (N. S.) 1143; *Wyatt* v. *McCreery,* 126 App. Div. 650, 111 N. Y. S. 86.

This extension of the equitable jurisdiction of the courts has found concrete expression in at least one case, *Itzkovitch* v. *Whitaker,* 115 La. 479, 39 So. 499, 112 Am. St. Rep. 272, 1 L. R. A. (N. S.) 1147, wherein it was said: "We think that the publication of an innocent man's photograph in the rogues' gallery gives rise to sufficient grounds to sustain an injunction. There is a right in equity to protect a person from such an invasion

of private rights. Everyone who does not violate the law can insist upon being let alone (the right of privacy). In such a case the right of privacy is absolute. It must be said that there is some limit to this right, which it is not necessary to discuss in this case. A person may be arrested, imprisoned, and acquitted, without right to damages. All of this is true, but it bears no application to the issue in hand. Where a person is not guilty, is honest (and that is the only light upon which to consider this case with the issues before us), he may obtain an injunction to prevent his photograph from being sent to the rogues' gallery. He has the personal right to the restraining order, at least for the time being. The theory in opposition to this view is substantially that the picture should be taken and exhibited for the public good. There can be no public good subserved by taking the photograph of an honest man for the purpose before mentioned. The court had jurisdiction to issue the preliminary injunction, and to make it perpetual if the evidence justifies the decree." And this would seem to be the better doctrine, which should be, and doubtless eventually will be, adopted without recourse to the pretense of the existence of property rights where none in fact exist.

MINOR BRONAUGH.

Cases of Interest

WHAT CONSTITUTES "ABILITY TO BUY" WITHIN RULE AS TO RIGHT OF BROKER TO COMMISSIONS.—To be able to buy, a customer produced by a broker must, it seems, actually have the money to make the cash payment, and be in shape financially to meet any deferred payments. It was so held in Reynor *v.* Mackrill (Ia.), 164 N. W. 335, wherein the court said: "It is urged that the court should have instructed as to what constitutes a ready, able and willing buyer, and the definition should have been that he is one who actually has the money to meet the cash payment, and not merely one who might have property upon which he could raise the necessary money. The support claimed is Jones *v.* Ford, 154 Ia. 554, 38 L. R. A. (N. S.) 777, 134 N. W. 571. The court charged correctly that: 'To be able means that the purchaser must have the money at the time to make any cash payments that are required in order to meet the terms of the seller and does not simply mean that the purchaser have property upon which he could raise the amount of money necessary; but, as stated, he must actually have the money to meet the cash payment, and be in shape financially to meet any deferred payments.' It charged correctly that to be willing 'means to be willing to make the purchase upon such terms.' This, as said, is correct, though it is held in McGinn *v.* Garber, 125 Ia. 535, 101 N. W. 279, that, though there be general testimony that the money to make the cash payment was on hand, if it does not appear the buyer owns property out of which a judgment for the purchase price can be enforced, there is a failure of proof as to sufficient financial ability. For, in McDermott *v.* Mahoney, 139 Ia. 306, 115 N. W. 32, 116 N. W. 788, where a proposed buyer testified generally that he was able to buy, that he could, within a day or two, have raised the money to make the necessary cash payment if the owner had not refused to sell, and it appears that there was issue on performing by a specified time, and at the time at which the ability was questioned, the agent still had ten days to perform, it is held that, in these circumstances, neither immediate ability, nor tender, nor actual possession of enough cash to tender or in readiness to tender, are material."

INCORRECT STATEMENT OF AGE AS VOIDING INSURANCE POLICY.—In Hope *v.* Maccabees (N. J.), 102 Atl. 689, reported and extensively annotated in 1 A. L. R. 455, it was held that a merely incorrect statement of one's age in an application for membership in a beneficial order, without more, cannot be said, as a matter of law, to be wilfully false and sufficient to invalidate the insurance certificate. The court said: "Did Golden falsely state his age? In his application for membership in the defendant corporation, he stated that he was born at Rondout, New York, February 22, 1868, and declared that the answers he had given to the questions propounded to him were fair and true answers, and agreed that those statements, together with those made by the examining physician, and the laws of the order then in force and that might be thereafter adopted, should form the basis of his contract for beneficial membership; that any untrue or fraudulent answers, any suppression of facts in regard to his health, age, occupation, etc., should vitiate his benefit certificate, and forfeit all payments made thereon; that the application and the laws of the order then in force, or that might thereafter be adopted, were made a part of the contract, and he, for himself and his beneficiary, agreed to conform to and be governed thereby. There was proof in the case to the effect that Golden was born February 21, 1864, instead of February 22, 1868, and that therefore he was four years older than he stated he was. It is to be observed that there is a provision in the application that if a member understates his age in good faith, and without any intention to deceive, he shall not thereby forfeit his certificate, etc. We fail to find any evidence in the case which would have justified the trial judge in saying, as matter of law, that Golden had misrepresented his age with intent to deceive, and that question was therefore properly left to the jury. . . . Some people do not know how old they are, and others forget their age. A merely incorrect statement of one's age, without more, cannot be said, as a matter of law, to be wilfully false, even if untrue in fact. In the case before us we have the bare misstatement, without more, and this, in and of itself, is certainly not plenary proof of wilfully false and fraudulent misstatement."

COMBINATION OF PATENTEES AS MONOPOLIES.—In U. S. *v.* United Shoe Machinery Co., 247 U. S. 32, 38 S. Ct. 473, it was held that a consolidation of a number of corporations each making patented machines for the manufacture of shoes did not violate the Sherman Anti-Trust Act, although by the combination of their patents and the acquisition of a large number of other patents the field was to a great extent monopolized. The court was divided four to three, Justices McReynolds and Brandeis not sitting. In the course of a lengthy opinion, Mr. Justice McKenna, speaking for the majority, said: "In considering the competition of the machines and in estimating the defendants' acts in uniting the companies, it is to be observed that the machines were all made 'under letters patent of the United States and other countries,' were owned by the companies, and covered improvements made by the companies from time to time and embodied in the machines, which were so far developed that they were in 1899 principally in use by shoe manufacturers in the kinds of work to which they were respectively adapted. The patents and the business passed to the new company, but necessarily were the same in its hand as before. In other words, the patents did not lose their distinc-

tion, nor the machines their difference; and to dwell upon the percentages of manufacture is misleading. Of a like situation we said in United States v. Winslow, 227 U. S. 202, 217, 33 S. Ct. 253, 255, 57 L. ed. 481, and said of it in answer to the charge against the combination here involved, that we could 'see no greater objection to one corporation manufacturing seventy per cent of three noncompeting groups of patented machines collectively used for making a single product than to three corporations making the same proportion of one group each. The disintegration aimed at by the statute [act of 1890] does not extend to reducing all manufacture to isolated units of the lowest degree.' Or, as expressed by one of the judges in the court below: 'The combination was not unlawful so far as it did no more than put the different groups of noncompeting machines into one control. . . . It was not unlawful unless, to an extent injurious to the public interest, it destroyed competition.' And it was held that competition was not destroyed to the designated extent. Indeed, the court was repelled, as it well might have been, by the consequences of so holding on account of the change of conditions, the union of the companies not having been questioned by the government for twelve years and large investments having been made not only by the company but by the public."

CONTRIBUTING TO FUND FOR PROSECUTION AS DISQUALIFYING JUROR.—In Blackwell v. State (Fla.), 79 So. 731, reported and annotated in 1 A. L. R. 502, it was held that one contributing to a fund to employ an attorney to assist in the prosecution of a person charged with an offense is disqualified to sit as a juror on his trial for such offense. The court said: "There is some conflict of authorities on whether or not a contributor to a fund to apprehend and prosecute a certain class of violators of law is disqualified to sit as a juror on the trial of a person for an offense of the class, to the fund for the prosecution of which he was a contributor; but reason and justice seem to be on the side of the courts that hold that such a person is disqualified. It was so held in Jackson v. Sandman, 64 Hun 634, 45 N. Y. S. R. 633, 18 N. Y. S. 894; Respublica v. Richards, 1 Yeates 480, and State v. Fullerton, 90 Mo. App. 411. In Com. v. Livermore, 4 Gray 18, the court said: 'We deem it to be our duty, however, to say that, in our judgment, the members of any association of men, combining for the purpose of enforcing or withstanding the execution of a particular law, and binding themselves to contribute money for such purpose, cannot be held to be indifferent, and therefore ought not to be permitted to sit as jurors in the trial of a cause in which the question is whether the defendant shall be found guilty of violating that law.' In an early English case it was held that, when a prosecution was instituted by the Society for the Suppression of Vice, the defendant was entitled to be furnished with a list of the persons who were members of the society, so that, on the call of the panel of the jurors, anyone who admitted he was a member of the society might be set aside. Reg. v. Nicholson, 8 Dowl. P. C. 422, 4 Jur. 558. As this precise question, however, is not involved here, we do not pass on it at the time. The question now presented, the qualification as a juror of a person who has contributed to a fund to employ an attorney to assist in the prosecution of the identical person charged with the offense, is a much stronger one. A person who employs or contributes money for the employment of an attorney to represent one side of a cause, must necessarily believe in the justice of that side which he so greatly desires to have prevail that he is willing to contribute money towards its success, and is not unbiased or without prejudice. One of the surest tests of a man's belief in and devotion to a cause is his willingness to contribute money for its success, and it would be a mockery of justice to permit such a person to insure that success by serving as a juror in the cause."

MAUSOLEUM AS NUISANCE.—In Rea v. Tacoma Mausoleum Association (Wash.), 174 Pac. 961, reported and annotated in 1 A. L. R. 541, it was held that the erection within a few feet of a dwelling house of a mausoleum for the burial of the dead cannot be enjoined as a nuisance, although its presence will cause the inmates of the dwelling unpleasant thoughts and injuriously affect the value of the property, if there will be no fumes or drainage to affect the physical senses or health of those in the neighborhood. The court said: "The facts shown by the record, we think, render it clear that our problem is reduced to this: Are appellants entitled to injunctive relief, restraining the construction and maintenance of this proposed addition to respondent's mausoleum, merely because of the fact that it is to become a place of permanent sepulture so near to their residence, when it will not, by the emission of fumes or drainage, affect the physical senses or health of appellants, or others residing equally near to it? That is, are the mere claimed unpleasant thoughts which its presence constantly suggests, though such effect of its presence may lessen the market value of appellants' premises, such as to entitle them to the relief prayed for? The authorities seem to hold, with practical unanimity, that cemeteries as places of permanent sepulture for the dead are not nuisances per se, and this, it seems to us, must also be the law with reference to permanent sepulture in a mausoleum, built above the ground, when such mausoleum incloses bodies with equal security as by ordinary interment in the earth. A mausoleum would seem to be no more suggestive of the presence of the dead than the ordinary tombstones so common in our cemeteries. In 5 R. C. L. 235, the learned editors state the general rule of nuisance as applied to cemeteries as follows: 'As public cemeteries for the orderly and decent sepulture of the dead are necessary requirements for all populous communities, private convenience must yield to the convenience of the public in fixing sites for them, and the courts should be particularly careful not to interfere to prevent such establishments, unless the mischief be undoubted and irreparable. The decided weight of authority may be said to be to the effect that a cemetery is not per se a nuisance.' No decision has been called to our attention wherein any court has awarded injunctive relief, rested upon the sole ground of the mere presence of a cemetery or other place of sepulture, unattended by injurious or offensive drainage or fumes, sensible to the complaining party, and our own search leads us to believe that no such decisions have been rendered."

RIGHT OF ACTION AGAINST HUSBAND FOR CAUSING DEATH OF WIFE.—In Osborn v. Keister, (Va.) 96 S. E. 315, it was held that the Virginia statutes removing the disabilities of married women give the wife no right to sue the husband for assault, and therefore her personal representatives have no right of action against him for wrongfully causing her death. Burke, J., epitomized the reason for the decision in the following concurring opinion: "At common law, husband and wife were, for the most part, regarded as one, and that one was the husband. By the mere fact of marriage he became the owner of all her tangible personal property, as fully as if he had bought and paid for it. He also became the owner of all her choses in action, provided he reduced them into possession, actual or constructive, during the coverture. He was entitled to the rents and profits of her real estate during the

coverture, and, under certain conditions, this right was enlarged to an estate for his life in such rents and profits. She could not make a will, nor a contract, nor could she sue or be sued alone. It was these restrictions upon her rights and powers that were considered 'a reproach to our civilization,' and led to the enactment of statutes in every state of the Union removing, to a greater or less degree, these common-law disabilities. But it must be borne in mind that marriage is something more than a mere civil contract. The mere act of marriage gives rise to a new status between the parties thereto and society, and to new rights and obligations between the parties themselves. It creates the most sacred relation known to society, and is fostered, regulated, and protected by statute. Upon the preservation of its integrity the health, morals, and purity of the state is dependent. For these causes 'shall a man leave his father and mother and cleave unto his wife, and they twain shall be one flesh.' The like obligation rests upon the wife. It is the duty of the husband to support his wife, and to shield, defend, and protect her in every way possible. It is the duty of the wife to reverence her husband, and to serve him. These duties grow out of the mere act of marriage. The husband may not present a bill against his wife for board and clothing, nor the wife present to her husband a bill for presiding over the household. The law will not imply a contract to pay such bills. By the act of marriage, the parties thereto establish a unit of society, which automatically carries with it primary obligations, which cannot be destroyed without reducing that honorable estate to mere licensed cohabitation. These obligations inhere in the mere fact of marriage, and forbid the idea that this 'one flesh' may so divide itself that either spouse may sue the other. Of course it is competent for the legislature to sever this unity so far as it may seem wise to do so, and it has severed it in respect of the wife's property; but to warrant a holding that either spouse may sue the other for slander, libel, or assault, the language of the statute should be so plain that there could be no room for difference of opinion on the subject. This cannot be said of our statute, which simply provides that: 'A married woman may contract and be contracted with, sue and be sued, in the same manner, and with the same consequences, as if she were unmarried, whether the right or liability asserted by or against her shall have accrued before or after the passage of this act.' Statutes in derogation of the common law are to be strictly construed, and I am unwilling, upon such language as is contained in the foregoing statute, to obliterate the primary obligations growing out of the marriage relation, to revolutionize the whole law relating to husband and wife, and to open the courts to the public discussion of domestic differences, which, when of sufficient consequence, may be settled by the chancellor in suits for divorce, or by prosecution for violation of the criminal laws of the state."

News of the Profession

THE IOWA BAR ASSOCIATION will hold its annual session at Davenport, June 26-27.

THE BROOKLYN BAR ASSOCIATION has re-elected for the ensuing year its former president Robert H. Wilson.

MEMORIAL SERVICES FOR THE LATE JUDGE KOHLSAAT of the United States Circuit Court of Appeals were held in Chicago, May 6.

CLEVELAND BAR ASSOCIATION.—Former appellate court Judge P. L. Lieghley has been re-elected president of the Cleveland Bar Association.

NEW YORK JURIST DROPS DEAD.—Justice H. P. Bissell of the New York Supreme Court dropped dead while hearing a case at Lockport, N. Y., on April 30.

VICE-PRESIDENT OF ALABAMA BAR ASSOCIATION DEAD.—The death of R. C. Hunt of Ft. Payne, Alabama, vice-president of the Alabama Bar Association, occurred the last of April.

DEATH OF INDIANA LAWYER.—John T. Hays of Sullivan, Indiana, and father of Will T. Hays, chairman of the Republican National Committee, is dead at the age of 73 years.

LOUISIANA JUDGE QUITS BENCH.—Judge W. F. Blackman of the Thirteenth Judicial District Court, Louisiana, has resigned after being more than forty years on the bench.

DEATH OF MINNEAPOLIS LAWYER.—William A. Kerr, a practitioner at the Minneapolis bar for thirty years, is dead. He was a member of the firm of Kerr, Fowler, Schmitt & Furber.

CINCINNATI LAWYER KILLED.—Former Congressman Stanley E. Bowdle of Cincinnati was struck by an automobile and killed April 6. He defeated Nicholas Longworth for Congress in 1912.

THE TEXAS BAR ASSOCIATION will meet at the Hotel Galvez, Galveston, July 1 and 2. T. W. Gregory, former Attorney General of the United States, will be among the speakers.

THE KANSAS CITY BAR ASSOCIATION will place a bronze memorial tablet in front of the court house in Kansas City, Mo., in memory of lawyers of that city killed in the late war.

UNITED STATES TRADE BOARD LAWYER RESIGNS.—John Walsh of Washburn, Wisconsin, chief counsel of the Federal Trade Commission, has resigned to enter the practice of law in Washington, D. C.

MISSISSIPPI BAR ASSOCIATION.—The Mississippi Bar Association met at Clarksdale, May 1.—United States Attorney General Palmer addressed the association on the subject "Enemy Property in America."

ST. PAUL LAWYER DEAD.—P. L. McLaughlin, president of the Ramsey County Bar Association, died at his home in St. Paul, April 29. He was born in Ireland in 1851 and had resided in St. Paul since 1888.

ST. LOUIS LAWYER DEAD.—Thomas H. Wagner of the firm of Wagner & Miller, St. Louis, died recently. He had practiced thirty years in the Missouri courts and for a time was State Superintendent of Insurance.

THE CHICAGO BAR ASSOCIATION, founded in 1874, now has a membership of 2300. Amos C. Miller is its president. There were 228 members at the outset. The association publishes monthly the *Bar Association Record.*

AMERICAN BAR ASSOCIATION.—Hearings of the American Bar Association Committee on the administration of military justice ended April 25, at Washington, D. C., subject to the call of the chairman, Judge S. S. Gregory of Chicago.

SPECIAL ASSISTANT TO UNITED STATES ATTORNEY GENERAL RESIGNS.—Robert H. Neil, special assistant to the United States Attorney General, assigned to Chicago, has resigned and will re-enter the practice of law in El Paso, Texas, his home city.

OKLAHOMA JUDGES RESIGN.—Chief Justice Summers Hardy of the Oklahoma Supreme Court resigned May 1, to become chief counsel for a Tulsa Oil Company. County Judge J. L.

Carpenter has also resigned to become attorney for the State School Land Department.

THE ILLINOIS BAR ASSOCIATION held its annual meeting in Decatur, May 28 and 29. Selden P. Spencer, United States senator from Missouri, delivered one of the addresses. Frederick A. Brown, a Chicago attorney and captain judge advocate in the late war, was elected president of the association.

BLIND LAWYER NAMED LAND TITLE EXAMINER.—Fred Powers, a blind attorney, has been appointed examiner of titles for Ben Hill county, Georgia, under the Torrens land title registration act. Colonel Powers has acted as examiner of titles for the Federal Farm Loan Association for the past two years.

CHANGE IN OFFICE OF ATTORNEY GENERAL OF PORTO RICO.—Mr. Salvador Mestre, formerly solicitor of the supreme court of Porto Rico, has been appointed assistant attorney general of Porto Rico and will be the acting attorney general of Porto Rico during the next few months of the absence of the attorney general Howard L. Kern.

GEORGIA AND SOUTH CAROLINA BAR ASSOCIATIONS.—At the joint session of the Georgia and South Carolina Bar Associations held at Tybee Island, May 30 and 31, one of the addresses was by A. Mitchell Palmer, attorney general of the United States, who spoke on the subject, "Germany's Commercial Invasion of America."

THE VIRGINIA BAR ASSOCIATION held its annual meeting in Richmond, May 15-17. Lucian H. Cocke of Roanoke, the president, presided. The annual address was delivered by Frederick R. Coudert of New York. Judge Martin P. Burke, one of the code revisers, read a paper on the revised code which will go into effect January 1, 1920.

IDAHO JUDICIAL CHANGES.—Bert S. Varian, a well-known Idaho attorney, has been appointed by Governor Davis, judge of the seventh judicial district, to succeed the late Isaac N. Smith, who died in Boise recently of Spanish influenza. Judge Varian will take up his duties immediately. His appointment is for the remainder of Judge Smith's term, which expires in January, 1923.

SOUTHEASTERN MINNESOTA BAR ASSOCIATION.—Arrangements are being made for the first annual convention of the newly formed Southeastern Minnesota Bar Association to be held at Red Wing in August. The president of this association is H. J. Edison of Kasson and the Secretary I. L. Eckholdt of Rochester. Judge H. L. Buck, president of the Winona County Bar Association, is a member of the executive committee.

SOLDIER-LAWYERS WELCOMED HOME.—Durham, North Carolina, lawyers paid tribute to the war heroes of the Durham bar association at a recent luncheon. And the Milwaukee bar association gave a luncheon to its president Robert R. Freeman who was a major judge advocate in the late war. Soldier-lawyers of St. Louis were welcomed at a smoker given by the St. Louis bar association. United States Senator Spencer, Frederick N. Lehmann and others spoke.

LOS ANGELES DEATHS.—Thomas C. Murphy, grandson of the great temperance lecturer Francis C. Murphy, and a practicing lawyer in Los Angeles, died recently. Another death in the same city was that of L. W. Sutton, a partner of former Senator Frank P. Flint. Still another death was that of Miss Evelyn Costello, assistant city police court defender and prominently identified with social welfare work in Southern California.

MISSOURI JUDICIAL CHANGES.—The appointment of Charles F. Hays of Hannibal to be judge of the circuit court of Monroe and Marion counties, Missouri, has been announced. The appointment was made to fill the vacancy existing by the resignation of Judge William T. Ragland, who was recently elected supreme court commissioner. Ralph Hughes of Liberty, Mo., has been appointed circuit judge of the seventh judicial district, filling the vacancy caused by the death of Judge Frank P. Divelbiss of Richmond.

English Notes*

SIR HENRY BARGRAVE DEANE, late Judge of the Probate, Divorce, and Admiralty Division of the High Court of Justice, died on April 21 in London, aged seventy-two. Sir Henry was the only son of the Right Hon. Sir James Parker Deane, and was educated at Winchester and Balliol College, Oxford. He won the International Law Essay Prize at Oxford in 1870, his subject being "The Law of Blockade: Its History, Present Condition, and Probable Future." He was called by the inner Temple in 1870, and joined the South-Eastern Circuit. In 1885 he became Recorder of Margate. He took silk in 1896, and was raised to the Bench in February, 1905.

THE INDEPENDENCE OF THE IRISH JUDICIAL SYSTEM.—The interesting proposal of the Spectator that, in event of the partition of Ireland under any Home Rule scheme, the six north-eastern counties should, for the purpose of the administration of justice, be treated as an English shire, with an Admiralty and a Chancery judge in Belfast, as in the County Palatine of Lancaster, and the English common law judges going circuit there, has naturally roused much controversy in Irish legal circles. The proposal is quite simple in its character, and, apart from the question of its desirability, undoubtedly affords the only logical solution of the problem of cutting off the six counties from the rest of Ireland. It has, on the other hand, the defect of bringing about a radical departure from a system of jurisprudence which has existed uniformly in Ireland for 736 years. No matter what the vicissitudes of the Irish politicians were in the efforts to maintain the existence and powers of the Irish Parliament, the Irish lawyers were uniformly successful in maintaining the independence and "self-determination" of the Irish legal system. The generally accepted view is that the Irish courts were not established till the reign of John (see Mr. Justice Day's judgment in the specially reported case of Hetherington *v.* Wogan); but undoubtedly Henry II., who was accompanied to Ireland by Glanville in 1172, brought with him the common law of England, and established then, or very soon afterwards, courts baron and the County Court. These courts, at the first, had very extensive jurisdiction: (Lynch's Feudal Dignities in Ireland, pp. 4, 5). Unfortunately the early Irish judiciary rolls were destroyed in the burning of St. Mary's Abbey in 1300, and it is not possible to fix with exactitude the date of the first establishment of a King's Bench Court and a Court of Common Pleas in Ireland; but there is good reason for thinking that they were in existence before the reign of John (see Hale's

* With credit to English legal periodicals.

History of the Common Law, p. 186; and Betham's Feudal Dignities, pp. 230, 231, 244.) The last event in the history of the independence of the Irish judicial system was the abolition in 1783 of the power to appeal by writ of error to the English King's Bench Court from judgments of the Irish Courts (23 Geo. III, c. 28, Eng.).

IMPLIED CONDITION OF MERCHANTABLE QUALITY.—By the proviso to clause 2 of sec. 14 of the Sale of Goods Act 1893 it is enacted that "if the buyer has examined the goods," the subject of the contract of sale, "there shall be no implied condition as regards defects which such examination ought to have revealed." Apparently for the first time the expression "if the buyer has examined the goods" was considered in the recent case of Thornett and Fehr *v.* Beers and Son (1919) W. N. 52), and Mr. Justice Bray's decision, although we think it perfectly right in the result, is based, as it would seem, upon an untenable ground. As he pointed out in his judgment, the section altered the pre-existing law. Prior to the passing of the Sale of Goods Act, the rule in such a case was as laid down in Jones *v.* Just (18 L. T. Rep. 208; L. Rep. 3 Q. B. 197). There it was said that "where goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies"; so that opportunity of examining goods was formerly sufficient, whereas now under the Act mere opportunity is not sufficient; there must have been an examination of the goods by the buyer in order that the proviso should apply. This was clearly brought out by the judge, yet he held that where buyers had every facility offered them to examine goods and they contented themselves with looking at the casks in which the goods were packed, they had "examined the goods" within the meaning of the proviso, and therefore there was no implied warranty that the goods were merchantable. What is this but the old law again? Opportunity of examination being turned into examination in fact. As we have said, we think the result arrived at by the learned judge was right, but we venture to think that the judgment should have been grounded not on what happened as amounting to an examination in fact, but on waiver of the right to examine the goods. Conditions may, of course, be waived, and in this case it would be difficult to contend that the conduct of the buyers in looking merely at the outside of the casks did not amount to waiver.

AMERICAN LAW REPORTS IN THE MIDDLE TEMPLE LIBRARY.—In a case recently heard by him Mr. Justice Horridge was referred to the decision of a Massachusetts court as the only one precisely covering the point upon which he had to adjudicate. As the report of the case was not in court the judge sent for it to the Middle Temple library, which, as he said, is peculiarly rich in American reports and text-books. This has, indeed, been a distinctive feature of the Middle Temple for sixty or seventy years, and is one which has frequently been found of great advantage to both Bench and Bar. We believe that the first real beginnings of the collection of American treatises and reports in the library were due to the liberality of J. G. Phillimore, one of that numerous family of notable lawyers who have labored so strenuously in the domain of jurisprudence. Next came the return for a great many years of his fees as a referee by Henry Busk, Crabb Robinson's friend, to be devoted to this special object. In Robinson's diary under date the 10th Nov., 1861, is this entry: "I had a long talk with Henry Busk. He was appointed to address the Prince of Wales [on the occasion of the opening of the new library of the Middle Temple] and he accounted for it by relating a circumstance unknown to me. There is an old sinecure office, of which I had never heard, given to Busk by Quayle when treasurer. Referees sit on certain days to decide controversies in the Temple. Anybody may, but no one does come; and £20 per annum has been held by Busk. Busk, however, did not choose, as others do, to put the money in his pocket, but he bought good American law books, and thus applied £600 to augment the Temple library. This rendered him a fit person for the distinction conferred." Some fifteen years ago another useful present was made to the library by the late C. E. Bretherton, of the New York Bar and the Middle Temple; and, still later, Mr. Choate, who greatly appreciated the compliment paid him in being elected an honorary Bencher of the Inn, gave the library the great consolidated American Digest. In addition to these various benefactions, the Library Committee have from time to time augmented them by judicious purchases of treatises and by subscribing to the reports.

THE RIOT ACT.—It is recorded that owing to disturbances in Glasgow on January 31, the Riot Act was read. The famous Act (1 Geo. 1, st. 2, c. 5), passed in the beginning of the eighteenth century, known as the Riot Act, makes it a felony for twelve rioters to continue together for one hour after the making by a magistrate of a proclamation to them to disperse. The making of this proclamation is commonly, but very incorrectly, termed "the reading of the Riot Act." The statute requires the magistrates to seize and apprehend all persons so continuing together, and it provides that if the persons so assembled, or any of them, "happen to be killed, maimed, or hurt in dispersing, seizing, or apprehending, or endeavoring to disperse, seize, or apprehend them," the magistrates, or those who act under their orders, shall be indemnified. It seems to have been generally understood that the enactment was negative as well as positive; that troops might not only be ordered to act against a mob if the conditions of the Act were complied with, but that they might not be so employed without the fulfilment of such conditions. This view of the law has been on several occasions decided to be altogether erroneous. The obligation is incumbent on all the subjects of the Crown, soldiers and civilians alike, to keep the peace and to disperse unlawful assemblies. In case of extreme emergency they may lawfully do so without being required by the magistrates. The true doctrine on this subject was thus enunciated by Lord Chief Justice Tindal in his charge to the grand jury at Bristol in 1832 (5 C. & P. 261): "When the danger is pressing and immediate, when a felony is actually committed or cannot otherwise be prevented, and, from the circumstances of the case, no opportunity is offered of obtaining a requisition from the proper authorities, the military subjects of the King, like his civil subjects, are bound to do their utmost of their own authority to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the lives and property of the people. Still further by the common law not only is every subject bound to exert himself to the utmost, but every sheriff, constable, and other peace officer is called upon to do all that in him lies for the suppression of riot, and each has authority to command all other subjects of the King to assist him in that under the King."—*Law Times.*

SILENCE AS ASSENT.—In holding that the silence of a man, when charged by a policeman, was corroboration of the evidence of accomplices, the Court of Criminal Appeal in the recent case of Rex *v.* Feigenbaum went further than any previous decision, and it seems difficult to reconcile their view with the authorities. It is true that in Rex *v.* Tate (99 L. T. Rep. 620; (1908) 2 K. B. 680) the court said: "It may be that in some cases the absence of an indignant repudiation of a charge may be some

corroboration," but they held in the case before them that the silence of the accused when charged was not corroboration. The fact that in Feigenbaum's case the jury had been warned against accepting the evidence of the accomplices does not suffice to distinguish it, as it was expressly stated in Tate's case that the conviction would not have been quashed if there had been in fact corroboration, notwithstanding the omission of the judge to warn the jury against the danger of convicting on the uncorroborated evidence of the accomplice. Strictly speaking, as an accomplice is a competent witness, his evidence does not require corroboration, but "it may be regarded as the settled course of practice not to convict, except under very special circumstances, upon the uncorroborated testimony of an accomplice" (Taylor on Evidence). This statement having been adopted by the Court of Criminal Appeal, there is little doubt that any verdict obtained on the uncorroborated evidence of an accomplice alone would be quashed, and so Feigenbaum's case may be taken to be a clear decision that the silence of an accused person when charged is corroboration of his guilt. The true doctrine was stated in Wiedemann *v.* Walpole (1891) 2 Q. B., at p. 540), by Bowen, L. J., thus: "Silence is not evidence of an admission unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not." The question is, therefore, whether it is reasonable to expect an innocent man, immediately he is charged with a crime, to deny it. Those who practice in the criminal courts have heard time after time the evidence of a police constable who says, "I charged the accused with so and so. He made no reply." Probably it never occurred to anyone that such evidence was an admission of guilt, and, it is humbly submitted, it is not. Every man has a perfect right to reserve his defense until he is put on his trial, and his failure to meet the statement of a police constable with an immediate denial is not, in the absence of special circumstances, evidence that the statement is true.

EMPLOYMENT OF A "CASUAL NATURE."—The definition of "workman" in section 13 of the Workmen's Compensation Act 1906 (6 Edw. 7, c. 58) is a tolerably intelligible one, and in all likelihood would have created but little difficulty in its comprehension, had it not been for the exclusion therefrom of persons whose employment is of a "casual nature." But that extremely ambiguous phraseology is answerable for having caused an infinitude of trouble and perplexity and the necessity for the decision of numerous cases. The latest is the recent case of Stoker *v.* Wortham before the Court of Appeal, consisting of the Master of the Rolls (Swinfen Eady) and Lords Justices Warrington and Duke, on appeal from His Honor Judge Selfe at the Marylebone County Court. The applicant in that case, not being a person who was employed for the respondent's trade or business, was refused compensation in respect of the "personal injury by accident" which she had sustained admittedly "arising out of and in the course of" her employment within the meaning of section 1 of the Act. The ground of the objection to pay her compensation was that such employment was of a "casual nature," and that consequently she was not a "workman" according to the definition in section 13. The applicant was taken into the respondent's domestic service and was employed as a temporary cook during the absence of the respondent's regular servant, who was absent on a fortnight's holiday. And the decision of the case afforded the learned judges of the Court of Appeal the opportunity to add much useful information as to the proper method of ascertaining whether or not a person's employment is included in the statutory description, to which itself "casual" may not unbefittingly be ascribed. The Master of the Rolls laid much stress upon what Lord Justice Hamilton (as he then was) had laid down in the course of his judgment in the well-known case of Knight *v.* Bucknill (6 B. W. C. C. 160) relating to the expression "casual nature." His Lordship there gave it as his opinion that "casual" was used in the section not as a term of precision, but colloquially. He could think of "no adjective to describe it better"—a tribute to the ingenuity of the Parliamentary draftsman that conceivably not everyone will feel prepared to lavish upon him. Nor would he add an adjective to the already considerable list of those contrasted with it by various learned judges. Space will not permit of our quoting further from the learned Lord Justice's observations on the equivocal—if not, indeed, cryptic—term now under discussion. But his conclusion that the burden must be cast on County Court judges of determining when employment is of a "casual nature" and when it is not so is an attractively simple way of getting rid of the difficulty in so far as the Court of Appeal is concerned. If in the present case the learned judges of the Court of Appeal have not succeeded in doing much better in the way of elucidating the mystery, their Lordships have, at any rate, gone so far as to vouchsafe many hints which County Court judges generally will doubtless find of much guidance and assistance to them while applying themselves to the task before them. And the free hand which is left to the tribunals that have, in the first instance, to deal with the question whether or not an applicant for compensation is or is not a "workman" because of the nature of his employment will perhaps be appreciated to the full by some. That will be so even if others would have preferred that the obligation should have been rendered somewhat less onerous. But there is no possibility of satisfying everyone.

Obiter Dicta

BLACKLISTED.—Musick *v.* Horn, 145 Ky. 639.

GASSING AN ALLY.—Daniels *v.* France, 168 Ky. 749.

WHY DID HE SUE?—Riddle *v.* McGinnis, 22 W. Va. 253.

GETTING THE GOVERNMENT'S GOAT.—Goat *v.* United States, 224 U. S. 458.

AS USUAL.—In Haight *v.* Love, 39 N. J. L. 476, Love won.

NOT FLEECED.—In Fleece *v.* Russell, 13 Ill. 31, Russell won in all the courts.

YIELDING TO PRECEDENT.—Browning *v.* Browning [1911], P. 161, followed Brown *v.* Brown, L. R. 1 P. & D. 46.

A BLIND PIG.—In State *v.* Pigg, 78 Kan. 618, the defendant was convicted of having liquors in his possession unlawfully.

NECESSARY HELP.—In John Barth Co. *v.* Brandy, 165 Wis. 96, the defendant got into the case, it seems, through helping another man to run a saloon.

WE DON'T KNOW ANY.—"What American judge would hold the office, if he were not allowed to talk?"—Per Lumpkin, J., in Thomas *v.* State, 27 Ga. 298.

A SERIOUS OMISSION.—In American Digest Key Number Series 5 A, p. 1950, appears a cross-reference head "Tailenders," but there is no reference thereunder to "Boston" or "Philadelphia."

TOO MANY DARLINGS.—In Mollie Darling *v.* James Darling, 181 Mo. App. 211, it appeared that Mollie was the third legal Darling of James, and that each of her predecesors had secured a divorce.

OUTSIDE THE PALE.—"We believe its ordinary meaning throughout Christendom to be matrimony and we are aware of no reason why it should be differently construed in Savannah." —Dillon *v.* Dillon, 60 Ga. 204.

HARDLY AN EXPERT.—The following remarks by a Canadian judge should be of superlative interest to the interested parties in the multitude of prosecutions due to be instituted after July 1: "The prosecution seems to me greatly to weaken, if it does not quite destroy, Hannah Taggart's evidence that the applicant was sometimes drunk; and drunkenness is the main accusation. Miss Taggart is a total abstainer, and, as far as she shows, all her relatives have always been total abstainers, and I am inclined to think that she is not quite competent to distinguish between taking a drink and becoming drunk."—Per Rose, J., in Re Taggart, 41 Ont. Law Rep. 101.

BIBULOUS MISSISSIPPI.—In Powell *v.* State, 108 Miss. 497, a prosecution for selling whisky unlawfully, Cook, J., disposed of one of the contentions of the accused as follows: "It seems that the bottle of whisky in question was produced in court, exhibited to the jury, and identified by the witness. In her brief the appellant says: 'An uncorked bottle of whisky displayed before a jury trying a person for selling whisky is like waving a red flag before an angry bull. If any presumption of innocence remained up to this time, the same would disappear like the "mist before the morning sun."' Appellant is a little mixed in her metaphor, but we apprehend that she means to convey the idea that the mere exhibition of whisky to a thirsty jury would be tantalizing in the extreme, but it seems to us that the state would be the victim of the jury's unsatisfied longing and consequent resentment."—How they must love whisky in Mississippi!

A SUGGESTION.—We quote the following extract from the opinion in Martin *v.* Wood, 4 N. Y., Supp. 208: "Upon the trial of this action a witness who had given material evidence for the plaintiff was asked on his cross-examination by defendant's counsel if at the town meeting he voted a ticket like the one shown him. . . . The paper so shown to the witness, and to which said question related, was in the following form, namely: 'Hear ye what the Lord saith! He that puts the bottle to his neighbor's lips is in danger of hell. From this I shall make out a temperance ticket: For supervisor, God; for town clerk, Christ; for assessor, Andrew; for justice of the peace, Simon; for commissioner, James; for collector, Zebedee; for overseer of the poor, John; for overseer of the poor, Philip; for inspector of election, Bartholomew; for constables, Matthew, Simon, Alpheus, Judas, Libbeus; for excise commissioner, Charles Hoag."—Trusting that we will not be charged with blasphemy, we venture to suggest the necessity of nominating a ticket similar to the foregoing in every town throughout the country in order to ensure the enforcement of the eighteenth Amendment to the Federal Constitution.

VINDICATED.—In the February number of LAW NOTES we registered our dissent from the proposition advanced by the New York Court of Appeals that "the probable number of widows of a given age out of a given number who will remarry in a given period may be determined with essential accuracy." We are pleased to be able to record the fact that the United States Supreme Court adopts our view of the matter. The further fact that the members of the latter court didn't know it was our view is of course a mere detail. It is none the less a vindication. In Dunbar *v.* Dunbar, 190 U. S. 345, Mr. Justice Peckham said: "How can any calculation be made in regard to the continuance of widowhood when there are no tables and no statistics by which to calculate such contingency? How can a valuation of a probable continuance of widowhood be made? Who can say what the probability of remarrying is in regard to any particular widow? We know what some of the factors might be in the question: inclination, age, health, property, attractiveness, children. These would at least enter into the question as to the probability of continuance of widowhood, and yet there are no statistics which can be gathered which would tend in the slightest degree to aid in the solving of the question. . . . There is no 'practical experience' as to the chances of the continuance of widowhood."

HOME, SWEET HOME.—In Matter of Hinson, 156 N. Car. 250, it appeared that the defendant Hinson had been convicted of a crime and sentenced to the county jail for eight months. The trial judge, however, told her that if she would leave the county of Wayne and not return, she would not be compelled to serve the sentence of imprisonment. The defendant left the county of Wayne and took up her abode in the adjoining county of Wilson, where she abided until after the expiration of the eight months, when she returned to Wayne. She was immediately arrested and committed to jail. Reviewing a judgment denying the release of the defendant on habeas corpus, Clark, C. J., said: "The distinguished counsel who represented the defendant attempted to distinguish this case from S. *v.* Hatley, supra, on the ground that in this case the defendant remained in the adjoining county for the full eight months of the sentence. . . . The position of counsel could be sustained only on the ground that eight months' sojourn in another county is the equivalent of eight months' imprisonment in the county jail of Wayne. His loyalty to his home is like that of the Argive——

'Who, in dying, remembered sweet Argos.'

His position if submitted as a proposition of fact to a Wayne County jury might possibly not be altogether hopeless, but we cannot sustain it as a proposition of law."

"At times there seems to be a legal result which takes no account of the obviously practical result. At times there seems to come an antithesis between legal sense and common sense." —Per Mr. Justice McKenna, dissenting, in Sauer *v.* New York, 206 U. S. 559.

"Res judicata, in full bloom and vigor, has drastic results—witness the maxim: *Res judicata facit ex albo nigrum; ex nigro album; ex curvo rectum; ex recto curvum.*" (A thing adjudicated makes what was white black, what was black white, what was crooked straight, what was straight crooked.)—*Per* Lamm, J., in Cantwell *v.* Johnson, 236 Mo. 603.

"The duty of the presiding judge to see that illegitimate methods are not resorted to in his presence to arouse personal bias against one of the parties to the suit is an important judicial function, and its timely exercise not only often avoids the necessity of granting a new trial in order to prevent a miscarriage of justice, but maintains the dignity of judicial proceedings."—Per Hodges, J., in S. A. Pace Grocery Co. *v.* Guynes, (Tex.) 204 S. W. 797.

Correspondence

"NOT RIGHT."

To the Editor of LAW NOTES.

SIR: While I was reading in your Correspondence column of the April number of LAW NOTES the interesting and suggestive letter of Mr. F. Dumont Smith, the schoolmaster was looking over my shoulder, and he wishes to say to Mr. Smith, in response to his final inquiry, "Am I not right?" No, you are wrong; you are not right; to be not right is to be wrong. You are right.

Seattle, Wash. F. V. BROWN.

AMNESTY FOR THE SEDITIOUS.

To the Editor of LAW NOTES.

SIR: I have just read your article "Amnesty for the Seditious," on page 2 of the April number of LAW NOTES, and I beg to say that the spirit of this article and the force of it strike me so strongly that I feel compelled to write you and suggest that if you can get a number of the leading papers in the country to copy this article and comment in the same spirit in which it is written it might be a great benefit to the country.

Guntersville, Ala. J. A. LUSK.

IN APPRECIATION.

To the Editor of LAW NOTES.

SIR: Out of the enthusiasm of my admiration for the large brain and heart that must be behind your writings, I am impelled to give voice to my feelings on your attitude toward and treatment of most of the large questions of the day.

Your appreciation of the great principles of liberty and justice upon which American institutions are founded, and your manifest fairness to all real workers, whether with brain or brawn, as well as to the accumulation of property as a reward of industry and thrift, but not of chicanery, and your very able advocacy of all these things, are enough to excite the admiration of any one.

I remarked, when reading an article of yours some time since, that the Editor of LAW NOTES has as much sense as anybody, and more broad wisdom and love of justice than anybody I know.

With kindest regards, and with hope that your life may long be spared in which to continue your good work.

Birmingham, Ala. G. R. HARSH.

ACTIONS AGAINST RAILROADS UNDER FEDERAL CONTROL.

To the Editor of LAW NOTES.

SIR: I note in the issue of April, 1919, an article referring to the matter of actions against railroads under federal control. I would like to suggest that, for the benefit of the profession, some member of your staff, or other qualified writer, discuss this subject somewhat more fully. It is obvious that grave injustice is bound to result from the present anomalous situation. Confining attention simply to injuries resulting to employees of railroads now under federal control, a most perplexing situation is presented. Notwithstanding the fact that the Act of Congress authorizing the taking over of the railroads—the Act of March 21, 1918—expressly provides that actions may still be instituted against the railroad companies, yet there have been several decisions holding that no action lies against the company, but only against the Director-General of Railroads. There are other decisions to the effect that notwithstanding General Order No. 50, issued by the Director-General on October 28, 1918, suits might still be started against the railroad company.

It may also be noticed that said General Order No. 50, in express terms, provides that any action "shall be brought against Wm. G. McAdoo, Director-General of Railroads, and not otherwise." Although Mr. McAdoo has been succeeded in the office of Director-General by Mr. Walter D. Hines, this order does not seem to have ever been modified; so that there seems to be no express authority for instituting a suit against Mr. Hines as Director-General.

It seems to me that there are three separate and distinct phases to this situation, and therefore, three distinct classes of cases. In the first class are those cases where an injury occurred and a cause of action accrued before the Government assumed control of the railroads. In this class of cases, it would seem clear that suit might properly be maintained directly against the railroad company, notwithstanding the subsequent federal control.

In the second class are those cases where a right of action accrued while the railroads were being operated by Mr. McAdoo as Director-General.

In the third class are those cases where the right of action accrued while the roads were being operated by Mr. Hines.

In the last two classes of cases, it is not apparent how, notwithstanding the provisions of the Act of Congress, any action could be maintained against the railroad companies, whose control had been entirely superseded and suspended.

"A statute which imposes upon a person a liability to answer for the acts and engagements of strangers over whom he has no control, violates the Bill of Rights and is unconstitutional and void."—Durkin *v.* Kingston Coal Co., 171 Pa. 193.

While the above is a construction of the Constitution of Pennsylvania, yet the principles enunciated therein would seem to be equally applicable in construing the Federal Constitution.

If, therefore, in the last two classes of cases, the only liability is that of the Director-General of Railroads, and suits can only properly be maintained against said Director-General, it is apparent that a party plaintiff does not have a very satisfactory or particularly adequate remedy. The Director-General (then Mr. McAdoo) has announced that he will only pay such claims as he considers reasonable and just, and at such times as he shall decide are appropriate; that he will not be bound by any verdicts and judgments, but will exercise an authority to review them and determine whether they are proper and just.

Again, we have this situation presented: A cause of action accrued while Mr. McAdoo was acting as Director-General. What authority is there for instituting an action against Mr. Hines as Director-General?

Again, there is no warrant whatsoever for the imposition of any liability upon the Federal Government. Therefore, liability,

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if any, is personal to the Director-General. But if any attempt should be made to impose such a personal liability, the obvious answer would be that the Director-General was simply a state or governmental agency; that he was exercising public governmental powers, and performing public governmental duties, solely for the general public good, under the authority of the Federal Government, and that, therefore, both he and the Government were entitled to immunity from liability.

I have not attempted, in this letter, to treat the subject exhaustively, or with particular precision, but simply attempted to suggest some of the difficulties and perplexities and injustices growing out of the present state of affairs. I am quite clear in my own mind that the situation needs remedying by congressional action—by a statute imposing a liability upon the Federal Government.

C. B. LITTLE.

Scranton, Pa.

UNDESIRABLE ALIENS AND WORLD CRIMINALS.

To the Editor of LAW NOTES.

SIR: Your editorial "No Compromise with Crime," page 2 of April LAW NOTES, interested me, and leads to the question whether the popular suggestion you there pass on, that "the undesirable aliens now in our midst should be promptly deported," is good Americanization doctrine. A kindred practice is for judges to fine an accused, then remit the fine on condition that the culprit leave town. And in a municipality near here the public authorities co-operated with the larger employers of labor in furnishing inducements for "undesirables" to leave town without even invoking the law. Two reasons against these practices occur to me. First, they are unlawful; therefore we are doing the very thing we claim to be decrying, viz., practicing Bolshevism, anarchy, in the name of the law. Deportation may be resorted to where final judgment of guilty is pronounced for an offense declared by law to merit it; I know of no law authorizing a judge of any court to "pass on" to some sister community a criminal; and for authorities and large employers of labor to co-operate in what are tantamount to threats, to induce "undesirables" to take their activities to another community, augmented by the hatred for society in general which would most naturally be engendered by such treatment, appeals to me as coming very close to the very acts which led America into the great war. Second, this course tends to aggravate and spread the evil rather than check or reduce it. The better plan is for public authorities, in conjunction with all available local reform agencies, to keep informed of each undesirable, and by the personal touch and Americanization methods applied so far as possible, make over the poor unfortunates; and where no response to those methods is induced to exercise lawful force on the spot. Each time an undesirable is forced to "leave town" the municipality where he locates takes him in, not as a known menace, and is put to the jeopardy of getting him "sized up" by a costly experience. Just that has quite frequently occurred in my section. Undesirables and menaces are greater menaces and more undesirable as strangers than as identified. In the municipalities where their habits and tendencies are known they can be the more readily watched and their dangerous tendencies curbed or re-directed. When asked why he invited Messrs. Seward, Chase and Stanton into his cabinet, Mr. Lincoln is said to have replied: "Just to keep my fingers on them." While there are a few of this class who are determined, dyed-in-the-wool trouble makers, by far the greater number are probably ignorant and misled, and need simply that their false views be brought home to them, and a square deal handed out.

As to your editorial "Punish the World Criminals," while I am inclined to agree with your proposal that the Powers try, convict and ignominiously execute a good big bunch of them, I am led to ask you if you know of a precedent. It is not to be expected that Germany, nor any organized government therein, will try them. The course you suggest would be something like the stringing up of a horse thief by a posse as was many times done in our West; there is in existence neither law (unless indeed common law), tribunal nor executive to represent the nations offended, in the procedure; the two latter at least will have to be created, by mutual action if nothing more formal. This leads me to opine that the better way will be to have the dirty job done by mutual international court martial. Perhaps this was in your mind? I do not believe in capital punishment, under local criminal procedure, but I should I believe feel to sympathize with rather than pity a firing squad specially sworn in to execute the sentence of an international court martial, to the end that the world might be rid of the pests. Each day that they are allowed to live with no action taken to punish stands to me like condoning. It is fitting that this procedure should be delayed a sufficient time for the natural fires demanding vengeance to cool; and it is just as fitting that it should be set in motion and brought to orderly conclusion with promptness sufficient to convince both those who are in sympathy with the guilty, and those who are disposed now to injure and destroy orderly government by consent of the governed, that they are eternally mistaken, and that the civilized world will not suffer their madness. I can only hope and pray that if it be a case of the mills of the gods grinding exceeding slowly, they will grind exceeding small. And when it is done the correct name should be given to the offense. His Low Vileness sought to excuse himself by the plea of the necessities of war. Should there come a binding League of Nations there will come with it an offense which may be correctly denominated international treason. In essence that is the crime of which we are speaking. It is the offense that should be so plainly named and so definitely defined that no Bolshevist, no Turk, and no member of any so-called royal house of either Prussia, Germany or Austria can fail to know its meaning. In the case under discussion it must be compulsorily atoned for, under an orderly procedure carrying with it the moral support, if not the organized lawful support, of the civilized peoples.

New Britain, Conn. A. W. UPSON.

"No fact can be proved to demonstration by any human testimony. The courts must need work with fallible instruments. The chance of error may be lessened by the number of witnesses or their character. It is always present. There is no absolute safeguard against mistake or perjury. A high degree of probability is all that we can expect. Not certainty, but reasonable certainty is the most we require."—Per Andrews, J., in People *v.* Cohen, 223 N. Y. 422.

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Law Notes

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A Peril Unmasked.

THE recent attempts to blow up the residences of men concerned in the prosecution of seditious agitators should prove to be the one thing needed to clarify public sentiment with respect to Bolshevism. As long as the Bolshevist propaganda was confined to mere oratory it contained a certain measure of danger. There are many people in the United States who recognize that evils exist and injustice is practiced for which our existing laws afford no remedy. Some of these are people whose emotions are better developed than their minds, and it is only natural that they should grow impatient of delays and lend a sympathetic ear to radical propaganda. But now that the ultra radicals have thrown off the mask of mock idealism and pretended sympathy for the poor, and come out boldly as the advocates of assassination there is no room for misunderstanding on the part of any good citizen, and with the ending of that misunderstanding the ranks of the Bolshevists in the United States will rapidly dwindle to the few thousands who are actually persons evilly disposed toward the government. The fomenters of the bomb outrages clearly betray their foreign origin by their idea that the American people can be terrorized by such methods. As a people we are careless and short of memory to a degree almost incredible. But any person who in the past has argued therefrom that a small display of "frightfulness" will throw us into a panic has speedily repented of his error. Once Bolshevism assumes the position of an open threat of violence its doom in the United States is sealed. It is a matter of public congratulation that this imported monstrosity has at so early a date manifested its true spirit.

Trial of the Bolshevists.

THE trials for seditious conduct which took place during the war afford a considerable amount of data from which to judge of the fitness of our judicial system to cope with the manifestations of anarchy which may be expected from time to time in the near future, and seem to warrant the general conclusion that the system itself is adequate, but that the weakness lies in individual judges. The ideal of fairness has been so vigorously inculcated that there are many judges who show strong tendency to lean backward. The more heinous the offense, the more sorely a conviction is needed for the public safety, the more such a judge is moved to magnify technicalities. The spirit of that viewpoint is not subject to just criticism, but the faults of its operation result from a failure to remember that there is a justice due to the people as well as to the accused. There is no desire in the present emergency to abate the fairness and impartiality of criminal trials, or to revive the spirit of the Bloody Assizes. But long before the war it was generally recognized that the administration of our criminal law was over technical, and that repeated reversals for trivial error despite the clearest proof of guilt were impairing seriously the efficacy of the criminal law. Such an administration of the law is bad enough in normal times. But when it comes to dealing with such an organized criminal propaganda as is now rife, every technical acquittal or reversal inevitably bears fruit in repeated crime. The trials conducted during the war by Judge Clayton, Judge Landis, and others who might be mentioned, show that it is possible to have a vigorous and sensible administration of the criminal law without violating any American ideal of fairness. Like many another much mooted problem of legal administration, it is not a matter of legislation but of judges who are competent not only in legal knowledge but in judicial temperament. Some measure of responsibility also devolves on the bar. Chief Justice Olson of the Municipal Court of Chicago said recently with respect to a local situation: "No thief can operate here without a criminal lawyer. The lawyer is part of the ring, and should be prosecuted for conspiracy. The bar association and police can put such a fellow out of business by showing his past conduct in similar cases." His remarks apply equally to the operations of the Bolshevist and the I. W. W., and the need for discipline of lawyers who go outside of the strict demands of professional duty in defending the seditious is plain. In a negative sense the conduct of the great majority of the bar during the war was unexceptionable. But it is to be regretted that to these negative virtues there was not added a little more of discipline inflicted on the few who violated the canons of patriotism which the great majority so well observed. Other opportunities for such discipline will undoubtedly occur and it is hoped that they will not be neglected. The bar should not be satisfied with any standard short of one hundred per cent Americanism. It is not practicable to enforce such a standard by criminal prosecution but it is possible for the law to say to those who will not observe it: "Never more be minister of mine."

An Ancient Delusion.

THE outbreak of any epidemic of crime always evokes a clamor for drastic penalties. Running true to form, some United States senator has already introduced

a bill making it a capital offense to transport a bomb in interstate commerce, or to belong to an organization advocating the overthrow of the government. The bill got the senator's name into the headlines of the New York papers and perhaps its passage would secure another headline. But as a contribution to the solution of the problem presented by the dynamiter these hasty and sensational measures are not worth the space they occupy in the Congressional Record. It was believed for a long time that if penalties could but be made sufficiently terrible no man would dare to violate the law. That idea has been definitely abandoned and the ancient horrors of the scaffold and the quartering block have become obsolete. So far as punishment is a deterrent, promptness and certainty are the requisites. Aside from the detection of offenses against the revenue and the currency, the national agencies for the detection of crime are a joke—rather a poor one; a condition which is due not to the officers of the secret service but to congressional parsimony in matters which are not productive of votes. And if one of the bombers is caught, there is the long road lined with continuances, demurrers, motions to quash, motions in arrest, appeals, habeas corpus, and so on ad infinitum, the while his fellow conspirators are planting more bombs and threatening a general strike if he is not instantly pardoned. The viewpoint of the criminal is well known to every student. Practically no crime would ever be committed if the perpetrator knew that he was certain to get ten years' imprisonment therefor. The criminal believes that by reason of his acuteness or his wealth or his influence he is going to escape entirely, and enough of them do escape to give some justification for that belief. Until it is effectually dispelled, crime will continue to be prevalent and the enactment of aggravated penalties will but serve to bring the law into greater contempt.

The Referendum and the Prohibition Amendment.

A LEGAL question of some nicety is presented by the contention that in those states which have adopted the referendum an amendment of the Federal Constitution must be submitted to popular vote. In an Oregon case abstracted in this issue that contention was overruled. In a Washington case as yet unreported it was held that a referendum must be had. To the same effect is a recent case in South Dakota (*State* v. *Polley,* 26 S. D. 5) holding that the referendum extends to a measure dividing a state into congressional districts, the court saying that the provision of the Federal Constitution that the division shall be made by the state "legislature" intends the legislative power as it may be locally established. The view which denies the right to a referendum rests mainly on the literal interpretation of the word "legislature" in the provision that the ratification shall be by the legislatures of the several states. On this point the better reason seems to be with the cases which construe the term broadly as meaning the body possessing the legislative power. It is entirely competent for a state to establish a commission government of the state, and in such a case the commission would unquestionably be the "legislature" to which federal amendments must be submitted. It is equally competent for a state to abolish the legislature entirely and enact all laws by initiative and referendum. In such a case the entire people would constitute the legislature. If therefore a state does not go that far, but provides that laws shall be enacted tentatively by an assembly subject to referendum, the vote of the people would seem clearly to be made a part of the legislative system. Once it is conceded as it must be that the word "legislature" may mean something different from the legislature known to the makers of the Constitution it cannot in reason mean anything else than the law-making power as it may be established in each state. The question is of course complicated by the fact that the referendum is conferred in varying language and perhaps in some states is so limited to the enactment of "statutes" that it does not extend to the ratification of a constitutional amendment. Every constitutional establishment of the referendum however manifests clearly enough a general intent that the acts of the legislative assembly shall be subject to review by popular vote, and it seems a mistake to construe away that intention as was done in the Oregon case by strict interpretation of the words of the grant. An amendment to the Federal Constitution may well be the most important matter coming before a legislative assembly and a holding that its action therein is exempt from the review by popular vote to which comparatively trivial enactments are subject is so unreasonable as to find justification only in the clear and positive language of the constitution.

The Merchant Marine.

THE trend of official opinion seems at the present time strongly in favor of relegating to private ownership the merchant vessels built by the United States during the war, and such a course is unequivocally recommended in a recent report of the shipping board. While there is in theory much attractiveness in the idea of a merchant navy operated by the government, the practical experience which the nation has had with government operation of railroads has given the government ownership idea a blow from which it will not recover for a generation. Assuming that the merchant marine is to pass into private hands, a very serious legislative problem is presented. The moment maritime affairs return to normal and competitive conditions must be met, the La Follette act and the Seamen's Union will inevitably drive every ship to a foreign register unless a system of subsidies is established. The ship subsidy plan has no inherent difficulties. It has worked well in other countries, as witness the Cunard and Hamburg-American lines. But the illustration loses something of its force when it is remembered that government-owned railroads also work well in England and Germany. The English people are keenly interested in maritime affairs and fully conscious of their dependence on the control of the sea, while the German people do (or at least did) the will of their rulers without thinking at all. In the United States, on the other hand, it will take a long campaign of education to convince a large part of the people that a ship subsidy is anything more than a present of the public funds to wealthy shipowners, and there will never be a dearth of demagogues to foster that belief. The question is apt to become a political one like the tariff, with shipping conditions disorganized by uncertainty before and after every election. On the whole the prospect of an American merchant marine is not very promising.

Political Strikes.

WHILE no instance of a political strike of any importance has yet occurred in the United States there has been frequent agitation for a general strike to

secure the pardon of a convicted murderer or for some similar purpose, and it is only a question of time when such an effort will meet with some measure of success. Whatever may be thought of the strike as an economic weapon, as a means of enforcing political or judicial action it is certainly indefensible. In the monarchies where most of the advocates of such measures received their training it may sometimes be the only means of securing attention to a legitimate grievance. But in the United States every citizen has his equal right of suffrage in the choice of every officer. If any political action is desired it needs but the will of a majority of voters to bring it to pass. In a state thus organized an attempt to influence the action of the lawfully chosen representatives of the people by imposing hardships on a great number of wholly innocent people is more reprehensible than to seek the same result by bribery. The right to quit work at will for any reason good or bad is one which it is difficult to restrict. But there certainly is no difficulty in imposing a legal prohibition of any agitation for a political strike; and without such agitation of course nothing of the kind would ever occur. If for the want of a law to prevent it such a strike should take place it would in all probability meet with the same weak spirit of truckling which found expression in the Adamson law. After such an occurrence popular elections would become a farce.

Local Legislation.

Is it not a fact that the principle of local self government is always and inevitably violated by local legislation? If the matter in question is essentially local, as it must be to warrant local legislation, what justifies its regulation by legislators from other districts? Of course in active legislative practice a considerable number of local bills are perfunctorily passed at the instance of the local representative. But every lawyer who lives in a state containing a large city knows that much municipal legislation is passed by country members which does not meet the approval of the representatives of the only district to be affected thereby. Legislation applicable to one or two localities only should be prohibited absolutely and in its stead provision made for complete self government as to all local matters, either by the local legislative body of the county, town or village or by a referendum confined to that locality. Local legislation has fallen into disfavor and is sharply restricted in most of the states. But its evils disappear when it ceases to be a special dispensation granted by a general legislative body and becomes the expression of the will of a locality in a matter as to which it alone is concerned. But the full realization of local self government requires going a step farther and reversing the rule that no local act should be passed where a general one is possible. The rule on the contrary should be that no general law may be passed if it is possible to establish instead a local option. That possibility would of necessity be a judicial question, involving a power to invalidate any act as to which a local option could have been allowed. Entirely apart from the vindication of a sound principle, the practical effects of such an innovation would be considerable. At the present time the political future of the average legislator rests largely on the local legislation which he secures. To obtain it, he must yield to the dictates of his party leaders and practically surrender his independence on matters of general legislation. With local matters largely removed from legislative cognizance, a degree of independence hitherto impossible would be secured on matters of state wide concern and the power of party leaders would be reduced to a minimum. Of course some communities would exercise the power conferred thus in a manner which other communities would consider very foolish. But it cannot be established too soon or too definitely that in matters which concern themselves alone people have a perfect right to be foolish.

Judicial Levites.

THERE is a small number of persons of eminent respectability whose formula for a quiet and peaceful state is that every wrong and injustice should be endured in silence that the more fortunate may not be disturbed by being compelled to witness the sufferings of its victims. The bench is not without its quota of those who desire, like the Levite, to pass by on the other side, particularly when domestic infelicity is sought to be brought to notice. For many years it was held in one American state that no relief could be awarded to a wife who was beaten by her husband, not because he had a right to beat her, but because public policy forbade a judicial investigation into the sacred privacy of domestic affairs. A similar spirit was exhibited as lately as 1911 in a case (*Lohmuller* v. *Lohmuller,* 135 S. W. 751) wherein a statute of 1897 permitting husband and wife to testify in divorce cases was referred to in the following language: "But in line with modern thought that makes the contract a trivial affair, to be set aside for the most frivolous reasons, the dragon's teeth were sowed, and the courts are being made the outlets of the most disgusting details of the inner lives of married people, homes are being disorganized and broken up, children branded with disgrace, and the most sacred relation on earth made a subject of ribaldry and ridicule in a way that is polluting the fountains of American society." Of course it is very hard on persons whose marital relations—if they have any—are ideal, to have to hear of the woes of others. But how about the person whose domestic life is made up of "disgusting details"? If a husband—or wife—inflicting continual cruelty sufficient in law to warrant a divorce is but cunning enough to put on a honeyed tone in the presence of visitors, must the sufferer go on without redress lest "the courts be made the outlet" of the tale of their misery? If a story be grievous to hear, what must the fact be to endure? As long as there is a wrong done the courts should be open to redress it. Whenever there is a fact which is subject to judicial inquiry no mouth should be closed which can speak with respect thereto.

Taking a Case from the Jury.

IN an editorial several months ago attention was called to the apparent absurdity of an appellate decision that a case was properly taken from the jury because reasonable men could not differ with respect thereto, accompanied by a dissenting opinion in which a member of the court differed most vigorously from his fellows. In a later issue a correspondent contributed a forcible exposition of the same thought. Since that time attention has been called to at least one judge who saw the stark inconsistency of such a decision. In a Florida case, *Thiesen* v. *Gulf, etc., R. Co.,* 78 So. 491, Chief Justice Browne in a dissenting opinion quoted the rule laid down in an earlier case as

follows: "When there is no room for a difference of opinion between reasonable men as to the proof of facts from which an ultimate fact is sought to be established, or when there is room for such differences as to the inferences which might be drawn from conceded facts, the court should submit the case to the jury for their finding." Following this he said: "Because of the 'differences of opinion' between the members of this court 'as to the inferences which might be drawn from conceded facts,' I think I am justified in saying that 'there is room for a difference of opinion between reasonable men.'" Just what loophole of escape this leaves for the majority of the court is hard to see. But quite apart from interest in the neatness with which the Chief Justice confounded his fellows, the question goes deeper than what the scholastic author might call the "contest of opposite analogies." If the decision quoted by Chief Justice Browne correctly represents the law of Florida, it is as clear as logic can make it that the plaintiff in the Theisen case was deprived of his constitutional right to a jury trial. There is considerable room for argument that the taking of a case from the jury is a usurped power, and in any event it is one which should not be exercised where it involves anything so ludicrous as a practical assumption that the Chief Justice of the court is not a "reasonable man."

The Cost of Punishing Crime.

THE first annual report of the Ohio Board of Clemency says among other things that the state of Ohio spends annually nearly ten million dollars in detecting and punishing crime. An estimate from these figures will suggest the staggering total thus spent annually in the United States. Add to this the loss and destruction of property by crime and the figure will be at least doubled. Those who are indifferent to the humanitarian aspects of the effort to prevent crime should be impressed by its financial importance. There is no doubt in the mind of every serious student of the subject that a large proportion of the crime now committed is preventable. The cases are comparatively few in which a man lapses from respectability into felony. Back of the conventional felon is a history of petty lawlessness and frequently of some form of degeneracy. Juvenile courts, criminal laboratories, reformatories run on humane modern lines, are still the exception rather than the rule. Any physician will bear witness that our facilities for preventing disease are far from perfect, yet they are much beyond those for preventing crime. If we can but discard from our traditional methods, as we have from our intellects, the last remnant of that hideous middle-age dogma of natural depravity, we will have made a beginning. Crime, like sickness, is not natural. It has causes which are ascertainable and to a great extent removable. Those which are inherent in the man sometimes antedate his birth, but that means merely that more time is necessary before we can have a generation which is free from them. The problem is no simple one; it yields to no catholicon. But purely from an economic viewpoint there is no problem in the nation which will better repay the time and labor necessary to its study. The purpose of organized society is to protect and promote the welfare of its members. How much study has this nation made officially of the problems of heredity, environment and prenatal influence, and how much use has it made of the knowledge on those subjects which have been acquired by private research? Yet, again putting aside every humanitarian consideration, is not the saving of several hundred millions of dollars every year worth a little effort?

DEPORTATION OF SEDITIOUS ALIENS.

EUROPE at the close of the war is in a ferment of internal dissension. Every newspaper brings a new story of revolutionists seizing some city, attempting to overthrow some government, or killing a few hundred innocent people. In the midst of this world-wide turmoil, it would be remarkable if the United States wholly escaped contamination. The forces of social revolution now manifest in the United States seem to be the I. W. W.—the "roughnecks of the world," as their now imprisoned leader was wont to call them—and the ill assorted group which is now gathering around the name of Bolshevism. Their activities have in a number of instances passed from incendiary speech to actual violence directed against employers and public officers.

The average lawyer has learned by experience to discount liberally newspaper discussions of any political or economic question, so that it is well at the outset to present the results of two recent judicial investigations of just what one of these elements, the I. W. W., is, and what it stands for. In *U. S.* v. *Swelgin,* 254 Fed. 884, a proceeding to revoke the naturalization of a German born member of the I. W. W., the court found the pledge of the order to be as follows: "I do solemnly pledge my word and honor that I will obey the constitution, rules, and regulations of the Industrial Workers of the World, and that, keeping always in view its fundamental principles and final aims, I will, to the best of my ability, perform the task assigned to me. I believe in and understand the two sentences, 'The working class and the employing class have nothing in common,' and 'Labor is entitled to all it produces.'" From a pamphlet of the order introduced in evidence the following quotation is taken: "The program of the I. W. W. offers the only possible solution of the wage question whereby violence can be avoided, or at the very worst, reduced to a minimum. To all opponents of the organization wherever found, we desire to state that this organization will, to the best of its power and ability, bend every effort towards making that program effective. We also desire to serve notice upon the ruling class and all its defenders, that whatever form the struggle may take, we are determined to continue in spite of all odds until victory has been achieved by the working class. If the ruling class of to-day decide, as its prototypes of the past have decided, that violence will be the arbiter of the question, then we will cheerfully accept their decision and meet them to the best of our ability and we do not fear the result. The Industrial Workers of the World is without doubt the most revolutionary body in the world to-day. Being propertyless and landless they have no patriotism nor reason for patriotism. The abolition of the wage system and the creation of a new social order is its ideal. For this ideal the members will suffer hunger, brave the blacklist, rot in the bastile, and fight—ever fight—for the freedom that awaits them when the rest of the workers awaken." In a later case, *Ex parte Bernat,* 255 Fed. 429, a proceeding to deport a Russian born member of the same

order, the following appear among other quotations from the literature of the organization introduced in evidence: "As a revolutionary organization, the Industrial Workers of the World aims to use any and all tactics that will get the results sought, with the least expenditure of time and energy. The tactics used are determined solely by the power of the organization to make good in their use. The question of 'right' and 'wrong' does not concern us. . . . Failing to force concessions from the employers by the strike, work is resumed and 'sabotage' is used to force the employers to concede to the demands of the workers. . . . The I. W. W. opposes the institution of the state. What is this sabotage that so worries politicians, preachers, profit grabbers, and parasites generally? It is a realization on the part of the working class that property has no rights that its creator is bound to respect. It means that the workers know that might makes right, and that they are possessed of a tremendous might in the productive process. It means that they are conscious of the fact that any action which weakens the employer and strengthens the worker is justified. . . . A slashed warp, a loosened bolt, an uncaught thread, a shifting of dyes, will make Billy Wood see the 'justice' of the men's demands quicker than all the votes cast since Billy Bryan commenced to run for office. Sabotage is an individual act performed for a class purpose. It may be denounced as 'anarchy,' but that scares no workers in these rebellious days. . . . These migratory workers have lost all patriotism—and rightly so. Love of country? They have no country. Love of flag? None floats for them." From the song book of the I. W. W. the court extracts five verses which for a combination of blasphemy, treason and folly seem pre-eminent. One verse, far from the worst, reads:

> "Onward, Christian soldiers! Duty's way is plain;
> Slay your Christian neighbors, or by them be slain;
> Pulpiteers are spouting effervescent swill;
> God above is calling you to rob and rape and kill.
> All your acts are sanctified by the Lamb on high;
> If you love the Holy Ghost, go murder, pray, and die."

Without multiplying cumulative quotations, it becomes obvious just what these people stand for. They are opposed to the state as an institution, they are opposed to property rights, they reject both law and morals as not binding upon them. Their objects they propose to achieve by force, by the destruction of property, by the overthrow of government, acknowledging no restraint except that of prudence which forbids defying a force presently too strong. And what is more they mean it. Whenever and wherever they feel strong enough to attempt it they will put their principles into execution.

What then is to be done with such a situation? Of course, the forces of lawlessness can be suppressed by law abundantly backed by military force. No sane man supposes that any such movement can ever gain the strength to overthrow by force the government of the United States. The most they can hope to do is to murder a few men, dynamite a few plants and induce a few cowardly congressmen to introduce bills for their benefit. But, reinforced as such a movement is sure to be from the ranks of the idle and dissolute, profiting by every financial panic, gathering to fan the latent flames of disorder in every labor dispute, the struggle will be one not pleasant to contemplate. There is, it would seem, a solution much more simple. The Bolshevists and the I. W. W. are not the product of American institutions and the leaders almost without exception are not Americans. They are the product, the natural product perhaps, of foreign lands. In some of the European countries the manual laboring class has little or no voice in the choice of rulers or the making of laws, and the government has been aptly enough described as "despotism tempered by assassination." From generations of life under such a system there has naturally grown up a class of persons to whom assassination is as normal a method of political agitation as pamphlets and stump speeches are with us. The thing that most concerns the people of the United States is that the law that one extreme produces another works both ways. Despotism produced anarchy in Russia and elsewhere. Anarchy prevalent in our midst will just as surely produce despotism. To keep in check a large number of imported anarchists, we must have drastic laws, arbitrary courts, abundant military reserves. There is just one way to preserve law and liberty at the same time and that is by the deportation of those who are unfit for liberty. The place for the anarchist or revolutionist is in the civilization which produced him. There his extreme views reacting against the other prevailing extreme will in time produce a reasonable compromise. In our land where no such other extreme exists, he tends inevitably to overthrow the entire social structure.

The right of a nation to deport any alien deemed a menace to the state where he sojourns has been recognized from the earliest days of modern civilization. "The government of each state has always the right to compel foreigners who are within its territory to go away by having them taken to the boundary," says Ortolan (Diplomatie de la mer, lib. 2, c. 14, p. 297). "It is even obliged in this respect to follow the rules which prudence dictates," adds Vattel (Law of Nations, lib. 1, c. 19, § 231). The question, as was said by Bar (Int. Law, p. 708) is purely a question of expediency. In this instance at least it is possible to make the punishment fit the crime in a fashion to suit the tuneful desires of the Mikado. These men coming here from a foreign land object so strongly to our institutions that they wish to overthrow them by force. What is more appropriate than to escort them politely to the border? The objection sometimes urged that we should deal with our own problems and not pass our criminals on to other nations, was adequately discussed in an editorial in the June issue of LAW NOTES.

The present laws of the United States as to the deportation of aliens require little or no amendment to make them adequate. The law now in force is the Act of Feb. 5, 1917 (Fed. St. Ann. 1918 Supp. p. 212) and provides in section 3 that the following among other classes of aliens are excluded from admission into the United States: "Anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States, or of all forms of law, or who disbelieve in or are opposed to organized government, or who advocate the assassination of public officials, or who advocate or teach the unlawful destruction of property; persons who are members of or affiliated with any organization entertaining and teaching disbelief in or opposition to organized government, or who advocate or teach the duty, necessity, or propriety of the assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their

official character, or who advocate or teach the unlawful destruction of property." Section 19 provides for the deportation of any of the foregoing classes of persons at any time within five years after their entry into the United States. The decision of the Secretary of Labor on the matter of deportation is declared to be final. Perhaps the only improvement which should be made to this act is the abrogation of the five year limit for deportation proceedings, for anarchistic tendencies, unlike the other statutory grounds for exclusion, may be concealed for that length of time.

Of the validity of this legislation there is no room for doubt. It is established that aliens may be deported for any cause which Congress may designate, that the provisions of the Constitution have no application to an alien sought to be deported and that while a hearing is essential to deportation it need not be a judicial hearing, but the matter may be delegated to an administrative officer. "We regard it as settled by our previous decisions that the United States can, as a matter of public policy, by congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials." *Wong Wing* v. *U. S.,* 163 U. S. 228, 16 S. Ct. 977, 41 U. S. (L. ed.) 140. "That Congress may pass laws forbidding aliens or classes of aliens from coming within the United States and may provide for the expulsion of aliens or classes of aliens from its territory, and may devolve upon the executive department or subordinate officials the right and duty of identifying and arresting such persons, is settled by previous decisions of this court. A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final." *Low Wah Suey* v. *Backus,* 225 U. S. 460, 32 S. Ct. 734, 56 U. S. (L. ed.) 1165. "It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want. The coincidence of the local penal law with the policy of Congress is an accident." *Bugajewitz* v. *Adams,* 228 U. S. 585, 33 S. Ct. 607, 57 U. S. (L. ed.) 978. In *Turner* v. *Williams,* 194 U. S. 279, 24 S. Ct. 719, 48 U. S. (L. ed.) 979, a case involving the exclusion of an alien anarchist, the court laid down clearly the power of Congress as to seditious aliens, saying: "It is said that the act violates the First Amendment, which prohibits the passage of any law 'respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.' We are at a loss to understand in what way the act is obnoxious to this objection. It has no reference to an establishment of religion nor does it prohibit the free exercise thereof; nor abridge the freedom of speech or the press; nor the right of the people to assemble and petition the government for a redress of grievances. It is, of course, true that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled, he is in fact cut off from worshipping or speaking or publishing or petitioning in the country, but that is merely because of his exclusion therefrom. He does not become one of the people to thom these things are secured by our Constitution by an attempt to enter forbidden by law. To appeal to the Constitution is to concede that this is a land governed by that supreme law, and as under it the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise. Appellant's contention really comes to this, that the act is unconstitutional so far as it provides for the exclusion of an alien because he is an anarchist. The argument seems to be that, conceding that Congress has the power to shut out any alien, the power nevertheless does not extend to some aliens, and that if the act includes all alien anarchists, it is unconstitutional, because some anarchists are merely political philosophers, whose teachings are beneficial rather than otherwise. . . . The language of the act is 'anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law, or the assassination of public officials.' If this should be construed as defining the word 'anarchist' by the words which follow, or as used in the popular sense above given, it would seem that when an alien arrives in this country, who avows himself to be an anarchist, without more, he accepts the definition. Aud we suppose counsel does not deny that this Government has the power to exclude an alien who believes in or advocates the overthrow of the Government or of all governments by force or the assassination of officials. To put that question is to answer it."

The term "anarchist" while not fully defined in the federal act is defined by the statutes of many of the states, an excellent legislative definition being for instance found in the Penal Law of New York (§ 161) as follows: "Any person who: 1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or, 2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or, 3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or, 4. Organizes or helps to organize or becomes a member

of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine, is guilty of a felony." A conviction of an offense under such a state law would establish the status of the individual beyond question and would doubtless move the federal authorities to action under the deportation act.

With the exception therefore of a repeal of the five year limitation on deportation proceedings based on the ground of sedition and perhaps some further provision similar to that of the Selective Draft Act to eliminate any element of judicial review, there is now adequate legislation of indubitable validity for the immediate deportation of every alien anarchist, Bolshevist and I. W. W. in the United States. The entire matter is in the hands of the executive department of the federal government and it needs but decisive executive action, without vacillation or truckling to political considerations, to put an end to the entire revolutionary propaganda in the United States. The need at the present time is therefore not for more laws but for an intelligent public sentiment to demand the use of the laws which we have. The United States must, in the words of Roosevelt, be a nation and not a polyglot boarding house. There is a story of a small boy who on being reproved by his Sunday school teacher for saying that George Washington was the first man, answered: "Oh, if you are going to count foreigners I suppose you are right." No such spirit as that should animate the American people. The immigrant who is ready and willing to give true allegiance to our flag and our government has proved his right to a welcome; the offering of that allegiance makes him an American. It is for the sake of such immigrants as much as for that of native born Americans that the unworthy few, the slag in the melting pot, must be spurned from our shores. The slogan "America for the Americans" acquired some ill repute because of the narrow sense in which it was first used. But interpreting the term "Americans" to mean all men within our shores, whatever their race or nativity, who venerate our institutions in their hearts and are ready to defend them with their hands, that slogan represents the only basis on which the republic can endure.

W. A. S.

LIMITING OR PROHIBITING THE POSSESSION OF INTOXICATING LIQUORS FOR PERSONAL USE.

"ALAS, poor Yorick, I knew him well." This feeling sentiment appeared recently under a cartoon depicting a thirsty faced individual holding in his arms an empty beer keg through the bung holes of which, pictured as the eye holes of a skull, the last drop of amber liquid had long since run. Many is the man, and hush! speak it low, and woman too, who will gaze with fond recollections and intense longing on the empty receptacles which in bygone days were filled with the spirit that cheers. And their inability to replace the dear lost ones will cause exceeding hurt. But they will get over it, for they say that time heals all things, and in days to come they will cease to mourn the lost one and their regrets will be softened by the pictures they can conjure up of the good times that flowed from the associations with the long departed. To them the adage that there are as good fish in the sea as ever came out, will no longer give comfort and they must be content to dwell in the pleasant memories of the past. A kind of spiritualistic seance, as it were. But how about him who has tenderly nursed and preserved his loved one to soothe and calm his declining years, housing her within impregnable walls (cellars rather) and surrounding and protecting her against inquisitive and covetous eyes? What will be his feelings when the ruthless hands of the law break down his stronghold and seize and bear away his mistress to destruction? It is one thing to say, No more shall you flirt with and wed the nymphs of Bacchus, but quite another to seize the nymph whom you have lawfully wedded and forcefully tear her from your loving embrace. And this brings us to the serious side of the question.

How far, in the exercise of its police power, may the state go in prohibiting the possession and personal use of intoxicating liquors which have been lawfully acquired? In many states laws have been passed limiting the amount that may be possessed at any one time and in some the possession of any amount whatsoever, even one teeny weeny drop of the awful stuff, has been prohibited. And these laws have been declared to be a proper and lawful exercise of the police power by the highest court in the land. It is interesting to note the gradual change in judicial opinion on this question in keeping with the growth of the prohibition movement. At first the legislatures were content to prohibit its manufacture and sale and in most instances they were particularly careful to insert a provision that the law did not apply to the possession of liquor for personal use. But later they began to place a limit on the amount that might be possessed, and finally in some instances prohibited the possession of any quantity whatsoever. If the press reports of the bills introduced in Congress to enforce the prohibition laws are correct the latter provision is embodied therein. That the acquisition of liquor for personal use may be prohibited seems to be conceded, but whether the state can by law deprive one of the possession of liquor lawfully acquired, is another question, though the trend of the more recent decisions is strongly in favor of the view that it can.

One of the earliest cases passing on the power of the state to forbid the possession of intoxicating liquors for personal use was *Preston* v. *Drew*, 33 Me. 558, 54 Am. Dec. 639, decided in 1851. Here a statute providing that no action could be maintained for the recovery of the possession of intoxicating liquor or the value thereof was held to be unconstitutional as a deprivation of property without due process of law. The court, recognizing that the state might legally forbid the future acquisition of intoxicating liquors, said: "The State, by its legislative enactments, operating prospectively, may determine that articles injurious to the public health or morals shall not constitute property, within its jurisdiction. It may come to the conclusion that spirituous liquors, when used as beverage, are productive of a great variety of ills and evils to the people, both in their individual and in their associate relations. . . . Such conclusions would be justified by the experience and history of man. If a legislature should declare that no person should acquire any property in them, for such a purpose, there would be no occasion for complaint that it had violated any provision of the constitution." And hearken to this from Kentucky (*Com.* v. *Campbell*, 133 Ky. 50), 117 S. W. 383, 19 Ann. Cas. 159, 24 So. R. A. (N. S.) 172. It sounds like a voice from the tomb: "The right to use liquor for

one's own comfort, if the use is without direct injury to the public, is one of the citizen's natural and inalienable rights, guaranteed to him by the Constitution, and cannot be abridged as long as the absolute power of a majority is limited by our present Constitution. The theory of our government is to allow the largest liberty to the individual commensurate with the public safety, or as it has been otherwise expressed, that government is best which governs the least. Under our institutions there is no room for that inquisitorial and protective spirit which seeks to regulate the conduct of men in matters in themselves indifferent and to make them conform to a standard not of their own choosing, but the choosing of the lawgiver; that inquisitorial and protective spirit which seeks to prescribe what a man shall eat and wear, or drink or think, thus crushing out individuality and insuring Chinese inertia by the enforcement of the use of the Chinese shoe in the matter of private conduct of mankind. We hold that the police power—vague and wide and undefined as it is—has limits, and in matters such as that we have in hand its utmost frontier is marked by the maxim 'Sic utere tuo ut alienum non ledas.'" Among the many cases supporting the sound constitutional doctrines announced in the cases just quoted from, see Luera's Application, 28 Cal. App. 185, 152 Pac. 738; *Cortland* v. *Larson,* 273 Ill. 602, 113 N. E. 51, Ann. Cas. 1916E 775, So. R. A. 1917A 314; *Shreveport* v. *Hill,* 134 La. 352, 64 So. 137, Ann. Cas. 1916A 283; *Flowers v. State,* 8 Okla. Crim. 502, 129 Pac. 81; *State* v. *Rookard,* 87 S. C. 442, 69 S. E. 1076. The theory of these cases is that there being a property right in intoxicating liquors lawfully acquired, it is beyond the power of the state in the exercise of its police power to destroy it.

But as the cohorts of prohibition have advanced, the constitutional barriers have fallen one by one, until we come to the decision in *Crane* v. *Campbell,* 245 U. S. 304, 38 S. Ct. 98, 62 U. S. (L. ed.) 304. This case arose in Idaho and involved the construction of a statute making it unlawful for any person to have in his possession any intoxicating liquors of any kind for any use or purpose except for scientific, medical or sacramental purpose, as provided by the act. The Idaho Supreme Court held the statute to be constitutional and on appeal to the Supreme Court of the United States the Idaho case was affirmed. After stating that it is well settled that a state may prohibit the manufacture, sale, gift, purchase or transportation of intoxicating liquors, the Supreme Court goes on to say: "As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective. . . . And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose. We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge. A contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase or transportation of such articles—the only feasible ways of getting them. An assured right of possession would necessarily ...ly some adequate method to obtain not subject to destruction at the will of the State." Apparently this decision gave the death blow to John Barleycorn, at least in so far as Idaho was concerned. But unfortunately the court in this case did not take notice of the time when the liquor was acquired and the language used is seemingly broad enough to cover the possession of liquor no matter when acquired or whether its acquisition was lowful or unlawful. At any rate it was so interpreted by the Utah court in *State* v. *Certain Intoxicating Liquors,* 172 Pac. 1050, L. R. A. 1918E 943, wherein it was held on authority of the Crane case, supra, that a statute prohibiting the possession of intoxicating liquor for personal use was constitutional, and that it was immaterial when, how or where it had been acquired. It appeared from the facts in this case that the liquor was lawfully acquired before the statute went into effect and the lower court held the statute to be unconstitutional basing its ruling on the ground that property rights in liquor lawfully acquired could not be destroyed by the state. In reversing the case on that point, the Supreme Court said: "If we correctly interpret the meaning of the opinion of the very able and learned trial judge, he holds that the act does not undertake to prohibit the use or drinking of intoxicating liquors within the state except as in the act expressly mentioned, and that the state may not, in the lawful exercise of its police powers, confiscate and destroy intoxicating liquors within the state, when acquired for personal use and recognized as property before the act became effective. . . . We have heretofore pointed out that in our judgment it was the intent of the legislature, and that the plain provision of the act abolishes, aside from the exceptions expressly made, all property rights in alcoholic liquors on and after August 1, 1917, no matter where or how acquired, for what use intended, or how possessed. It necessarily follows that the very purpose and intent of the act was to preclude the right to use intoxicating liquor within the state except for the specific purposes in the act expressly mentioned and reserved." And now we come to the case of *Barbour* v. *Georgia,* 39 S. Ct. 316. Here the Georgia court like that of Utah held that it was within the police power of the state to prohibit the possession of intoxicating liquor for personal use, and the fact that it incidentally destroyed the property rights lawfully acquired therein before the law became effective did not render it void as contrary to the Fourteenth Amendment of the Federal Constitution, and the Supreme Court of the United States sustained the decision. Among the recent decisions adopting this construction, see the following: *Frazier* v. *State,* (Ala.) 73 So. 764; *Southern Express Co.* v. *Whittle,* 194 Ala. 406, 69 So. 652; *O'Rear* v. *State,* (Ala.) 72 So. 505; *State* v. *Carpenter,* (S. C.) 92 S. E. 373. As may be seen from these cases the tendency of the more recent legislation with respect to alcoholic liquors is directly against the consumption on the theory that it is in the consumption always that the evil lies.

But in the Barbour case we see the first glimmer of hope for the man with the well stocked cellar—a small, very small one it is true, but nevertheless it is there. The court sustains the decision of the Georgia court, but is very careful to point out that in that case although the liquor was acquired before the law became effective, it was acquired after the passage of the act, and though lawfully acquired, the possessor was put on notice by the passage of the law of the inherent evil qualities of his property. It also points out that in the Crane case it

only decided that liquor acquired after the passage of an act forbidding its possession, though lawfully acquired, could be outlawed by the statute, and particularly states that in neither the Crane case nor the Barbour case did it decide that liquor acquired before the passage of an act making its possession unlawful could be divested of its property rights by the statute. So here we find the one possible oasis in the coming desert. The court also states that the particular question as to whether a state can legally prohibit the possession of liquor acquired before the passage of the act has never been passed on by it, although the two cases cited as touching on the question give a very clear indication of what would have been decided by the court as then constituted. In *Boston Beer Co.* v. *Massachusetts,* 97 U. S. 25, 24 U. S. (L. ed.) 989, the court while holding that a state might enact a law prohibiting the manufacture and sale of intoxicating liquors said: "We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation. But we infer that the liquor in this case, as in the case of *Bartemeyer* v. *Iowa,* (18 Wall. 129) 21 U. S. (L. ed.) 929, was not in existence when the liquor law of Massachusetts was passed." And in *Bartemeyer* v. *Iowa,* 18 Wall. 129, 21 U. S. (L. ed.) 929, it was said: "The weight of authority is overwhelming that no such immunity has heretofore existed as would prevent State legislatures from regulating and even prohibiting the traffic in intoxicating drinks, with a solitary exception. That exception is the case of a law operating so rigidly on property in existence at the time of its passage, absolutely prohibiting its sale, as to amount to depriving the owner of his property."

The reasoning on which the decision in the Barbour case is based is somewhat difficult for the ordinary mind to grasp. The court says: "Does the Fourteenth Amendment, by its guaranty to property, prevent a state from protecting its citizens from liquor so acquired? A state, having the power to forbid the manufacture, sale, and possession of liquor within its borders, may, if it concludes to exercise the power, obviously postpone the date when the prohibition shall become effective, in order that those engaged in the business and others may adjust themselves to the new conditions. Whoever acquires, after the enactment of the statute, property thus declared noxious, takes it with full notice of its infirmity and that after a day certain its possession will, by mere lapse of time, become a crime." Now if property rights existed in liquor acquired after the passage of the act but before it went into effect how could it be divested by the law's becoming operative? In other words how did the law's going into effect affect the inherent evil nature of the liquor? Was it innocent of evil during the period between the passage of the act and the time set for it to go into effect, and then suddenly by the magic touch of legislative legerdemain did it become invested with all the qualities of the evil one? And could it be said that liquor purchased before the passage of an act declaring its possession to be unlawful retained its innocent and law abiding qualities, while liquor purchased after the passage but before the law became effective lost its innocent character and assumed the livery of the evil one on the happening of the latter event? It would seem that the wish to uphold the statute was stronger than the reasoning on which the decision was based.

What does this opinion presage as to the court's action, should it be called on to construe a law of Congress, enforcing the prohibition amendment, containing provisions prohibiting the possession of intoxicating liquors for personal use? Does not the amendment put all on notice of the evil qualities of liquor and in the language of the court "whoever acquires after the enactment of the statute property thus declared noxious, takes it with full notice of its infirmity, and that after a day certain its possession will, by mere lapse of time, become a crime"? The cases are certainly parallel, and if a legislative enactment can warn the possessor of the evil qualities about to inhabit his property surely an amendment to the Constitution adopted by forty-five states is a trumpeting announcement that that which to-day is innocent of evil in the eyes of the law shall in the near future be looked upon by the same law as invested with noxious qualities. In one other recent case the Supreme Court has shown some signs of relenting in its strict construction of the liquor laws. In *U. S.* v. *Gudger,* 39 S. Ct. 323, the court held that the Reed Amendment prohibiting the transportation of intoxicating liquor into any state which had prohibited its manufacture, sale, etc., did not apply to liquor being transported through the state. In this case it appears that a passenger bound from Baltimore to Asheville, North Carolina, was arrested in Lynchburg, Virginia, where his train was temporarily stopped and his baggage searched.

But the state legislatures and courts are still revelling in extreme and rigorous laws. As an instance to what extremes a law-making body may go in its zeal to deal a death blow to intoxicating liquors, take the recent statute passed by the legislature of Georgia. By this statute it is made illegal to manufacture, sell, etc., all liquors and beverages or drinks made in imitation of or intended as a substitute for beer, wine, whisky or other alcoholic or spirituous, vinous or malt liquors (Acts 1915, p. 77). And the Supreme Court of Georgia holding this act to be constitutional even when applied to beverages admitted to be non-intoxicating said: "On the basis of protecting health, morals, and the public safety, the provisions of the act making it illegal to manufacture, sell, etc., intoxicating liquors have been held to be a valid exercise of the police power. *Delany* v. *Plunkett,* 146 Ga. 547, 91 S. E. 561, Ann. Cas. 1917E 685, L. R. A. 1917D 926. The manufacture and sale of drinks made in imitation of or intended as a substitute for intoxicating drinks as specified in the act, although not intoxicating themselves, afford a cloak for clandestine manufacture, sale, etc., of intoxicants—the evil which the legislation was designed to prevent. Under such circumstances, the power to prohibit the manufacture, sale, etc., of the beverages will include the power also to prohibit the manufacture and sale of substitutes and imitations. *Purity Extract, etc., Co.* v. *Lynch,* 226 U. S. 192, 33 S. Ct. 44, 57 U. S. (L. ed.) 184. Under this view, it is within the police power of the state to enact a law prohibiting the manufacture and sale of liquors and beverages not intoxicating in character, but made in imitation of or intended as a substitute for beer, ale, wine, whisky, or other alcoholic or vinous or malt liquors." *Kunsberg* v. *State,* 147 Ga. 95 S. E. 12. Luckily for the Salvation Army the twenty-five or more saloons in New York city on which it has obtained options are not located in Georgia. It is the announced purpose to con-

duct these saloons in all particulars, i.e., with bars, mirrors, fixtures, brass rail and all, just as they are now conducted, except that in the place of alcoholic beverages there will be served over the bar as a substitute, soda water, buttermilk, ice cream, etc.

There is another phase of this question which deserves careful and unprejudiced consideration. For years the right of property in intoxicating liquors was recognized by the law-making bodies and the courts. Only in comparatively recent times has this been denied. If such a right of property exists it is setting a dangerous precedent to deprive the owner of it by legislative ukase. Where will such a procedent lead us? The right of property, always so jealously guarded by civilized governments, was never before in the history of the world so jeopardized. One big country has repudiated it in a large measure and the leaders of that doctrine are endeavoring with all their might to fasten it upon others and with some degree of success in its neighboring states. Even here in our own great land of the free these destroyers of human liberty in the name of liberty are organizing and their insidious propaganda is being industriously spread. The professional reformer, whether he be prohibitionist, advocate of blue laws, or what not, is prone to say of such arguments as the above that they display "prejudice, blind prejudice born of interest and not of reason." But is it not time for all of us to cease imputing prejudice and to realize that an honest difference of opinion can exist without prejudice and without ulterior motive? When one looks at the question from the standpoint of the lover of constitutional government and not that of a partisan or follower of any particular fad or ism, can it be said that the precedent set by such decisions does not lead logically and directly to the doctrines advocated by the Bolsheviki? To them all property possessed by the individual is against the health, morals, and general welfare of the public, so they take it away. In the present case it is property in liquor lawfully acquired that is taken, but for the same reasons as announced for the action of the Bolsheviki. The tendency of such decisions is well expressed by Chief Justice Browne in his dissenting opinion in *Morasso* v. *Van Pelt* recently decided by the Florida Supreme Court. The majority, following the decision of the Crane case, upheld the Florida law limiting the amount of intoxicating liquor that might be possessed for personal use. But in an exceptionally well-reasoned dissenting opinion Justice Browne said: "The right to abolish private ownership of property for the public welfare is predicated on the doctrine that whatever a strong and preponderant public opinion regards as against the prevailing morality and inimical to the public welfare constitutional guarantees are impotent to secure. This is the apotheosis of the police power, at whose feet all constitutional guarantees must humbly kneel, petitioning but not demanding observance. Before it, the right of free speech, a free press, freedom of conscience and religious worship, must yield. The attention of the civilized globe is now centered in one of the great nations of the world whose government, conducted upon this doctrine, is ruthlessly destroying life, liberty and property. There the 'prevailing morality' and the 'strong and preponderant opinion' is that private ownership in lands and manufacturing capital, and private wealth, are inimical to the public welfare; that they produce idleness, pauperism, suffering and crime, and consequently must be abolished. These people feel as deeply on these subjects as our people feel on the liquor question. Their doctrine is not a new one. It was proclaimed by Karl Marx more than half a century ago, but it has recently become more insistent, and its spread threatens our own institutions. He taught that 'the proletariat will use its political supremacy to wrest by degrees all capital from the bourgeoise,' and his followers advocate that 'the institution of private property, that is, the right of private ownership in things tangible or intangible, is to be abolished—by indirect and peaceful means as far as convenient, but by violence so far as conducive to speed and thoroughness of the change.' It is a short step—one that will be essayed much sooner than many anticipate—from abolishing private property in intoxicating liquors, to abolishing without compensation private property in lands, manufacturing capital, railroads or other public utilities, whenever a 'strong and preponderant public opinion' shall consider the public welfare demands it. When that time comes, the decision of the majority of the court in this case, and those in line with it, will be authority for legislation along these lines, and they will plague those who too late seek to check further inroads upon the rights of property. Not the least of the evils that the traffic in liquor is responsible for, is this line of decisions sustaining laws destructive of property and property rights, enacted in response to 'strong and preponderant opinion.'"

Do not let the possessors of well-stocked wine cellars delude themselves with the idea that Congress or the states will not go to such extreme lengths as to take away from them the liquor which they have lawfully acquired for their own personal use. Such laws already exist in not a few states and a similar provision is incorporated in one of the bills introduced in Congress, and one of our most prominent business men and capitalists, Mr. Schwab, according to the press, advocates such a law. In his opinion if we are to have nationwide prohibition we should be consistent about it and make it apply to all alike. If we are to deprive the poor man of his beer, then make the rich man empty his wine cellars. And there are many who agree with him. A law prohibiting the possession of any intoxicating liquors, no matter when, where or how acquired, would do this, and the Supreme Court has said that it is a lawful exercise of the police power, certainly to the extent of liquor acquired after the enactment of laws prohibiting their possession although acquired before the law becomes operative.

MINOR BRONAUGH.

THE WAR AND CONDITIONAL LEGACIES.

THE recent case of Re Cole; Cole *v.* Cole (1919) 1 Ch. 218) before Mr. Justice Sargant is one which will no doubt be frequently quoted as an authority in the very many future cases which, from the nature of things, must arise as one of the consequences of the war. There are no doubt many subsisting wills wherein the testator has imposed conditions on his gifts, such as requiring sons to remain employed in some particular business for a specified time. Such testator, who died before the war, did not foresee the possibility of a war wherein the great bulk of the young manhood of the country either voluntarily joined the Army or came under the provisions of the Military Service Acts, and therefore left their employments.

The recent case as an authority has a bearing, however, not only on cases of wills, but also on contracts for service and similar contracts. It is one which, from the state of things subsisting in the dark years which now fortunately have ended, must necessarily apply to many other similar cases.

The facts were somewhat complicated, but the main point may, in effect, be put quite shortly. The testator directed his trustees to assign certain shares in a company to each of his sons, who should, prior to attaining a certain age, enter the employ of the company, and remain in such employ until he was thirty-three years old. This was a pre-war will, the testator dying in 1912. The testator was at the time of his death the chairman of the board of directors of the company in question, and in his will he expressed the desire, in effect, that his sons should be treated as any other employee. The object and purpose of the provision was, as the learned judge observed, that the sons should remain connected with the company and become good business men.

On the outbreak of war the eldest son, who had fully complied with the conditions of the will, and was employed by the company, but had not reached the age of thirty-three, with the consent of the directors voluntarily joined the Army, and had remained in the Service down to the time of the application to the Court. Apparently he joined as a private and afterwards obtained a commission. He had been wounded.

The question arose whether in these circumstances the son in question, if he obtained his discharge from the Army as soon as reasonably possible, and then proceeded to work in the service of the company until the age of thirty-three, would be entitled to receive the benefit of the legacy of the shares. Mr. Justice Sargant held that he would. The ground of his Lordship's judgment was that the employment as contemplated by the will, in fact, continued, notwithstanding the son's service in the Army. There was, in fact, as his Lordship held, a mere temporary dispensation of obligation to render service under the contract of employment. It ought here to be observed that there was evidence by the directors that they still regarded the employment to be a continuing employment, although payment for services was in fact discontinued. The ground for this discontinuance of payment was the view that the son in question was amply provided for under his father's will.

The upshot of this case as an authority is that employment may continue, although the employee for the time being is in the Army. No doubt the peculiar conditions which have in the last four years or so obtained have made it possible to predicate as undoubtedly was the fact, that the great majority of men who joined the Army at the time did so merely for "the duration," as the phrase goes. Had the legatee similarly situated in peace left his civil employment and entered on a course for Sandhurst, the question of continuance of employment would of course have been precluded. The legatee would have forgone his legacy. But it is precisely this general temporary nature of service in the Army that makes the recent case we have mentioned of such general application as an authority. It is satisfactory from every point of view that Mr. Justice Sargant found his way to decide in the way he did. It would undoubtedly be a great hardship if young men who left their civil work to take up military duties to meet the passing exigencies of the times should suffer for their patriotism and sense of duty. But, hardship or no hardship, the question in such cases where trustees have to administer trusts, must be decided according to the true construction of the trust instrument, and whatever may be the personal feeling of a trustee, he must adhere strictly to the terms of the trust instrument which molds the trusts, whether that instrument be a will, or a settlement, or, for that matter, any other deed.

Lord Eldon, in the case of Herbert *v.* Reid (16 Ves. 481), held that a legatee was entitled to a legacy given to her by the testator if she should be in his service at the time of his death. The facts of that case were as follows: The legatee had been the servant of the testator for a considerable number of years. Shortly before his death the testator caused her to be sent away. There was a question with regard to this sending away. She alleged that the testator had been induced by some one interested under the will to make her quit the house. The testator apparently had expressed displeasure with her, and she had left, on the recommendation of some interested party, for a short time. The case was, of course, that she was still in his service, and the question was whether or not this was so, at any rate, in the view of the testator. The legatee had left the house only a fortnight before the testator's death. The case set up by one of the defendants, who was alleged by her to have caused the testator to send her from the house so that the defendants might benefit by the failure of the legacy, was that the legatee had deliberately left, having latterly "used him (the testator) very ill," and that the object of the legacy was to ensure her continuing in the service. Another dependent alleged that the testator had expressed the view that the legacy was too much.

The case of Herbert *v.* Reid (sup.) is an interesting one upon the question of the admission of oral evidence. According to the legatee's case, the testator had said that, notwithstanding her leaving the house, he, the testator, still regarded her as his servant, and that when he, the testator, recovered, he would get her to come home again. Lord Eldon admitted this evidence. "The conversation and declarations," he said, "of the testator may be not only evidence, and extremely strong, but in many cases the only possible evidence within reach of the fact whether she was or was not in his service, especially where, if in his service, she certainly was not in the house, and the fact that she was not in the house could be accounted for only by him and her. If it was proposed to prove the fact, whether she was or was not in his service, conversation about the legacy though not admissible to prove upon what terms it was given, to alter, detract from, or add to the terms of the will, might be evidence of the fact that he conversed upon that legacy, as being due; as it could not be, unless she was in his service; and it was, therefore, competent to prove the fact that she was still in his service."

Sir William Grant, who was then Master of the Rolls, decided in favor of the legatee in the last-mentioned case of Herbert *v.* Reid (sup.). Lord Eldon affirmed the decree. Thus the legatee was held to be in the service of the testator at the time of his death, although she was actually out of the house, and had been so for a fortnight preceding the death. This case was relied upon by Mr. Justice Sargant in the recent case of Re Cole; Cole *v.* Cole, to which we have referred.

No doubt the recent case primarily concerns beneficiaries under testamentary dispositions. But, as we have pointed out, it also concerns persons interested under such contracts as contracts of service. Many employers and commercial and other concerns agreed with their employees who left their service to volunteer for service in the Army to continue to pay wages or to make up the pay to certain amounts. Sometimes these employees have not returned in accordance with the understanding upon which they have been receiving pay while in the Army from their employers. In cases such as these the question must arise as to up to what point of time the employee is entitled to receive what was intended as an inducement or as an as-

sistance towards voluntary enlistment. There will no doubt be a number of such cases in the immediate future.

Another class of case is illustrated by the recent case of Stretch *v.* Scout Motors Limited (118 L. T. Rep. 665), where certain employers had caused to be posted up in their works notices to the effect that from a certain specified date a war bonus would be credited to all employees and paid out at the end of the war, but that if an employee should leave before the date of disbursement that employee would forfeit all claim to the bonus. On a date subsequent to the specified date, and while the period of the war bonus was, as it were, running, the plaintiff who was one of the employees enrolled as a war munitions volunteer under the Munitions of War Act 1915. By so doing he became liable to be transferred from the employers' works to any controlled works under the direction of the Minister of Munitions. The plaintiff was, in fact, subsequently transferred, and the question arose whether he was entitled to the bonus. Mr. Justice Lush held that, inasmuch as the plaintiff had not voluntarily left the employers' works, he was entitled to the bonus. But the Court of Appeal held otherwise, and consequently the plaintiff failed in his claim to participate in the bonus.

The question of compliance with a condition imposed by a testator on his legatee has been raised in a number of cases. Strange to say, the general tendency would appear to be more strict than formerly. A distinction appears to have grown up in this respect between conditions subsequent and conditions precedent. The purport of this distinction would appear to be this, that the former is less favorable to the legatee than the latter. Certainly there are some cases which appear to work a very considerable hardship. Thus it has been held that a condition that a legacy shall be claimed within a certain time or not at all, defeats the legacy by the lapse of time without a claim, although the unfortunate legatee was wholly unaware of the existence of the gift or indeed of the death of the testator.

In the case of Powell *v.* Rawle (18 Eq. 243) the testator directed his executors to invest a certain sum and to pay the income to his daughter for life, and after her death to hold the capital in trust for her children. There was, however, a proviso to this gift that if the bequest was not claimed within three months after the testator's death, the bequest should lapse. The daughter did not know of the legacy, nor did she indeed hear of the testator's death until two years afterwards. Yet, on the authorities, Vice-Chancellor Bacon found himself forced to hold that the bequest failed. It was, as his Lordship stated, a hard case.

Conditions defeating a legacy or a life interest in the legatee or life tenant becoming a nun, are frequently the subject matter of dispute in the courts, so also are conditions against marriage with some particular person. A condition against marriage at large has, of course, been held as void on the ground of public policy. There would seem to be authority for the proposition that a condition imposed by a well-intentioned parent against his daughter marrying a man without a certain specified income would be held void as against public policy in that it amounted to a general restraint on marriage. It would seem from the arguments in the case of Bellairs *v.* Bellairs (18 Eq. 510), that these principles relating to restraint on marriage were originally derived from the decisions of the old ecclesiastical courts.

Alienation or bankruptcy are often made conditions in relation to gifts. By reason of the Bankruptcy Act, these provisions must now be very carefully drawn if they are to be effectual. Again, conditions as to residence are well-known cases. A gift to A. so long as she shall reside on Blackacre was at one time a frequent form of gift. Conditions of this kind may be found to offend against sect. 51 of the Settled Land Act 1882. That section renders void any direction or declaration, or similar provision contained in any will or settlement which purports or attempts to forbid a tenant for life to exercise the powers of a tenant for life bestowed by the Settled Land Acts. This section may operate to vitiate a condition in a will which does not constitute the settlement within the meaning of the Acts. The effect is that a life interest, for instance, given to a tenant for life of Whiteacre by some stranger, and which is made terminable if she ceases to dwell in the mansion house on Whiteacre would be rendered ineffectual, because it induces or tends to induce or fetter the free exercise of the power of sale which the Settled Land Acts bestow on her as a tenant for life. The point, it is conceived, often misses attention.

Indeed, the law relating to conditional bequests either of realty or personalty is very multifarious in its branches. The war will introduce a new branch. The recent case of Re Cole; Cole *v.* Cole (sup.) is one of the first, if not the first, of the war decisions on the subject. Hence its importance.—*Law Times.*

Cases of Interest

Delay of Remittance in Mail as Affecting Loss of Rights Through Nonpayments.—In Kays *v.* Little, 103 Kan. 461, 175 Pac. 149, reported and annotated in 1 A. L. R. 675, it was held that a gas and oil lease would not be cancelled for failure to pay a rental at a stipulated time where it appeared that the lessee remitted the amount of the rental by registered letter but that the remittance failed to reach the place of payment in time because of delay in the mails. The conclusion of the court, after an examination of the facts, was stated thus: "The plaintiff attempted to enforce the forfeiture of Foster's rights under the lease, although Foster was diligent in doing what the lease required that he should do. He manifested no intention to abandon his rights under the lease, not even by neglecting to make any effort to pay the rental required until after the time fixed for that payment. He attempted to make those payments before the stipulated time. It was not through any act of his that the payment did not reach the plaintiff in ample time. Under the circumstances, it would have been inequitable to have granted the plaintiff the relief he asked."

Liability of Labor Union for Circulating False Statement with Respect to Industrial Dispute.—In Martineau *v.* Foley, 231 Mass. 220, 120 N. E. 445, reported and annotated in 1 A. L. R. 1145, it was held that the circulation by a labor union among master masons of a statement that members of the union would refuse to work for certain contractors for the false reason that they had been working nonunion masons, for the purpose of preventing such contractors from securing mason work, which resulted in putting the contractors out of business, gave them a right of action for damages, although the purpose of the union was the lawful one of furthering the interests of its members. The court, after reviewing the facts, said: "These facts, and their legitimate inferences, plainly show an intentional and harmful interference with the business of the plaintiffs. The defendants not only refused to have business relations with the plaintiffs, but combined to prevent contracting masons from having business relations with them. It is apparent from the charge of the trial judge that the wrongful act of the defendants, on which the plaintiffs relied, was the means

employed by the members of the union to accomplish their purpose, namely, the circulation of a statement which was known to be untrue and was circulated to prevent the plaintiffs from employing or contracting with master masons. Even assuming that the purpose of the defendants was a lawful one, the means they employed to accomplish it were unlawful. The sending out of this false statement, with intent to destroy the business of the plaintiffs, was malicious within the legal meaning of that word, was without legal justification, constituted an unlawful conspiracy, and entitled the plaintiffs to recover substantial damages."

POWER OF TESTAMENTARY TRUSTEE TO PURCHASE AT HIS OWN SALE.—It seems that a testamentary trustee with power to sell cannot purchase the trust property from himself at private sale. It was so held in Clay *v.* Thomas, 178 Ky. 199, 198 S. W. 762, reported and extensively annotated in 1 A. L. R. 738, wherein the court, after an exhaustive review of the authorities, said: "In some cases, as will be found from the authorities, supra, a trustee, especially if he be one not vested with the power of sale, may be empowered by a court of equity to become a bidder at the sale of the trust property. But we think, that, practically without exception, the exercise of such authority by the court is always confined to cases where the trust property is sold at public sale, where the bidding is competitive, and where the court rightfully has jurisdiction of the persons of both the trustees and cestui que trust, as well as of the rem, in a proceeding justifiably brought for the purpose of securing the aid or procuring the advice of the court in carrying out the trust. But where the property is not already in custodia legis, in the character of proceeding just described, and where the trustee has full and complete authority from the creator of the trust to sell, we have been unable to find any authority for a court of equity, in proceedings brought for that purpose only, to remove by its judgment the disabilities of the trustee, so as to enable him to legally purchase the trust property from himself as trustee, nor have we been able to find any authority in the character of case just described, whereby a court of equity, in a proceeding brought for that purpose, might approve of a private sale of the property by the trustee to himself, so as to make it effectual and binding against the cestui que trust."

LIABILITY OF MASTER FOR INJURY TO SERVANT DURING LABOR DISPUTE.—One is not negligent in employing another to assist in expelling a dangerous mob from his premises, during a labor dispute, if the facts are not concealed from the employee, so as to become liable for injuries inflicted on the employee by the mob. It was so held in Manwell *v.* Durst (Cal.), 174 Pac. 881, reported and annotated in 1 A. L. R. 669, the court saying: "It must, we think, be conceded that defendants had an absolute right to solicit and employ those people to assist them in clearing their premises of this dangerous mob, the existence of which is so specifically alleged, even though the service to be rendered was one dangerous to those rendering it. Many necessary employments are notoriously hazardous in the very nature of things, and certainly it is not the law that the mere fact of employing one to render such a service constitutes negligence. Of course, in such a case, the employer must use what is reasonable care under the circumstances to protect his employee from injury in the rendition of his service; but there is no allegation of any omission in this regard, as there was in McCalman *v.* Illinois C. R. Co. 132 C. C. A. 15, 215 Fed. 465, cited by appellants. And, where the danger is not obvious from the very terms of the employment and the nature of the service prescribed, it may freely be conceded that it is the duty of the employer to acquaint the employee with the facts of which he has actual or imputed knowledge, and that, if he fails to do this, he is guilty of negligence. In such a case, it is the employment without informing the employee of the danger that constitutes the negligence. . . . In the case at bar, as we have seen, there is no allegation whatever in this regard, and without such allegation we cannot see that the complaint stated negligence in the matter of the employment of Manwell."

NATIONAL PROHIBITION AMENDMENT AS SUBJECT TO STATE REFERENDUM.—In Herbring *v.* Brown (Ore.), 180 Pac. 328, it was held that the referendum provisions of the Oregon constitution apply only to proposed laws, and not to legislative resolutions, memorials, or the like, and hence that a joint resolution of the legislature ratifying the prohibition amendment to the Federal Constitution is not subject to referendum to the people of the state for approval or rejection. The court, after quoting the referendum amendments to the state constitution, said: "To ascertain what is meant by the terms 'bill' and 'act,' as used in the amendments quoted above, we must refer to the sense in which they were used in the constitution before the initiative and referendum amendments were passed. The word 'bill' occurs in section 1 of article 4 of the original constitution, where it is said, 'The style of every bill shall be, "Be it enacted by the Legislative Assembly of the State of Oregon," and no law shall be enacted except by bill,' thus indicating that a 'bill' is a proposed law; a document in the form of a law presented to the Legislature for enactment. The same word is used in sections 18 and 19 of article 4, and section 15 of article 5, and in the same sense as above indicated. We come now to the term 'act,' as used in the constitution. In section 20 of article 4 we find the following: 'Every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title.' In section 21, art. 4, the following occurs: 'Every act and joint resolution shall be plainly worded,' etc. In section 22 of the same article, it is ordained: 'No act shall ever be revised or amended by mere reference to its title,' etc. And in section 28 it is prescribed: 'No act shall take effect until ninety days from the end of the session,' etc. No one can read these excerpts without at once arriving at the conclusion that, as referred to in the constitution, the term 'bill' imports a document in the form of a law, presented to the Legislature for enactment, and that the term 'act,' as there used, means a bill which has been enacted by the Legislature into a law. That the framers of the constitution intended to preserve the well-known distinction between 'acts' and 'joint resolutions' is indicated in section 21, supra, wherein it is required that 'acts' and 'joint resolutions' shall be plainly worded. The initiative and referendum amendments were passed and should be construed in the light of the construction put upon the terms 'bill' and 'act' by the instrument they proposed to amend, and taking this view it must be held that, as a joint resolution is neither a bill nor an act, it is not subject to the referendum."

LIABILITY FOR DESTRUCTION OF LAWYER'S PAPERS BY JANITOR OF OFFICE BUILDING.—In Weiss *v.* Gordon (Tex.), 209 S. W. 486, it was held that the owner of an office building was liable in damages to a lawyer tenant for the destruction by the janitor of the building of valuable papers belonging to the tenant. Affirming a judgment for the tenant in the trial court, the Court of Civil Appeals disposed of two of the principal assign-

ments of error as follows: "Appellant's first assignment is as follows: 'That in order for the plaintiff to recover herein it was necessary for him to allege and prove such facts as would show that the wrongful act of the janitor in destroying the papers, the value of which is sought to be recovered in this case, was done while said janitor was in the prosecution of the business of the defendant herein, and, the evidence failing to show this, the court erred in rendering judgment for the plaintiff, and said judgment should have been for the defendant.' We cannot sustain this assignment. Under the facts of this case, this janitor was acting within the scope of his employment at the time he cleaned out appellee's office. Appellant testified: 'I furnished him with pass-keys to all of the rooms. . . . The occupants of the offices called on him pretty much to do something for them.' W. M. Coleman testified that he instructed the janitor not to destroy anything in the office unless it was in the wastebasket or unless the occupant of the office instructed him to do so; that the janitor who destroyed plaintiff's property had the same kind of instructions as the others. 'He might go through the offices to get to the windows to wash them, but he was instructed not to clean the offices, and never move anything unless instructed by the occupants.' This witness was in the employ of the defendant, and looked after the janitors in the defendant's office building. From this last statement of this witness, it is clear that it was the duty of this janitor, when instructed to do so by appellee, to clean out his office and to remove this waste paper. . . . Appellant asserts the further proposition that appellee was guilty of contributory negligence in not telling appellant of the loss of these papers for two days. The assignment cannot be sustained. As said above, this janitor was the servant of appellant, and appellee was authorized to act on his statements. There was no duty, contractual or otherwise, resting on appellee to make this report to appellant at any particular time, nor did appellee have notice of any facts that would have caused him to believe that these papers could have been recovered by any action taken by appellant. Appellee did not agree with the janitor to conceal this information from appellant, but simply did not inform appellant of the loss for two days. Where no duty rested on appellee to give this information to appellant within any special time, under the facts of this record, he cannot be guilty of negligence in failing to do so for two days."

VALIDITY OF STATUTE FORBIDDING EMPLOYEES TO RECEIVE TIPS.—In Dunahoo *v.* Huber (Iowa), 171 N. W. 123, it was held that the provision of the Iowa Code making it a crime for employees in certain occupations to accept or solicit tips but permitting by implication employers in the same occupations to receive such gifts is invalid as granting special privileges or immunities within the state constitutional prohibition. The court said: "It will be observed from an analysis of the statute 'that only the employee of a hotel, restaurant, or barber shop is prohibited from accepting a tip or gratuity. The proprietor of the hotel, restaurant or barber shop is not interfered with or prohibited from accepting such gift. While an employee of a person engaged in the transportation of passengers may not receive any gratuity or gift, such person may under like circumstances accept favors of this kind. An employee is defined by Webster as 'one employed by another; a clerk or workman in the service of an employer, usually distinguished from an official or officer or one employed in a position of some authority'; and a like definition is found in the Century Dictionary. See Johnston *v.* Barrils, 27 Or. 251, 41 Pac. 656, 50 Am. St. Rep. 717. Under this act the proprietor of a hotel, restaurant, or barber shop, even though engaged in the same employment, would be perfectly free to accept tips or gratuities or anything of value while the employee working at his side and engaged in the same occupation might be prosecuted for having committed a crime should he do the same thing That the proprietor would not be likely to be made the recipient of such a so-called courtesy does not answer the criticism. . . . Tipping may be an evil, but this does not justify discrimination between classes in order to put it down. In so far as the public is concerned, the evil of tipping the employer is quite as obnoxious to good morals as though it were done to the employee. Surely, here there can be no ground for discrimination. Nor can tipping the employee be said to work an injury to him, for he is free to decline the gratuity, and if it be claimed that his character be in some way affected thereby, there is no ground for saying that like consequences would not result to the employer under the same circumstances. Nor are we ready to accede to the proposition that tipping is necessarily a wrong by the employee against the employer. That necessarily depends on the nature of the employment. If the employee were working by the piece or receiving so much for the performance of a particular task, it would be entirely immaterial to the employer whether he accept a gratuity or not. In such a situation the employer would not be affected, even though greater care were bestowed or more time given by the employee than were the gratuity not received. It might prove an injury only in those instances where additional time is consumed by the employee when time furnishes the basis of compensation. No such distinction is attempted in the statute. Moreover, the tip or gratuity is customarily paid after the service has been rendered, and there is no ground for saying in general that any additional compensation is accepted from the patron at the expense of the employer; rather the giving of such gratuity is an expression of satisfaction by the patron of whatever service has been rendered. The proprietor of a hotel, restaurant, or barber shop often renders service in connection with employees, and we entertain no doubt but that permitting the employer, often unknown to the patron to be such, to accept tips or gratuities and denying a like privilege to the employee is unfair discrimination and such legislation is prohibited by the section of the Constitution quoted."

LIABILITY OF FATHER FOR MISREPRESENTING AGE OF CHILD TO EMPLOYER.—One induced to employ a minor under statutory age by false representations of the minor's father that he has attained the prescribed age may hold the father liable for the expenses to which he is subjected by a recovery against him by the minor because employed in violation of the statute, for injuries received in the employment. It was so held in Stryk *v.* Mnichowicz, 167 Wis. 265, 167 N. W. 246, wherein Winslow, C. J., said: "The following propositions are decided in this case: I. Where a person is induced by the false representation of another to do an act which, in consequence of such misrepresentation, he, without negligence on his part, believes to be neither illegal nor immoral, and which would not be illegal or immoral if the representations were true, but which is in fact a criminal offense, he may recover from the maker of the representation any damages sustained by him proximately resulting from the act. Burrows *v.* Rhodes [1899] 1 Q. B. 816, 68 L. J. Q. B. N. S. 545, 63 J. P. 532, 48 Week. Rep. 13, 80 L. T. N. S. 591, 15 Times L. R. 286; Morrill *v.* Palmer, 68 Vt. 1, 33 L. R. A. 411, 33 Atl. 829; Hess *v.* Culver, 77 Mich. 598, 6 L. R. A. 498, 18 Am. St. Rep. 421, 43 N. W. 994. II. The rule that a minor, suffering an injury while engaged in an

employment which the law forbids him to be engaged in on account of his age, cannot be barred of his recovery nor subjected to an action or counterclaim for damages because he misrepresented his age when he was employed (Stetz *v.* F. Mayer Boot and Shoe Co., 163 Wis. 151, 156 N. W. 971, Ann. Cas. 1918B 675) does not apply to the father or other third person upon the faith of whose false representations the minor was employed. The law prohibiting the employment of children of tender years at dangerous occupations is for the protection of the children themselves, and public policy forbids that they should be capable of dispensing with its provisions. The same consideration, however, does not apply to the act of the parent. No good reason is perceived why he should not answer for his wrong." In the course of a vigorous dissenting opinion, Owen, J., said: "The right of action here sanctioned may well be denied upon grounds of public policy, the promotion of the general welfare, and in the interests of the enforcement of our Child Labor Laws. It may also be firmly grounded upon another consideration, and that is, that the employer of labor has no right to rely upon the representation of the father who is so keen to convert his children into revenue producers that legislative restraint in the form of criminal penalties is deemed necessary. By § 1728j, Statutes, it is provided that when there is any doubt in a court proceeding as to the age of any child, a verified baptismal certificate or a duly attested birth certificate shall be produced and filed with the court. In case such certificate cannot be secured, upon proof of such fact, the record of age stated in the first school enrolment of such child shall be admissible as evidence thereof. It requires no argument that in this state, at this time, the employment of children of unsuitable age in dangerous employments is of great public concern. Our comprehensive statutes upon the subject disclose indubitable evidence of legislative recognition of that fact. . . . When the importance of this matter is so generally conceded, I hold that an employer of labor should not be permitted to rely upon the representations made by the father concerning the age of his child whom he proffers for employment. His responsibility should be less shifting and evasive. He should be required to satisfy himself in some of the methods mentioned in § 1728j, Statutes, or by some other reliable evidence, that the minor is of employable age."

News of the Profession

THE WOMEN'S BAR ASSOCIATION OF ILLINOIS held its annual meeting June 6.

THE TEXAS BAR ASSOCIATION will meet at Galveston July 1 and 2. Elmer Johnson is the president.

IOWA BAR ASSOCIATION.—The annual convention of the Iowa Bar Association took place at Davenport June 26 and 27.

TEXAS JURIST PASSES AWAY.—Judge J. P. Yates of Greenville, Texas, is dead after a lingering illness.

DEATH OF CHICAGO LAWYER.—Alexander H. Heyman of Chicago died recently. He was born in New Orleans.

THE KENTUCKY BAR ASSOCIATION held its annual meeting at Lexington June 26 and 27. The president, John K. Todd of Shelbyville, presided.

MISSOURI LAWYER DEAD.—The demise of Rush C. Lake of Kansas City, Missouri, is announced. He was active in Republican politics for thirty years.

LOUISIANA BAR ASSOCIATION.—Walter L. Gleason of New Orleans was elected president of the Louisiana Bar Association at its annual meeting at Baton Rouge.

DEMISE OF ST. PAUL LAWYER.—Charles E. Hamilton, a well-known St. Paul attorney, is dead at the age of seventy-three. He was born in England.

VIRGINIA BAR ASSOCIATION.—At a meeting of the Virginia Bar Association held at Richmond, May 16, Randolph Harrison of Lynchburg was elected president.

THE FLORIDA BAR ASSOCIATION held its annual meeting at Atlantic Beach, Florida, June 10-11. William Hunter delivered the president's address.

SIOUX CITY ATTORNEY DEAD.—The death of Dan H. Sullivan, a widely known Sioux City attorney, occurred recently. He was distinguished as a criminal lawyer.

CHANGE IN OFFICE OF COUNTY ATTORNEY OF TEXAS.—Newton Crane, county attorney of Dewitt county, Texas, has resigned. His successor is W. E. Neely of Yoakum.

DEATH OF WISCONSIN JURIST.—Judge John Goodland, of Appleton, Wisconsin, is dead at the advanced age of eighty-eight. He served on the Circuit bench for twenty-four years.

THE CHICAGO BAR ASSOCIATION held a dinner at the Hotel La Salle June 10 in recognition of its four hundred members and other lawyers in the service.

PROMINENT OHIO LAWYER DEAD.—Frank E. Pomerene of Coshocton, Ohio, died June 20. He had an extensive practice and was a trustee of Ohio State University.

NEW SUPERIOR COURT JUDGE FOR INDIANA.—William T. Gleason has been named judge of the newly established superior court No. 2 of Terre Haute, Indiana.

VIRGINIA JUDGE RESIGNS.—Judge Stafford G. Whittle, president of the Supreme Court of Virginia, has resigned. He went on the bench in 1893, succeeding Judge A. A. Phleger.

MISSISSIPPI BAR ASSOCIATION.—At the recent meeting of the Mississippi Bar Association at Clarksdale Judge J. B. Harris of Jackson was elected president of the association.

PENNSYLVANIA JURIST DEAD.—Judge James Watson Over, president judge of the Orphans' Court, Fifth Judicial District of Pennsylvania, is dead. He was on the bench 38 years.

ILLINOIS JUDICIAL CHANGES.—The Illinois Supreme Court has appointed Judge Martin M. Gridley of the Superior Court a judge of the Appellate Court, branch 1, first district, to succeed Judge Charles A. McDonald.

PASSING AWAY OF VIRGINIA LAWYER.—William W. Woodward of Newport News, Virginia, passed away recently. He was the law partner of Colonel Maryus S. Jones and they maintained offices in Hampton and Newport News.

DALLAS LAWYER MADE TELEPHONE ATTORNEY.—J. D. Frank of the Dallas, Texas, bar has been appointed general attorney in Texas for the Southwestern Telegraph and Telephone Company. He succeeds the late Shirley English.

GENERAL SOLICITOR OF WABASH RAILROAD RESIGNS.—James L. Minnis of St. Louis, for twenty-five years with the Wabash Railroad, has resigned as vice-president and general solicitor of the company. He is to resume the practice of law.

TEXAS JUDICIAL CHANGES.—The vacancy in the office of county judge of Kinney county, Texas, created by the resignation of H. E. Veltmann on account of ill health, was filled by the appointment of James T. Nolan.

RESIGNATION OF RHODE ISLAND JURIST.—Judge Darius Baker of the Rhode Island Supreme Court has resigned after nearly forty-two years' continuous service in the Probate, District, Superior and Supreme courts.

BANK ATTORNEY OF CHICAGO ENTERS PRIVATE PRACTICE.—George L. Wire of Chicago has resigned as attorney for the National City Bank to enter private practice as a member of the law firm of Nelson, Little, Gordon & Wire.

COUNTY ATTORNEY OF MINNEAPOLIS APPOINTS ASSISTANTS.—William M. Nash, county attorney for the county which includes Minneapolis, has appointed three new assistants, namely, Floyd B. Olson, Arthur C. Lindholm and Harry M. Griffith.

THE ARKANSAS BAR ASSOCIATION held its twenty-second annual convention in Little Rock May 29-30. Judge George T. Page, president of the American Bar Association, was the chief speaker. George B. Rose was the toastmaster at the annual banquet.

CHANGES IN FEDERAL COURTS.—Judge David P. Dyer of the United States District Court for the Eastern District of Missouri has resigned. He was appointed in 1907 and is eighty-one years of age. A vacancy also exists in the Western District of South Carolina owing to the death of Judge Joseph T. Johnson. Judge Johnson was in Congress for sixteen years, and when the federal court for the western district of South Carolina was created in 1915 he received his appointment as judge.

ASSISTANT ATTORNEY GENERAL OF LOUISIANA RESIGNS.—Harry Gamble, assistant attorney general of Louisiana for about eight years, has resigned to practice law in New Orleans. T. Semmes Walmsley of New Orleans has been appointed an assistant attorney general in consequence of such resignation.

THE ILLINOIS BAR ASSOCIATION met at Decatur, May 28. The annual address was delivered by Walter M. Provine of Taylorville, president of the organization, the subject being "The Courts and Labor." At the annual banquet Judge George T. Page, president of the American Bar Association, and United States Senator S. E. Spencer of Missouri spoke. Frederick A. Brown of Decatur presided.

OKLAHOMA JUDICIAL CHANGES.—Chief Justice Summers Hardy of the Oklahoma Supreme Court has resigned to become general counsel for the Standard Oil interests. Judge Thomas H. Owen, vice chief justice, now becomes the head of the court. District Judge W. J. Campbell of the Rogers-Nowata district, Oklahoma, has resigned to accept a position as counsel for the Producers & Refiners Corporation of Tulsa. Charles W. Mason of Nowata, who held a captain's commission during the period of the war, succeeds the latter on the bench. County Judge Carpenter of Greer county has resigned and his successor is H. D. Henry. A. A. McDonald of Hugo has been appointed judge of district 27, comprised of McCurtain, Choctaw and Puchmataha counties.

"That country is undutiful and unfaithful to its citizens which sends them out of its jurisdiction, to seek justice elsewhere."—Per Ellsworth, J., in Hatch *v.* Spofford, 22 Conn. 499.

English Notes*

RIGHT OF ALIEN TO HOLD OFFICE.—The Omagh Board of Guardians have elected as a medical officer a gentleman, Dr. McCortan, who is duly qualified, but who is admittedly an alien, a citizen of the United States. The question arises: Is an alien qualified for the office? The Local Government Board have power to refuse to sanction the appointment, and apparently need not give any reason (*Guardians of the Lismore Union v. Local Government Board for Ireland* (1917, 2 Ir. Rep. 27). In that case the central authority refused to sanction the appointment of a doctor of military age during the war, and the King's Bench Division upheld them in this course. An alien is not disqualified to hold office, but under the existing law he may be deported, or he may not be allowed to land in this country, and hence the placing of a large district in the charge of such a man is a serious step. The matter is certain in any event to find its way into the courts of law.

INTERCHANGE OF STUDENTS AND PROFESSORS BETWEEN INNS OF COURT AND UNITED STATES.—"The presence from across the seas of a number of students from the Dominions and the United States, under the auspices of the Council of Legal Education, raises the question," says the *Law Times*, "whether the opportunity might not be taken for some permanent arrangement to be made at the Inns of Court for an interchange of students and professors. Although the present arrangement is of a temporary character for men who can be released for a short period from their military duties, there is no doubt that it will be sufficient for them to appreciate the advantages of study in this country, so that upon their return others will desire to follow the same course. Similarly, in respect to the teachers, it would be an advantage for English students at the Inns of Court to have an opportunity for study under some of the distinguished professors of the law schools in the United States. Since some of the Benchers of the Middle Temple have taken a leading part in facilitating the present arrangements, it might well be that from the same direction assistance might be forthcoming with the co-operation of the United States Ambassador, who would thus commemorate his association with them in creating one more link between the Inns of Court and the United States."

A VERSATILE JUDGE.—While most judges are content to confine the exercise of their energies within the domain of law, Sir John H. A. Macdonald, whose death is announced, was a striking exception to this rule. Although for the long period of twenty-seven years he was Lord Justice-Clerk of Scotland, and as such presided in the Second Division of the Court of Session, his voracity for work of all kinds was prodigious. He was the author of the standard treatise on the Criminal Law of Scotland, a subject which he did much to simplify when, as Lord Advocate, he carried through Parliament the Criminal Procedure (Scotland) Act 1887; but the subjects upon which his pen was active even to the end may be termed legion, including, as they did, military tactics—he was an enthusiastic volunteer—science, motoring, fiction, and autobiography. A man of original and inventive ideas, he probably would have attained greater distinction in a sphere where his scientific attainments had a greater outlet than in the law in which, although he did his work satisfactorily enough, he can scarcely be said to have

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* With credit to English legal periodicals.

shone with any special luster. One of his colleagues on the Bench—Lord Young—who at times could say pungent things, had a gibe at his chief on one occasion. In a case before the Second Division one of the litigants was named Macdonald. "I thought," remarked Lord Young, "that there were no Macdonalds outside Skye." "You will find them all over the world," said the Lord Justice-Clerk. "Yes, and sometimes in the most unexpected places," was Lord Young's somewhat bitter retort.

THE PARLIAMENTARY OATH.—The taking and the subscribing by members of both Houses of Parliament of the oath required by law, which constitutes so large a part of the proceedings of the first few days of a new Parliament, a ceremony which has been the occasion of many stirring and momentous incidents in the history of Parliament, is a requirement of modern origin. The Parliaments of the Middle Ages asked no special oath from their members as a legal preliminary to the fulfilment of their duties. The institution of the oath is wholly due to the religious conflicts of the sixteenth century. The oath of supremacy was required to be taken by the Commons alone in 1563 (5 Eliz. c. 1), and the oath of allegiance in 1610 (7 Jac. 1, c. 6). These oaths were administered, not in the Chamber of the House, but in one of the rooms of the Palace of Westminster, by the Lord Steward or his deputy. It was not until 1678 that these oaths, with an additional declaration against the doctrine of Transubstantiation, were prescribed to be taken by both Houses and in Parliament (30 Car. 2, st. 2, c. 1). The form of the oath has undergone many changes. As provided by 31 & 32 Vict. c. 72, it consists in the swearing "of faithful and true allegiance to the Sovereign, his or her heirs and successors according to the law." Acts, however, have been passed from time to time for the relief of persons to whom the form of oath, or the taking of an oath, was objectionable, and since 1888 the Oaths Act (51 & 52 Vict. c. 46, s. 1) enables any person to make affirmation in all cases wherein an oath is required, on stating either that he has no religious belief or that it is contrary to his religious belief to take an oath. "A survey," writes Professor Redlich, "of the whole history will convince anyone that the members' oath of allegiance does not arise out of any constitutional principle inherent in the nature of Parliament. It has been merely a political expedient for narrowing the circle of persons eligible for membership."

TIPS AS ELEMENT OF DAMAGES FOR WRONGFUL DISMISSAL OF SERVANT.—An interesting recent case dealing with the measure of damages to be accorded to a servant who has been wrongfully dismissed by his master, is Manubens *v.* Leon (120 L. T. Rep. 279; (1919) 1 K. B. 208), where a hair-dresser wrongfully dismissed his assistant, and the question was whether gratuities given to him by customers should be taken into account in assessing the amount of damages. It is a matter of common knowledge that the man who cuts one's hair expects a small gratuity for doing so. No doubt this is considered in fixing the amount of his wages. According to the statement in Lord Halsbury's Laws of England (vol. 20, p. 111): "If the servant elects to treat the contract as continuing and sues for damages for its breach, he is entitled to recover (1) the estimated pecuniary loss resulting as a reasonable and probable consequence from the premature determination of his service; (2) the amount of wages earned but not paid at the date of his dismissal, provided that such amount is expressly claimed; and (3), if he is engaged on service away from home, the expenses of his journey home." It is not always remembered that it is the duty of the servant who has been wrongfully dismissed to minimize his loss by obtaining, if possible, other suitable employment (*Ibid,* p. 113). It is obvious that the hairdresser's assistant, if he had not been discharged, might and probably would have obtained a reasonable sum by way of "tips," besides his regular wages, and they would form a part of his pecuniary loss. The Divisional Court held that his claim should include all such damages as necessarily flowed from the breach and were within the contemplation of the parties. "The plaintiff," said Mr. Justice Lush, "was therefore entitled to add to his claim for damages the item in dispute, inasmuch as the defendant prevented him from performing his duty and earning the tips, and thus broke his contract with the plaintiff, and part of the damages to which the plaintiff was entitled was an amount in respect of the loss of these tips."

THE TAXATION OF BACHELORS.—In a recent statement, Mr. Chamberlain as Chancellor of the Exchequer deprecated a suggestion that bachelors should be taxed. He said he had already received letters illustrative of the nature of the opposition likely to be afforded to such a proposal. A wise man would endeavor to justify a tax on bachelors not because they were unmarried, but because in proportion to their means they had fewer outgoings. That statement would be controverted by the fact that there were quite a number of cases throughout the country where men did not marry, or did not marry until late in life, because they had relations dependent on them. It was not an easy thing to transfer the burden from the married person to the bachelor with regard to the claims which the bachelor might have to be saved from the burden. A tax on bachelors is not, however, without precedent in the history of the laws of England. It is entitled to a place among the curiosities of the statute book, and is an illustration of the famous aphorism that our liberties have been bought with gold. The pressure of war taxes, which had become severe, furnished the Parliament in 1694 with the opportunity of carrying the Bill for triennial Parliaments, to which William III had refused his assent in a former session. The new Parliament of 1695 passed the great statute for regulating trials for treason, one of the strongest constitutional bulwarks for the protection of the liberty of the subject, by taking advantage of the taxation rendered necessary to meet war expenses, including a tax, which remained in force for eleven years, whereby every unmarried man had to pay a graduated tax, in accordance with his station, ranging from a shilling to 12 guineas a year. This tax was imposed simply as a method of raising money. It had no social or economic purpose such as an encouragement to marriage with a view to the prevention of a diminution in the population. On the contrary, the marriage ceremony was subjected to heavy taxation, and a payment was enforced of £1 2s. 6d. upwards on the birth of a son. The tax on bachelors of 1695 should not be decried when it is borne in mind that it may be regarded as part of the price paid for securing the safeguards of liberty created by the Act of 1695 for regulating trials for treason.

EVIDENCE OF SUBSEQUENT CONDUCT OF PARTY AS AID TO CONSTRUCTION OF DEED.—The recent judgment of the Judicial Committee of the Privy Council in Watcham *v.* Attorney-General of the East Africa Protectorate (120 L. T. Rep. 258) enunciates a principle which it is thought will be new to many lawyers. It is generally considered, and is stated in some of the textbooks, that the subsequent conduct of a party to, or person claiming under, a deed cannot be received to aid the construction of the deed, and North-Eastern Railway Company *v.* Hastings (82 L. T. Rep. 429; (1900) A. C. 260) is cited in support of that view. But, as pointed out in the Watcham case, the lan-

guage of the instrument in the Hastings case was plain and unambiguous. In the Watcham case it was treated as well settled that in the case of an ancient deed or other document, in which there is a latent ambiguity, evidence may be given of user in order to show the sense in which the parties used the language in executing the document and the Judicial Committee decided that that principle applied also to a modern instrument, and that such evidence might be adduced for a similar purpose where the ambiguity in the language of the instrument is latent. As pointed out by Lord Atkinson in the course of his judgment in Chapman *v.* Bluck, 4 Bing. N. C. 187, Mr. Justice Park said: "The intention of the parties must be collected from the language of the instrument, and may be elucidated by the conduct they have pursued." And in the case of Van Diemen's Land Company *v.* Table Cape Marine Board (93 L. T. Rep. 709; (1906) A. C. 92) Lord Halsbury in delivering judgment said: "When these are the circumstances under which the grant is actually made (it was a Crown grant), why is it not evidence, and cogent evidence, when the taking possession of the particular piece of land is proved, and the continuance in possession before and after the grant is proved? It would be a singular application of the maxim quoted by Coke (2 Institutes, 11), *contemporanea expositio est fortissima in lege*, to suggest that proof of user must be confined to ancient documents, whatever the word 'ancient' may be supposed to involve. . . . The contemporaneous exposition is not confined to user under the deed. All the circumstances which tend to show the intention of the parties, whether before or after the execution of the deed, may be relevant." Having regard to the foregoing decisions, the statement at p. 138 of Norton on Deeds, namely, that the subsequent conduct of a party to, or person claiming under, a deed cannot be received to aid the construction of the deed—is too wide and requires modification. It is true that the learned author also states that the rule does not apply to ancient documents. But, according to the Watcham case, it also does not apply to modern ones.

Employer Prevented by Vis Major from Employing Injured Workman.—Intervention by a trade union and a threat by them to call out employees unless the injured workman in Thompson *v.* Richard Johnson and Nephew, Limited (111 L. T. Rep. 734; (1914) 3 K. B. 694), was discharged by his employers prevented the latter from giving him work which he was perfectly competent to do. He was held, therefore, not to be entitled to compensation, under the Workmen's Compensation Act 1906 (6 Edw. VII, c. 58), as the difference in the amount of his "average weekly earnings" before and after the accident which had befallen him was owing to a rule of the trade union which debarred him from the more remunerative work at which he was engaged at the time of the accident. It was, in brief, *vis major* that the employers had to bow to. Not through any fault of theirs was it that the workman was unable to continue in their employment. And the effect of that arbitrary conduct on the part of the trade union was, to such extent, to prejudice one member, at any rate, of that body. Similarly, in the recent case of Williams *v.* Oakwood Colliery Company, Limited, the workman was partially incapacitated for work by reason of the "personal injury" which he had suffered "by accident arising out of and in the course of" his employment, within the meaning of sect. 1 of the Act of 1906. He was incapable of doing his ordinary work, but light work was not beyond his ability. Accordingly, his employers offered him certain work answering that description. It was the only suitable occupation in which it was in their power to engage the workman. And he was efficient at that work and did it in so satisfactory a manner that the employers had no desire to withdraw him from it. *Vis major*, in the guise of trade union intervention, however, rendered it impracticable for the employers to permit the workman to remain occupied in that fashion. His fellow-workmen struck, and refused to return to work so long as he was occupied in the way of which they complained. In the view taken by the learned County Court judge, the employers were perfectly entitled to employ the workman in that way; and it was the duty of the workman to do the work so offered to him, it being a suitable occupation, notwithstanding that it violated the policy and principles of the trade union. Applying by analogy the decision of the Court of Appeal in Thompson *v.* Richard Johnson and Nephew, limited (*ubi sup.*), His Honor was of opinion that the employers ought not to be regarded as responsible for the unemployment of the workman, since it was solely in consequence of the position taken by the trade union that he was constrained to relinquish the light work which alone it was open to them to ask him to perform. The learned judges of the Court of Appeal, the Master of the Rolls (Swinfen Eady) and Lords Justices Warrington and Duke, saw no reason for holding that the learned County Court judge had come to a conclusion that was wrong in law. Indeed, in the face of what was thought proper to be said in the course of the judgments in Thompson *v.* Richard Johnson and Nephew, Limited (*ubi sup.*), it was only right and proper to treat the intervention of the trade union in the present case as having the result which in the court below was ascribed to it. And it is a result that is not unlikely to be often repeated.

Obiter Dicta

The Hunt.—Gallup *v.* Fox, 64 Conn. 491.

History Repeats.—Waterloo *v.* Berlin, 28 Ont. L. Rep. 206.

Shimmie or Jazz?—Dancy *v.* Walz, 112 N. Y. App. Div. 355.

Why Doesn't He Emigrate?—Goodman *v.* Wineland, 61 Md. 449.

No Way to Treat a Friend.—In Friend *v.* Childs Dining Halls Co. (Mass.) 120 N. E. 407, it appeared that the plaintiff was served with baked beans mixed with stones.

Speaking of Teetotalism?—"That which seems vain and capricious to one generation may become the wisdom of the next."—Per Pound, J., in People *v.* Beakes Dairy Co., 222 N. Y. 416.

The Unspared Tree.—In Ash *v.* Childs Dining Hall Co. (Mass.) 120 N. E. 396, it appeared that the plaintiff was injured by a tack which he found (too late) in a piece of blueberry pie.

A Prima Facie Case.—The case of In re Farthing, 202 Fed. 557, was a petition by the creditors of Farthing to have him adjudged a bankrupt. It would seem as if such a petition would ordinarily be granted as of course.

The End of Romance.—Those who in their youth followed the fortunes of the disinherited son of Cedric and the fair Rowena will be interested to know that she eventually sued him for non-support. See Ivanhoe *v.* Ivanhoe, 136 Pac. 21.

FOR MEN ONLY.—"In a country so vast as ours, tropical clothing is worn in one part, while skates and fur coats are in use in another."—Per Bijur, J., in Bower *v.* Barrett, 171 N. Y. Supp. 324. True, perhaps, as to men; but as far as women are concerned "tropical clothing" seems to be *au fait* in all parts and at all times.

A GOOD SUGGESTION.—The constant reader who suggested that by reason of the ill repute acquired by the name, the Hun reports should be given a new designation, now desires, for a like reason, the abolition of the digest heading "Prohibition." Precedent may be found in Washington where "certiorari" was legislatively abolished, presumably because the legislators couldn't pronounce it.

PUBLISHERS TAKE NOTICE!—A correspondent at Tulsa, Okla., thinking it might be of interest to the readers of LAW NOTES to know where they could obtain a "full set" of law books in a small compact edition, sends us the following ad. which recently appeared in one of the newspapers published in that city:

> FULL SET of law books, 14 large volumes, practically new; best offer takes them. Phone 5777.

A STRAY ONE.—We were a bit surprised at the discovery in a recent issue of the London *Law Times* of the following spark of humor flashing from the page devoted to prosaic "Comments on Cases": "Suggestive as is the name of the applicant in the recent workman's compensation case of Prophet *v.* Roberts and Wife (120 L. T. Rep. 239), she could scarcely be credited with the power to foretell that the House of Lords would reverse the decision of the Court of Appeal," etc. The *Times* ought to have an "Obiter Dicta" column, but, of course, one swallow does not make a summer.

APODEICTICAL.—Usually we say of an elementary rule of law that it is elementary, well-settled, fundamental or incontrovertible. But these be hackneyed terms, and they need no longer be used by the ambitious (and courageous) advocate, briefer and law-writer, for we have the authority of the Supreme Court of Missouri for the employment of the word "apodeictical." See Pitman *v.* Drabelle, 267 Mo. 78, 183 S. W. 1055, Ann. Cas. 1918D 601, wherein the learned court said: "The rule is apodeictical that the charter of a municipal corporation or a state statute will not be held to violate the Constitution if any other rational interpretation or construction can be given to it."

MIGHT HAVE BEEN PENNED TO-DAY.—"We live in a time of inquiry and innovation, when many things having the sanction of the time are questioned, and many novelties jarring with long accepted theories are proposed. In political science, there are those who would reduce government to a mere skeleton of absolutely necessary powers, purely political; and those who favor paternal government, recognizing in the sovereignty much of the authority of patriarchal rule. All this is seen chiefly in political discussions; but the late reports show that these conflicting theories are finding their way into judicial tribunals."—Per Chief Justice Ryan, in Milwaukee Industrial School *v.* Supervisor of Milwaukee County, 40 Wis. 328, decided in 1876.

A QUESTION OF VOCABULARY.—In 9 Op. Atty-Gen. 59, Attorney General Black, speaking of the interpretation to be given to a federal appropriation act, said: "He who claims a payment out of the treasury, and bases that claim upon an act of Congress, must show the payment to be authorized either expressly or by very clear implication. . . . Of course I do not mean to say that a claim ought to be defeated by straining the sense of the law against it. But if Congress has all the money of the United States under its control, it also has the whole English language to give it away with." Theoretically, of course, this is true. But the actual fact is that Congress seems to have a very limited vocabulary, especially when it comes to giving away money.

THE FOUNDER OF THE ANANIAS CLUB.—We have been advised that the following "notice" may be found duly registered in Book "I," No. 2, page 324, in the office of the Register of Deeds for Cumberland County, Fayetteville, N. Car.:

WILLIAM JONES
to
PUBLIC.

NOTICE to the Public, that I, William Jones, do hereby acknowledge myself a Public Liar, that I have said and told unnecessary lies on Jesse Northington, and his family, and says that I am sorry for the same.

5th January, 1822.

Witness: (Signed) WILLIAM JONES.
ZACHARIAH COFIELD.

North Carolina,
Cumberland County. September Term, 1822.

Then was the execution of this notice proven in open Court by Zachariah Cofield, and admitted to be registered.

Test. JOHN ARMSTRONG,
Clerk.

THE WAY OF A GRASS WIDOW WITH A MAN.—In upholding a judgment against the defendant in Ashley v. Dalton, 81 So. 488, an action for breach of promise of marriage, the Supreme Court of Mississippi seems to have been impelled by the circumstances of the case to utter wise words of caution to those who may have dealings with grass widows. We can only hope that the court was not drawing from the wells of its own experience when it spoke thus feelingly: "It would perhaps be useless to offer suggestion or counsel to a man of the age of appellant, or to lay down any proposition that would carry caution to the mind of people of his age and class, especially when it comes from his junior in years if not in wisdom. Yet it might be proper to remind others of his type that he who would trip the light fantastic toe with the terpsichorean maid must contribute coin to the man who extracts mystic music from the violin strings, or, in other words, that pleasure must be paid for with the coin of the realm; and to remind them of the truth expressed by a minor poet when he said:

> 'When of "dough" we get a batch,
> The women make us toe the scratch,
> And he who courts and does not wed,
> She will pull his leg in court instead.'

Beware of the grass widow when her eyes beam love and the shades are down low. She hypnotizes the reason, and the soul escapes the prison bars of discretion, and 'you float airily on golden clouds to rosy lands of pleasure and joy.' Temporary bliss reigns supreme in the palace of love but in the end it creates mournful memories, heartache, remorse of conscience, and a burning desire to 'blot out the past.'"

"The state is merely a corporation which the people make to serve their purpose, and not to obstruct their happiness or their natural rights. It has no claim to Divine right."—Per Robinson, J., in Woodward *v.* Blake, 38 N. Dak. 48.

Correspondence

AN OBJECT LESSON IN PROHIBITION.

To the Editor of LAW NOTES.

SIR: I have no fault to find with the conclusion reached in your editorial in the May number, entitled "An Object Lesson in Prohibition," but desire to correct several statements of fact. You refer to Oklahoma as having one of the smallest populations in the Union. According to the 1910 Federal census, the population was 1,657,000, the state ranking 23d of the 48. At present the population is at least 2,500,000. You also surmise that hundreds of liquor cases are tried during the year; you would be safe in saying several thousand, as there are several hundred in this city alone.

Oklahoma City, Okla. R. A. K.

THE PROHIBITION AMENDMENT.

To the Editor of LAW NOTES.

SIR: I have just read with great interest the article in your May issue by Howard C. Joyce on the subject of the Prohibition Amendment, and while I think his views are correct, yet when I remember some decisions of the Supreme Court I do not feel a great amount of hope that they will prevail.

The decision of that court on the Child Labor Law was undoubtedly correct although I have the greatest personal sympathy with the accomplishment of the object of that law. That decision, however, doesn't appear to be in harmony with earlier cases as to the power of Congress over the transportation of women and intoxicating liquors in interstate commerce. The attempt by the court to draw a distinction between those earlier cases and that of the Child Labor Law is not at all satisfactory. The Supreme Court seems to be fully committed to the doctrine that Congress has power to prohibit transportation in interstate commerce of intoxicating liquors on account of the evil nature of such liquor. Can we expect that that court will not uphold the validity of the prohibition amendment to the Constitution for the same reason?

Entirely aside from these considerations of a practical character, I write to call attention to a recent decision of the Supreme Court of Nebraska which appears to be in harmony with the arguments of Mr. Joyce. In the case of Allen *v.* White, 171 N. W. 52, the court uses the following language:

"It is well known that powers of corporations recognized under legislative charters are only such as the statute confers, conceding what is fairly implied is as much granted as is expressed. It remains that the charter of a corporation is a measure of its powers, and the enumeration of these powers implies the exclusion of all others. The amendment here sought changes the fundamental arrangement and plans of the corporation as organized in 1906, and hence the amendment sought is violative of the fundamental law of contracts."

The applicability of the above quotation to the subject now under consideration, in harmony with Mr. Joyce's line of argument, must be apparent. It is equally known that the powers of the government of the United States are only such as the Constitution confers, a clear exposition of this doctrine being set out in I Tucker on the Constitution beginning at section 178. It should be clear that the Constitution of the United States like the charter of a corporation is a measure of the powers of the government and that the enumeration of powers implies the exclusion of all others. If a minority of stockholders in a corporation is entitled to judicial protection as stated by the Nebraska court, why isn't a minority of the people of a country equally entitled to protection against a usurpation by the majority of a power which was never contemplated by the Constitution created by the people of the United States?

Santa Fe, N. M. FRANK W. CLANCY.

"Equity ever favors those who are prompt and diligent in the assertion of their rights, and frowns with displeasure on those who listlessly stand by during the heat of battle, and, after the smoke has rolled away, come bravely forward, and seek to deprive others of the well deserved rewards of their vigilant efforts."—Per Dent, J., in Crumlish's Adm'r *v.* Shenandoah Valley R. Co., 40 W. Va. 647.

"The prosecuting attorney goes beyond his duty when he seeks to secure a verdict by known unfair arguments. They should not be used or allowed, for if the case for the prosecution is clear such arguments are unnecessary; if not clear, a verdict procured by the use of them will not be permitted to stand."—Per Dunn, J., in People *v.* McCombie, 274 Ill. 600.

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Law Notes

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Prohibition and Bolshevism.

WHATEVER one may think of the merits of the trade union movement, the patriotic attitude maintained during the war by its present head, Samuel Gompers, and his earnest efforts to check Bolshevist tendencies in his organization, give weight to his views on the present industrial situation. He is quoted as having said recently that the effect of prohibition is to cause a spirit of discontent among the laboring classes which furthers the spread of Bolshevism. Its practical working in this respect is beyond our province, but perhaps no man in the United States is in a better position than Mr. Gompers to know whereof he speaks on this point. From the theoretical standpoint, there is every reason why prohibition should engender Bolshevism, since the two are identical in spirit. The theory on which the American republic was founded is that civil liberty is the right of every man to do as he pleases except so far as his acts interfere with the enjoyment of like liberty by others. Opposed to that is the theory that any person or class of persons who may seize the power so to do may rightfully impose on their fellows such restrictions as whim or self interest may dictate. The victory of the allied powers on the bloody fields of France merely cut off one head of that hydra. Between rule by the Kaiser and his junkers, rule by the proletariat as expounded by Lenine, and rule by the pharisaical prohibitionists, there is no distinction in principle. So close is their identity that the decisions sustaining the prohibition laws are sufficient to sustain a large share of the Bolshevist program if the ultra radical element ever gets control of a legislature. If industries lawful and respected for centuries may be wiped out by a stroke of the pen and individual rights in a recognized class of property destroyed without recompense, where is the stopping place? There are men who are as sincerely convinced that private ownership of land is iniquitous as any prohibitionist is of the evil of permitting the ownership of a quart of wine. If those persons succeeded in controlling a legislature long enough to destroy every landed interest in the state, could the Federal Supreme Court honestly say that the decision in *Crane* v. *Campbell* (245 U. S. 304, 38 S. Ct. 98, 62 U. S. (Led.) 304) did not sanction the statute? The Bolshevist hates a church as heartily as the prohibitionist does a distillery. A confiscation of all church property would bring forth an anguished wail for constitutional protection, yet where is the distinction in principle between that and the legislation for which prayers of thanksgiving have been offered? "Spirits and distilled liquors are universally admitted to be subjects of ownership and property." License Cases, 5 How. 504, 12 U. S. (L. Ed.) 256. What greater sanctity can any piece of property in the United States claim? This time when an imported horde of anarchists is clamoring for an opportunity to pillage seems ill chosen for the breaking down of the constitutional protection of property rights.

Cause and Effect.

A METROPOLITAN journal commented recently on the fact that the state of Michigan, which was at one time one of the most conservative states in the Union, is now so given over to the spirit of Bolshevism that the national socialistic party, by no means a conservative organization, has expelled its Michigan locals because of their ultra revolutionary proclivities. While the journal in question sought at some length for an explanation of the transition, its very statement would seem to be self explanatory. The spirit of Bolshevism grew up in Europe as the result of the rule of the Romanoffs and the Hohenzollerns. It is the legitimate offspring of suffering and injustice. Like a disease germ seeking a weakened organism in which to develop, the spirit of extreme radicalism will not take root in the United States except where it finds some trace of ultra conservatism to foster discontent and class bitterness. It was in the mining districts of Montana and Colorado, where gigantic monopolies control an entire industry and have been suspected of controlling legislatures and courts, that labor developed the policy of criminal violence out of which grew the I. W. W. The Soviet idea would get little hearing in New York city if there was no industrially submerged population on the East Side to listen to the ravings of its advocates. It is very well and satisfying to say that no man is poor except by his own fault and no man rich save because of his own merit. The difficulty is to convince the poor of the truth of this complacent theory. The sense of justice is inherent, and where a "square deal" prevails there may be individual malcontents but there will never be social revolution. Per contra, where injustice is flagrant the outbreak of violence is inevitable. In the present concentration of legislative inquiry on the prevention of the spread of anarchistic doctrine the greatest danger is not that the means adopted will not be presently effective, but that the revulsion of all right thinking persons against Bolshevism may be turned to account by the conservative to strengthen

their hold on public affairs and prevent legitimate and needed reforms. Never in the history of the world was a government which deserved to live overthrown by internal violence. Never has a national institution or system fallen except from its inherent vices.

Transplanting American Institutions.

IN these days we hear a great deal about "mandatories," and the idea that the more highly civilized powers can diffuse their culture in more backward states seems to be meeting with favor in some quarters. If there is any one thing which history establishes with certainty it is that institutions, whether religious, political or economic, owe their characteristics to a slow growth in the soil and atmosphere of a nation, and change those characteristics very markedly when transplanting is attempted. For example, the fairness, honesty and efficiency of our federal courts are generally recognized. The system was transplanted to Alaska, with a result described as follows by a leading Alaskan attorney in a brief recently filed in the circuit court of appeals: "Out of the eight judges who occupied the one judicial seat of the territory during the sixteen years from its organization in 1884 to the year 1900 when three judicial divisions were created, none served out his term and all but one were removed for cause, the average time of service before removal being two years. Since 1900, four judges have been removed for cause, one was recommended for removal, but was saved through political influence, and there has been hardly any time but that some one of the judges was under charges of corruption. . . . The writer has practiced his profession in Alaska for some eighteen years. During that time he has witnessed attorneys threatened with disbarment because they excepted to the court's ruling; he has witnessed a woman incarcerated solely to be held as a witness against her own husband, and when the latter's attorney objected, the attorney was publicly denounced by the Court for embarrassing the administration of justice; he has himself been charged with contempt because he interposed objection to the court's jurisdiction, such questioning of the judicial authority being considered by the presiding judge as contempt per se; he has been refused permission to enter exceptions to the court's rulings; he has been refused the pro forma order granting a writ of error; he has been refused certified copies of the court records, though the fee was tendered in advance; he has been publicly reprimanded for submitting a bill of exceptions in narrative form instead of an unabridged transcript of the stenographer's notes; he has been—but what is the good of continuing a list of incidents with which any attorney in Alaska might regale an audience for hours without going outside of his own personal experience for material." Similar statements have been made—with how much truth we cannot say—of the administration of law in the Philippines. The only conspicuous exception which now comes to mind is Hawaii, and the good results generally attributed to the introduction of the American judicial system there are due almost wholly to the remarkable qualities of one man—Chief Justice Dole. Missions, mandates and protectorates are something worse than impertinent; they do a positive injury to the supposed beneficiary because the representative of the supposedly superior race either sinks to the moral level of his surroundings once he is freed from the pressure of the public sentiment of civilization or else he is so enamored of his native institutions that he cannot resist the temptation to force them on those for whom they are unsuited.

Trial of the Kaiser.

THE learned editor of the *Lawyer and Banker* in a recent issue takes issue with the views expressed by Mr. Otto Erickson in LAW NOTES as to the amenability of William Hohenzollern to punishment for the acts of his armies, his contention being as follows: "1. The acts of the German sovereign were under all custom and law the acts of the State and not of the individual, and should be so construed. 2. Conceding for the argument that the opinion of Mr. Erickson correctly states the law, yet his authorities cited do not apply to the facts at hand, for the reason: (*a*) Such acts, however heinous they may have been, were not known as criminal under any rule or statute, internationally or otherwise, no code so defining them. (*b*) Law is a rule of action, defining what is wrong and prescribing a penalty. In the case at bar, while the Law of Nations and natural justice may have been outraged, yet it is not claimed that a punishment has until now been named for like offenses by any government or that any law has been framed covering the subject." One would think that the Kaiser was under the protection of the Constitution of the United States and that no ex post facto legislation affecting him could be enacted. Debate along that line is now somewhat irrevelant, since the decision of the allied powers has been put on a higher ground and one which is unassailable. The Council of the Great Powers decided to adopt the view that international safety justified them in establishing a new practice in dealing with those of high estate who had been responsible for causing the war. They support this new order of things on the ground that it is essential as an example for the future heads and ministers of a Government whose ambitions lead them to bring on war and for those who are guilty of cruel practices in the conduct of a war. This would seem to put an end to all cavil about precedent. Meanwhile sundry prominent Teutons are offering themselves for trial in the stead of the deposed "All Highest," their heroism being possibly assisted by the knowledge that no such offer will be accepted. A "scapegoat" is essentially an innocent person on whom the guilt of the culprit is constructively cast, and if there is a public man in Germany who does not deserve death for his own acts he has not yet come to the notice of the world.

Disregard of Law.

IN Pennsylvania a grand jury recently failed to indict certain persons charged with election frauds, and considerable popular indignation was thereby aroused. To escape personal criticism, some of the grand jurors made a public statement of the vote pro and con on the indictments in question. Defending these jurors from a censure of their action in making this disclosure a local paper said editorially:

> The sleep of the minority of the grand jury should not be disturbed. What they did they did out of the loftiest of motives, and the result of an awakened public morality transcends any breaking of precedent on its part.
>
> Technicality or ethical consideration that stands in the way of

what the minority did should be swept aside, and if necessary the law that is cited in support of the argument that it was not according to Hoyle, should be hurled into the discard. People are only safe, contented and happy with justice, and justice must not be fettered by any compromise with wrong, though that wrong be committed in the grand jury room.

This viewpoint, while appealing strongly to the thoughtless mind, is utterly destructive of the just administration of law. It may be that the law in question is wrong, but the notion that a law may be "hurled into the discard" by any person who happens to disagree with its policy is anarchy pure and simple. The idea seems to be that the majority of the grand jury disregarded their oath to find without fear or favor, and therefore if the minority disregarded their oath to keep "your own counsel and that of your fellows" the two wrongs could be made into some kind of a right. Carrying the same logic back a step further, perhaps the perpetrators of the alleged election frauds thought that the ballot law ought to "hurled into the discard" and were sustained by "the loftiest motives" in keeping the wicked Democrats (or Republicans as the case may be) out of office. It is true enough that the people will not and should not be satisfied with anything less than justice, but justice secured otherwise than in accordance with law is nothing more or less than revolution.

The Passing of the Legislature.

ONE of the phenomena of the times is the increasing tendency of legislative bodies to truckle to any organization which appears to muster a few votes. The prohibition amendment, the suffrage amendment, the Adamson law, the repeal of the daylight saving law—these are but a few of the recent instances of legislators stultifying their personal convictions under the threat of a small but compact minority. With this goes naturally an increasing disregard of measures which have no such backing. Commenting on the defeat in Texas of a measure proposed by the Bar Association to establish a unified system of courts, the *Journal of the American Judicature Society*, says:

> The State Bar Association is driven to a consideration of its standing among legislators. It is probably no exaggeration to say that the organized bar of the state has less influence upon the legislature, and this means particularly the judiciary committees composed entirely of lawyers, than the steam-fitters' union or the onion growers' association. It is from the bar that a sane and progressive solution of present trouble is to be expected, but the first work of the association may well be to advance its position to the point that its opinions will carry some weight with the highly pragmatic lawyer-legislator, who at present can snub the bar association with impunity. The legislator is indulgent toward an association which limits its activities to rapturous after-dinner eulogies of the Goddess of Justice. But when it proposes to secure legislation affecting offices, it is quite another thing.

It is a shallow pessimism which attributes this condition to a decadence of manhood. Congressmen and state legislators, while far from being the flower of the nation, are fair average representatives of a people who are far from decadence. It is more probable that the tendency under discussion represents a more or less unconscious recognition of a transition in our institutions. Rule by the people is the spirit of the age, and in its growth it is breaking down the ancient theory of representatives who, when once elected, were wholly independent of their constituency. In the transition stage the very commendable desire of representatives to give effect to the will of their constituents results in a rule by active minorities, simply because there is no adequate means by which the real will of the people can be ascertained. But the growing dissatisfaction with that perversion of popular government will inevitably force a more perfect and logical democracy wherein all important measures will be established by a referendum, and the legislature will be relegated to the position of a mere advisory council for the formation of proposed legislation.

Identification from Photograph.

THAT a photograph may be used to identify a person is of course well established. See *Udderzook* v. *Com.*, 76 Pa. St. 340. In the detection of crime it is a very common practice to exhibit to the victim several photographs and ask him to identify the perpetrator, such identification being of course followed by a personal identification at the trial. While the legal propriety of such testimony is beyond question, there are two considerations, not often adverted to, which seem seriously to impair its weight. The identification by photograph is of course much less reliable than identification of the person. Is it not a fact that the ordinary witness, having once identified a person from his photograph, will, on being confronted with a person recognized as the original of the photograph, be so far predisposed that the second identification is a mere form rising no higher in evidentiary value than the first? Reverting to the identification of the photograph, counsel in a case as yet undecided urges a unique psychological consideration which seems to have some merit. The victim of a rape was shown several photographs of negroes, and identified one as her assailant. Of this counsel argues: "Defendant lived about a mile from her house. Each of them frequented for years the town of Trappe. They may have several times passed each other on the road in or about Trappe, the one not knowing the other, or being intellectually conscious of having seen the other. When seven photos are shown a 14-year old girl, six of them being negroes whose faces by no possibility could be registered on her subconscious mind, one of them being a face from her own immediate neighborhood, which she may have passed many times on the road, without knowing it, and whose face may have unconsciously been partially impressed on her mind. She examines seven photos. She sees in one *something* that has a familiar look. May she not, while perfectly conscientious in the selection of that picture, confuse the two impressions made on her mind?" The readiness with which an honest witness may lose the sequence of events and state as part of a transaction something which he observed at another time has been commented on by the courts. See Moore on Facts, § 812. All this of course goes to the weight of the testimony rather and not to its admissibility, but it illustrates very forcibly the possibilities of error which inhere in that which presents itself at the trial as the positive testimony of an eyewitness.

Psychology at the Trial.

THE fact that the trial of most contested issues of fact involves not merely a question of veracity but nice considerations of the predisposition, perceptive capacity, and memory of honest witnesses and the operation of many subtle currents of influence, has led some to advocate

the admission of tests by psychological experts. Other writers deny the possibility of obtaining any light from such sources. Both sides of this controversy have been fully presented in previous issues of Law Notes. The opponents of the psychological expert seem to base their contention on the claim that the judges are by their experience de facto psychologists and do apply the established canons of psychology in the trial of questions of fact. Accepting this view for the moment, though with serious misgivings, it remains to be shown what good this supposed expertness does on a jury trial, the stock examples cited being always of trials without a jury or of the weighing of facts by an appellate court. The judge who attempted to display his psychological acumen before a jury would merely be paving the way to a reversal, and certainly the most enthusiastic defender of the present judicial system will not contend that the average juror is a potential Münsterberg. If we are to depart from the present haphazard method, it must be by affording the jury some measure of expert assistance, either from the witness stand or from the bench. The latter method involves of course the adoption of the English practice of allowing the trial judge to comment freely on the weight and credibility of the testimony. This practice has much to recommend it. The one objection urged against it is that the jury would be influenced unduly by the judge. Most lawyers are of the opinion that in the average case the judge is more competent to weigh the evidence than the jury. The jury system is venerated not because it is the best method of arriving at the truth but because it protects the common right against the occasional judge who consciously or unconsciously represents a special interest. In the cases, if any should arise, which call for the exercise of that function, an American jury would doubtless disregard the opinion of the court as readily as British juries have done in many historic instances. In a recent discussion of expert testimony (XLV *Med. Times,* No. 6) it was well said:

> Most of the obvious defects in the administration of our law in the conduct of trials arise out of the necessity of having some theoretically safe "step-down transformer" for the jury. Our law treats it as the palladium of our liberties for all theoretical purposes; and, inconsistently, in practical administration, regards it as the most easily disarranged mechanism in the whole machine, subject to be misguided by the slightest departure from the established, but frequently ill-understood, procedure.

Appeals by the State.

Is there any just reason why the prosecution should be denied the right of appeal in a criminal case? In a few jurisdictions an appeal to settle the law is allowed, which in no way affects the result of the instant case, but in no state is there an appeal which leads to a new trial. As a result the defendant's counsel has nothing to fear from error in his favor. His misconduct can go to the utmost limit which the trial court will permit without sending him to jail for contempt. He can make unfair comment, offer irrelevant evidence and take the fullest advantage of any errors in his favor with no fear of consequences. The accused is entitled to a fair trial, but to nothing more. If any misconduct or error gives him an unfair advantage an acquittal should be set aside as readily as a conviction is vacated for misconduct or error against him. Some courts would doubtless rule that such a provision would amount to putting him twice in jeopardy, but the contention seems unsound. A trial on an invalid indictment or before a court having no jurisdiction is not jeopardy, and on principle it should be competent for the legislature to declare that a trial at which material error was committed against the state shall not constitute jeopardy. Under such a system the pettifogger would find his occupation gone, for an acquittal secured by trickery would merely mean a few months more imprisonment for his client pending a new trial. Criminal trials would be raised to the level of dignity which now surrounds the trial of important civil issues and punitive justice would lose something of its impotence.

The Turntable Doctrine.

In *Ziehm* v. *Vale,* 98 Ohio St. 306, 120 N. E. 702, Judge Wannamaker in a separate opinion took occasion to criticise a former decision (*Wheeling, etc., R. Co.* v. *Harvey,* 77 Ohio St. 235, 11 Ann. Cas. 981, 83 N. E. 66, 122 Am. St. Rep. 503, 19 L. R. A. (N. S.) 1136), which repudiated the "turntable doctrine," saying in conclusion: "Many cases no doubt sustain the Harvey case, but an equal number of cases may be found in the books sustaining witchcraft, slavery, and other inhumanities and infamies in the light of present day civilization and jurisprudence." Progressivism, especially in jurisprudence, is a need of the hour, but it involves some strain of the imagination to see any progress in the turntable doctrine, unless it is to be deemed a dogma of progressivism that the defendant in a personal injury case must always lose. The doctrine of the turntable cases was a passing judicial vagary which the courts are now engaged in obliterating as fast as a decent respect for stare decisis will permit. See the learned review of the subject by Judge Jeremiah Smith in 11 Harvard L. Rev. 349, 434. The fallacy of the doctrine lies in the fact that it is incapable of any rational limit. No man who has not forgotten his childhood would venture to say that any appliance might not look attractive to playful children. Must every tree be guarded because boys climb trees and may fall from the branches? Must the premises be raked daily lest the combination of a pebble and a passing cat evoke the doctrine of attractive nuisance? As to pools of water it was well said in *Edmond* v. *Kimberly-Clark Co.,* 159 Wis. 83, 149 N. W. 760, that "every drop of water except that in the washbowl is attractive to children," and in the same case it was added, "To construct a boy-proof fence at a reasonable cost would tax the inventive genius of an Edison." There is no logical stopping place for the rule short of making a land owner liable for every injury to a trespassing child on his premises. Since the courts assuredly will not go to that absurd length, the entire theory should be repudiated.

A Fine Distinction.

The case of *U. S.* v. *Colgate & Co.,* abstracted elsewhere in this issue, has been hailed as a legal victory for price control. The decision is confined to a very narrow field, coming up on demurrer to an indictment and turning wholly on the construction of the indictment. The crucial point in the case was whether the indictment charged Colgate & Co. with selling its product to dealers under agreements which obligated the latter not to resell except at prices fixed by the company, and the court held that it did not so charge. Even within these limits it is

hard to avoid the conclusion that the court has made a distinction without a difference. The things which the indictment charged as having been done were summarized in the opinion as follows: "Distribution among dealers of letters, telegrams, circulars and lists showing uniform prices to be charged; urging them to adhere to such prices and notices, stating that no sales would be made to those who did not; requests, often complied with, for information concerning dealers who had departed from specified prices; investigation and discovery of those not adhering thereto and placing their names upon 'suspended lists'; requests to offending dealers for assurances and promises of future adherence to prices, which were often given; uniform refusals to sell to any who failed to give the same; sales to those who did; similar assurances and promises required of, and given by, other dealers followed by sales to them; unrestricted sales to dealers with established accounts who had observed specified prices, etc." The only coercive force by which the agreements to maintain a fixed price which have in the past been held to be illegal were secured was the refusal to sell to those who would not so agree. Wherein such agreements so procured are different in principle from a practice established at the demand of the seller and enforced in the same way, the court certainly does not make clear. The object to be attained being a monopolistic one, the difference between refusing to sell to persons who will not agree to maintain the fixed price and refusing to sell to those who do not in fact maintain it seems quite inadequate to render the court impotent to put an end to an outrage on the long suffering ultimate consumer. Of course a man has a right to sell or refuse to sell his own property, but that right is not unlimited and wholly independent of motive. Every man in the United States has an absolute right to refuse to buy a Loewe hat or a Bucks range. But when sundry individuals, for the purpose of advancing their interests in a labor dispute, began an agitation for the general exercise of that absolute right, the courts had something to say on the subject. What would the profession think of a decision that an attorney is liable to disbarment if he exacts from his clerks an agreement to cheat clients but is wholly blameless if he merely tells them that he desires the clients to be cheated and discharges such as do not act on the intimation? The whole purpose of the efforts of the Colgate Company as set out in the indictment was to prevent competition between retail vendors of Colgate products, which would result in reduced prices to the consumer. That purpose being an unlawful one, any means whatever directed to that end, however innocent of themselves, share in its illegality. If that is not the law, it is because, in the language of Mr. Justice McKenna (*Sauer* v. *New York,* 206 U. S. 559, 27 S. Ct. 686, 51 U. S. (L. Ed.) 1176) there is "a legal result which takes no account of the obviously practical result."

Declaratory Judgments.

THE state of Michigan is apparently the first American jurisdiction to adopt an act authorizing judgments which are purely declaratory of rights. The two most important sections of the statute read as follows:

Section 1. No action or proceeding in any court of record shall be open to objection on the ground that a merely declaratory judgment, decree or order is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not, including the determination, at the instance of anyone claiming to be interested under a deed, will or written instrument, of any question of construction arising under the instrument and a declaration of the rights of the parties interested.

Section 3. Where further relief based upon a declaration of rights shall become necessary or proper after such declaration has been made, application may be made by petition to any court having jurisdiction to grant such relief, for an order directed to any party or parties whose rights have been determined by such declaration, to show cause why such further relief should not be granted forthwith, upon such reasonable notice as shall be prescribed by the court in the said order.

The principle of the act is one approved by most persons who have interested themselves in the reform of our system of judicature. Disavowing wholly the invidious intent with which the statement is often made, the fact remains that we are ruled almost wholly by the courts. Laws and contracts are effective only in accordance with the judicial interpretation thereof, which may vary widely from the actual intent of the framer. Any procedure whereby that interpretation can be obtained before rather than after the fact is a step in the right direction. Some considerable amendment may however be necessary before the act is brought to a workable basis. The validity of a statute or ordinance is pre-eminently a proper subject of a declaratory decree, yet it is doubtful whether the Michigan act includes this subject matter. It might have been better in this respect to have followed the form of the suggested law given in Bulletin XIII (1913) of the American Judicature Society. Declaratory jurisdiction with respect to the validity and construction of a will during the life of the testator would also be of much value, but if the Michigan act permits a judgment of that kind it will probably be held invalid under the decision in *Lloyd* v. *Wayne Circuit Judge,* 56 Mich. 236, 23 N. W. 28, 56 Am. Rep. 378. But, granted a sound basic principle, a reform will eventually overcome initial obstacles and cast off early crudities. Therefore a recognition of the probability that the act under consideration may be largely ineffective does not detract from the fact that a step has been taken which will ultimately work out a distinct reform in judicature.

CONCURRENT JURISDICTION.

SECTION 2 of the eighteenth amendment to the Constitution of the United States provides that "the Congress and the several states shall have concurrent jurisdiction to enforce this article by appropriate legislation." This provision was inserted at the behest of those members of Congress who still believe in the antiquated doctrine of state rights, a kind of weak-kneed and belated assertion of state self respect. Whether it was intended as the proverbial "joker" or merely as a sop to those who still retained some modicum of belief in our dual form of government as originally planned, we cannot say, but that it is destined to become the storm center of a mighty legal battle is obvious to anyone who has taken the trouble to look up the meaning of the term "concurrent jurisdiction." Lawyers are familiar with two phases of concurrent jurisdiction—that of two or more courts, either all state or federal and state, to enforce a law; and that of states and municipalities both to enact and to enforce

laws. The meaning of the term when used in connection with either of these conditions is generally understood and presents little difficulty, but until the adoption of the eighteenth amendment we have never had any provision giving Congress and the states concurrent jurisdiction to enact laws on the same subject. That there are spheres within which it is lawful for the states to enact laws regulating matters over which Congress has the power to assume exclusive control is well settled, and until Congress sees fit to exercise its power the state laws are supreme. And our Supreme Court has more than once defined the limits of state and federal legislation. In speaking of the power of a state to enact laws regulating interstate commerce, the court in *Adams Express Co.* v. *Croninger,* 226 U. S. 491, 33 S. Ct. 148, 57 U. S. (C. Ed.) 314, 44 L. R. A. (N. S.) 257, said: "Until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular state, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the state. Such regulations would fall within that large class of regulations which it is competent for a state to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the state over such carriers and its duty and power to safeguard the general public against acts of misfeasance and nonfeasance committed within its limits, although interstate commerce may be indirectly affected." But the power conferred on Congress and the states by the eighteenth amendment is anomalous, and in construing this section little help is derived from cases defining the term "concurrent jurisdiction" possessed by courts or by states and municipalities.

Concurrent jurisdiction conferred on courts to enforce a fixed or given law means nothing more or less than litigants have a choice as to the forum to which they will submit their grievances. The leading general principle as to concurrent jurisdiction of courts is that whichever court of those having such jurisdiction first acquires possession of a cause will retain it throughout. The jurisdiction once actually acquired becomes exclusive in so far as that particular action is concerned. Construing a statute conferring concurrent jurisdiction on city and circuit courts the Supreme Court of Illinois has said: "Concurrent jurisdiction is that jurisdiction exercised by different courts at the same time over the same subject matter and within the same territory, and wherein litigants may, in the first instance, resort to either court indifferently. (See Bouvier's Law Dic. 'Jurisdiction'; Rapalje & Lawrence, same title.) Hence, concurrent jurisdiction with the circuit court as here used, means equal power and authority to hear and determine all civil and criminal causes, treason and murder excepted, the subject matter of which arises within the prescribed territorial limits of the city." *Hercules Iron Works* v. *Elgin, etc., R. Co.,* 141 Ill. 491, 30 N. E. 1050. The reason for the rule giving the court which first acquires jurisdiction exclusive control over the cause is apparent. In the interest of the public, citizens should not be subjected to a multiplicity of suits. Reasoning by analogy the argument has been advanced that in enforcing the eighteenth amendment the law first enacted, whether by Congress or a state, would control. However, it is manifest that such a proposition will not stand close scrutiny. Those who assert such a doctrine overlook the fact that in the case of concurrent jurisdiction of courts the power conferred is to enforce an established law while the power conferred by the amendment in question is to enact laws. Nor does the rule that Congress may supersede the laws of the states affecting matters over which it can assume exclusive jurisdiction apply. By the very terms of the amendment Congress is forbidden to assume exclusive jurisdiction; concurrent or equal power is expressly reserved to the states. That concurrent jurisdiction to enforce a law is not the same thing as concurrent jurisdiction to enact a law is self evident, and cases construing statutes conferring concurrent jurisdiction on courts are not applicable in determining the meaning of the term as used in the prohibition amendment.

Nearer akin to the question at issue is the concurrent jurisdiction possessed by states and municipalities both to enact and to enforce laws. As a rule municipalities are vested by law with the power to enact ordinances covering a wide variety of subjects. But the sovereign power which created it (the state), and gave it its power, may alter or dissolve it at pleasure and control its conduct in all public matters as it may see fit. Consequently a state statute will override a municipal ordinance in conflict with it. In such cases the superior jurisdiction will prevail to the exclusion of the inferior. This relation between states and municipalities has been cited as authority for the statement that laws enforcing the eighteenth amendment must give way to the acts of Congress when in conflict therewith, but a moment's thought will show that the cases are by no means parallel. The municipality is a creature of the state, exercising only those powers delegated to it by the state and subject always to the control of the state. But the most ardent partisan could not contend that the state was a creature of the national government. As said in *Lowenstein* v. *Evans,* 69 Fed. 908: "The state is a sovereign having no derivative powers, exercising its sovereignty by divine right. The state gets none of its powers from the general government. It has bound itself by compact with the other sovereign states not to exercise certain of its sovereign rights, and has conceded these to the Union, but in every other respect it retains all its sovereignty which existed anterior to and independent of the Union." Within its sphere the sovereignty of a state is of as high dignity as that of the nation. In exercising the powers belonging to each they act as equals. The United States and a state being distinct governments, sovereign and supreme within their respective spheres, and both alike being controlled by the Federal Constitution, it follows that the power of neither can be extended or curtailed by the other. The Federal Constitution says that Congress and the several states shall have concurrent jurisdiction to enforce the amendment by appropriate legislation. Plainer language could not have been used. To hold that a state could not enact a law enforcing the amendment which was in conflict with an act of Congress would certainly seem to deprive the state of its "concurrent jurisdiction to enforce the article by appropriate legislation."

As has been pointed out, the meaning of the term concurrent jurisdiction when used in connection with the jurisdiction of courts to enforce a law or the jurisdiction of states and municipalities, is not applicable to two equal sovereigns empowered to enact laws on the same subject. If as said in *State* v. *Sinnott,* 89 Me. 41, 35 Atl. 1007, "concurrent jurisdiction means equal jurisdiction" Congress cannot by the passage of an act enforcing the amendment deprive the states of the power conferred on them to enact appropriate legislation on the same subject. While

the authorities in point are few they are clear and forcible. The question as to what is meant by concurrent jurisdiction of two equal sovereigns has arisen chiefly in cases dealing with the power of states over waters forming their boundaries. In the case of In re Mattson, 69 Fed. 535, the term "concurrent jurisdiction" as applied to two states was defined as follows: "The word 'concurrent,' in its legal and generally accepted definition, means acting in conjunction, and when applied to the jurisdiction of Oregon to enact penal laws for the Columbia river it can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the state of Washington, or as are already in force within its jurisdiction." This definition was adopted by the court in Ex p. Desjeiro, 152 Fed. 1004, wherein it was held that an act of the Oregon legislature prohibiting aliens from fishing in the Columbia river was void, as it had not been concurred in by the state of Washington. Fortunately this question has been passed on by the Supreme Court, and it is difficult to see how the decision of that court can be gotten around. In *Nielsen* v. *Oregon,* 212 U. S. 315, 29 S. Ct. 383, 53 U. S. (L. Ed.) 528, the Supreme Court overruling the Oregon court lays down the rule that where two states have concurrent jurisdiction a person cannot be punished under the law of one state for an act permitted by the laws of the other. In this case Mr. Justice Brewer stated the rule as follows: "Undoubtedly one purpose, perhaps the primary purpose, in the grant of concurrent jurisdiction was to avoid any nice question as to whether a criminal act sought to be prosecuted was committed on one side or the other of the exact boundary in the channel, that boundary sometimes changing by reason of the shifting of the channel. Where an act is *malum in se* prohibited and punishable by the laws of both states, the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both states, so that one convicted or acquitted in the courts of the one state cannot be prosecuted for an offense *malum in se,* but for one simply *malum prohibitum.* Doubtless the same rule would apply if the act was prohibited by each state separately. But where as here the act is prohibited by one state and in terms authorized by the other, can the one state which prohibits prosecute and punish for the act done within the territorial limits of the other? Obviously, the grant of concurrent jurisdiction may bring up from time to time many and some curious and difficult questions, so we properly confine ourselves to the precise question presented. The plaintiff in error was within the limits of the state of Washington, doing an act which that state in terms authorized and gave him a license to do. Can the state of Oregon, by virtue of its concurrent jurisdiction, disregard that authority, practically override the legislation of Washington, and punish a man for doing within the territorial limits of Washington an act which that state had specially authorized him to do? We are of opinion that it cannot. It is not at all impossible that in some instances the interests of the two states may be different. Certainly, as appears in the present case, the opinion of the legislatures of the two states is different, and the one state cannot enforce its opinion against that of the other, at least as to an act done within the limits of that other state." This decision would seem to be on all fours with the enforcement of the prohibition amendment, and unless it is overruled should serve as a check on Congress, though the majority do not seem inclined to heed it. In the minority report on the enforcement bill, however, the position is taken that any enforcement measures must be concurred in by the states. This minority stated its position as follows:

"We cannot eliminate from the Constitution that concurrent power to enforce its provisions which was given to both Congress and the several states. No law would be passed in pursuance to the Constitution which failed to observe this provision. Joint or concurrent legislation is necessary for the enactment of proper enforcement legislation."

If we eliminate the meaning of the term "concurrent jurisdiction" when applied to two or more courts or exercised by state and municipality, and it is hard to see how such cases can be applied to the concurrent jurisdiction of two equal sovereigns to enact laws, we find ourselves confronted with the Oregon-Washington case. And while Congress may enact laws regardless of precedent, the court will have to indulge in some weird judicial gymnastics to get by that case.

Minor Bronaugh.

LEGISLATION TO PREVENT THEFT OF AUTOMOBILES

The same conditions which once made the horse thief the bane of the western frontier have now brought into prominence his successor the automobile thief. The extent to which this kind of larceny is being carried is appalling—many thousands of cars being stolen every year according to the best statistics obtainable. Every magazine devoted to the automobile trade contains advertisements of locks, chains or other devices designed to prevent theft. But however effective such appliances may be as to mischievous boys, they have little effect on the professional auto thief, who is ordinarily a skilled mechanic. The sight of a man working on a car at the side of the street is too common to excite even passing notice, and the thief may smash the lock or hack saw the chain at his leisure. If the lock is proof against his skill, he needs but hitch on another car and tow away the securely locked auto, and the passerby will see only the familiar incident of a garage mechanic rendering first aid to the injured. The nefarious industry is increasing rapidly. It is said that in 1918 the auto theft squad of the Detroit police force was increased from four to twenty men, yet in that year over 2500 cars were stolen in that city. An illustration of the methods of the auto thief is found in the recent case of *State* v. *Monroe* (Minn.), 172 N. W. 313, wherein it appeared that the accused was ostensibly in the restaurant business in Minneapolis, Minn., but maintained a garage in charge of an accomplice where stolen cars were refitted, the manufacturer's numbers erased, other numbers substituted and the car sold.

In consequence not only the police authorities but the various legislatures are seriously concerned over the problem. The ease and speed with which an automobile will transport itself and its thief to parts unknown make the prevention of the theft a practical impossibility. The vulnerable point is the subsequent identification and recovery of the car, which saves the victim from loss and often leads to the detection of the thief. If possession of a stolen car is rendered so dangerous that none will pur-

chase without the showing of a title in the seller, the incentive for professional crime is destroyed. To this object the recent legislation seems to be addressed. The Illinois act passed in 1917 provides as follows: "Any person having in his or her possession any motor bicycle or motor vehicle from which the manufacturer's serial number, or any other manufacturers' trade or distinguishing number or identification mark, has been removed, defaced, covered or destroyed for the purpose of concealing or destroying the identity of such motor bicycle or motor vehicle shall be liable to a fine of not more than two hundred dollars ($200.00) or imprisonment in the county jail for a period not to exceed six (6) months, or both." The validity of that act was sustained in *People* v. *Fernow,* 286 Ill. 627, 122 N. E. 155, the court saying: "It is agreed that the section was enacted in the exercise of the police power, which may be exercised in the passage of laws for the protection of the public and the general welfare. The purpose of the act is to prevent the defacing, covering, or destruction of the manufacturer's serial number or distinguishing mark, so as to preserve the identity of motor vehicles and thereby protect the public against violations of law. The motor vehicle has become the most common and efficient agency for the commission of crime and the chief instrumentality employed by criminals to avoid detection and escape punishment, and one of the methods employed is to destroy the evidence of identity. Motor vehicles have also become very frequent subjects of larceny, and the removal or change of the serial number is a convenient method of preventing identification and recovery. One committing a crime, even the most serious, and escaping in an automobile, would be more difficult of apprehension if the serial number or identification mark should be removed. The section is a legitimate and proper exercise of the police power."

A recent New Jersey act goes a step further. Section 3 of the law reads: "No motor vehicle shall be sold or purchased unless it contains the manufacturer's number, nor shall there be a sale or purchase of a motor vehicle containing an obliterated, erased or mutilated manufacturer's number." Section 4 requires: "In all sales or purchases of a motor vehicle directly from the manufacturer or through an agent or agency of such manufacturer, there shall be issued to the purchaser a manufacturer's bill of sale, which bill of sale shall contain the manufacturer's number on the engine or motor of the motor vehicle so sold." Section 5 provides: "In all other sales or purchases of motor vehicles the original bill of sale shall be assigned by the seller to the purchaser by an assignment witnessed by two persons and acknowledged by the seller before a notary public. All such assignments shall at all times be kept and attached to the original manufacturer's bill of sale; provided, however, that in the event the said motor vehicle was purchased from the manufacturer or his agent prior to the going into effect of this act, then, instead of assigning the original bill of sale and attaching such assignment to said original bill, the seller shall execute a new bill of sale witnessed by two persons, and acknowledged before a notary public."

A plan yet more elaborate is propounded by the Automobile Abstract and Title Company of Detroit and is explained at length by Mr. Chas. E. George, the general counsel of that company, in a recent issue of the *Lawyer and Banker.* The measure proposed by that company is, omitting the penal provisions, as follows: "Section 1. It shall be the duty of every owner of a motor vehicle, except tractor engines, who hereinafter sells or acquires an interest therein to reduce the terms of such contract relative thereto to writing, and to cause the same to be recorded in the office of the Secretary of State, or in the Department assigned for the licensing of automobiles at . . . within three days following the date of the execution of such contract, together with a statement in form prescribed by such License Bureau or Secretary of State, duly executed before a notary public, or court official, which contract shall state that the vendor has signed the same, and is personally known to such official, and that the signature thereto is the true signature of such vendor—or in lieu of such contract or recordation, it shall be the duty of such person selling or purchasing such motor vehicle to procure an abstract of title and a certificate of ownership from an automobile abstract and title company, duly authorized to do business, certifying that the vendor has such ownership and title to such motor vehicle as he purports to sell, convey or own. Such certificate is hereinafter referred to as a 'Motor Vehicle Certificate of Title.' Section 2. No person shall hereinafter operate, or have the custody or possession of any motor vehicle unless he has upon his person or in said car convenient for inspection by any constable, police or other officer, a Motor Vehicle Certificate of Title, or a certified copy of such recorded contract of sale bearing the attest of said License Bureau or Secretary of State." The enactment of this bill as a uniform measure will be sought and it is now under consideration by the legislatures of several states. Of the abstracts to be furnished by the company Mr. George says: "This company, at but very small cost, will assume liability by guaranteeing title to the full amount of the purchase price of the car through the abstract they issue. This abstract can no more be imitated or forged than can a thousand-dollar bill. It is in itself an absolute assurance which the owner of a car may rely upon. This abstract will eliminate the use of automobiles for the carrying of liquor, hold-ups and bank robberies. It will forever stop the giving out of automobile license plates for cars registered in foreign territory. It will be an aid to the insurance companies, preventing the automobile thief or dishonest policy holder from making fraudulent claims. It will reduce to a minimum cost insurance against theft upon the part of all automobile insurance companies. It will save sufficient to the state to pay the interest on good road bonds. It will reduce by fully 75 per cent the expense of maintaining the State Automobile License Department, and it will add 100 per cent to the efficiency of that department. It will save to the Motor Vehicle Department of each state tens of thousands of dollars yearly in compelling car owners to register, in preventing a person taking out one license and using it for the operation of two, three or half a dozen cars. It will prevent the repainting of last year's license plates, and the application for lost license plates, which are furnished at a minimum cost, which in turn may be used on cars not carrying a license."

Each of these measures is addressed to the same object, to make possible the identification of a stolen car. It would seem that the same result might be reached more simply by a slight adaptation of existing laws. In practically every state registration or licensing is required and a card is issued by a public officer showing the description of the car, including the manufacturer's serial number,

the name of the owner and the license number assigned to the car for the current year. It would seem that from this provision adequate legislation may be developed. There is only one loophole in the identification afforded by these acts. The expert thief can readily substitute new serial numbers, and then take out a new license, stating that the car was purchased in another state in order to explain the absence of a previous licensing of that car. This done, the purchaser of the stolen car is in a position to defy detection. This possibility may however be excluded in a manner which seems to offer some advantages over any of the other proposed remedies which have been referred to. Each person registering a car should be compelled to make a showing of his title. If it is a new car a bill of sale from the manufacturer should be required, while if a used car is registered, a showing of the previous registration, no matter in what state, and clear proof of title from the last registered owner should be made imperative. That proof should include an official certificate of the previous registration if it was in another state, a bill of sale from the previous registered owner and satisfactory proof of the identity of the person executing it. Of course the annual renewal of registration by a person who has once registered his car and proof of title would be a mere formality. A certificate of registration issued with the precautions suggested would furnish an absolute identification, far more difficult of falsification than the bill of sale provided by the New Jersey act. It seems in no way inferior to the abstract proposed by the Detroit Company and has the advantage of resting wholly on official certification and not requiring the intervention of a private company operating for its own profit. In addition, it embodies one advantage not found in any other plan thus far suggested. No matter how complete and certain may be the evidence of identification required it is a practical impossibility in any large city to hold up every car owner and make him exhibit it. The most that can be done is to imitate the practice of the motor boat inspectors and make occasional visitations which will detect such violators of the law as happen to be running at that time and place. But if evidence of title must be adduced at the registration of the car, the possession of license number plates is visible evidence that such proof has been made, and even if by some substitution of plates a stolen car was operated for the rest of the current season, the next registration would inevitably bring detection. Moreover, the description of all stolen cars should be registered with the licensing officer. In view of the great value of the automobile property annually stolen it would be well worth while to maintain in connection with that office a staff of detectives to make personal inquiry as to the antecedents of every car registered which changed hands during the previous year. Imagine for the purpose of a test, the most difficult possible case, a Ford car stolen in New York city, repainted, the maker's number obliterated and a new one substituted, and the car sold to a suburbanite in New Jersey. The purchaser could not use it until he secured number plates, and to obtain these he would have to show the previous registration of the car. This the change in the serial number would make impossible. Even if a set of number plates of another state was in some manner obtained and attached to the car before sale the purchaser's dilemma would only be postponed to the end of the current year. Detection would not be dependent on the chance that some day a police officer might demand the exhibition of a bill of sale or abstract of title; the car could not be run for an hour without advertising to all beholders that it was illicitly operated.

Without attempting to formulate a bill, the proposed law may be summarized as follows: 1. Requirement of annual registration and display of number plates as evidence thereof (now universally required). 2. Factory bill of sale to accompany every application for registration of a new car. 3. Certified copy of previous registration and full proof of title from previous registrated owner to accompany every application for registration of a used car not previously registered in the same jurisdiction by the same person. 4. Provision for a systematic record in the office of the registering officer of all complaints of stolen automobiles. 5. Provision for a staff of inspectors to investigate all suspicious cases disclosed by applications for registration.

Of course to secure the fullest possible efficiency of any plan of identifying stolen property of a nature so fugitive as the automobile, there must be regulations of a substantially uniform character in all the jurisdictions. To bring about that uniformity speedily the measure adopted should involve the least possible departure from existing conditions, and the law here outlined, which involves merely the addition to existing laws of some provision as to the showing prerequisite to the grant of a license, seems to reach the acme of simplicity. Throwing on the possessor of an automobile the burden of showing that he is the rightful owner before he can obtain a license to use it, the law would be practically self enforcing.

With the exception of the provision for requiring a showing of the registration of used cars in other states, it is probable that every provision in the proposed act is in force in some one or more states, but it is believed that in no state have all the suggested provisions been enacted. The state most closely approximating thereto is New York which by an act of May, 1919, has made it unlawful to transfer or receive the transfer of a used automobile unless the certificate of registration is produced and delivered to the vendee. This excellent provision is however deficient in that it fails to require the certificate so surrendered to be sent to the secretary of state as a condition precedent to a new registration and therefore does not preclude the transfer of a stolen car if buyer and seller are in collusion. But since state lines are quickly crossed by the possessor of a stolen automobile and since uniform legislation is essential to the full protection of car owners in any state, the effort of the writer has been to devise a form of legislation whose simplicity and correspondence to the existing legislative policy of the states will facilitate its general adoption.

There are in the United States many thousands of automobiles whose purchase involved saving and sacrifice, whose purchase was justified by the fact that each car represented years of healthful recreation for the owner and his family. From the peculiar facility with which the crime of automobile stealing may be committed and the peculiar social injury it inflicts, the crime is one which deserves more legislative and police attention than it has thus far received. A tenth of the zeal and acumen which have been devoted to the enactment and enforcement of sumptuary legislation would have put an end to this serious and increasing offense.

W. A. S.

THE LEAGUE OF NATIONS AND SECRET DIPLOMACY.

The question must arise, What will be the probable effect of the provisions of the Covenant of the League of Nations on secret treaties and the system of secret diplomacy? Under the provisions of arts. 11, 18, 19, and 20, treaties must be public, must be liable to reconsideration at the instance of the assembly, and must be consonant with the terms of the Covenant. No provision, so far as we are aware, is made in the Covenant for securing that the nations at large, as distinct from the body in which the treaty-making power is vested—in this country the King acting on the advice of his Ministers—shall have knowledge of treaties, and that treaties as a condition precedent to their ratification shall have the approval of the nations affected thereby as distinct from the bodies in whom the treaty-making power is vested. So far as the letter of the Covenant is concerned, the old system of secret diplomacy is unimpaired. That system was thus described by Mr. Bright in a speech at Glasgow in 1858: "When you come to our foreign policy you are no longer free. You are recommended not to inquire. If you do, you are told you cannot understand it. You are snubbed; you are hustled aside. We are told the matter is too deep for common understandings like ours; that there is a great mystery about it. We have what is called diplomacy." It must, however, be borne in mind that the introduction in the Covenant of provisions of this nature would undoubtedly be an intervention in the internal affairs of individual states as members of the league, and as such a violation of the principle of national sovereignty which it is the aim of the covenant, as its framers declare, jealously to maintain and strengthen. The indirect effect of the League of Nations as a system will, however, be undoubtedly to secure that all treaties entered into, by the very fact of their being public and being subject to consideration at the instance of the assembly, and, as an essential condition, consonant with the terms of the Covenant, must, having regard to their publicity and liability to revision, be strengthened by the approval of the people founded on a full knowledge of their contents before being finally concluded. The publicity of diplomacy and the sanction of the people as a condition preliminary to the conclusion of a treaty no doubt does not extend to the arrangements and negotiations which are the preliminaries to a treaty. It cannot be reasonably urged that the knowledge of such negotiations and approval thereof by the peoples of the negotiating states are included in the term "open agreements openly arrived at." Sir Edward (Viscount) Grey, speaking in the House of Commons on the 12th April, 1911, pleaded for secrecy in the early stages as distinct from the final stage of treaty arrangements. "We cannot," he said, "take the House of Commons, especially at the early stages of negotiations, publicly into our confidence, because we should be disclosing to the world matters which concern not only ourselves, but the other Powers with whom we are in negotiation, and very often at an early stage of negotiations to make a premature disclosure would result in the other Power desiring to break off the negotiations altogether." Mr. Lloyd George, in his exposition of the foreign policy of the Government in the House of Commons on the 16th ult., when he was, no doubt, well acquainted with the provisions, then, of course, unpublished, of the Covenant of the League of Nations, in respect to the publicity of treaties, maintained and justified the observance of strict secrecy with reference to the negotiations and discussions preliminary to the final presentation, first to Germany and then to the world, of the proposed treaty of peace. "What about publicity?" asked Mr. Lloyd George. "We considered that question. We came to the conclusion, which was unanimous and quite unhesitating, that to publish these terms before they were discussed with the enemy would be a first-class blunder. There has been rather silly talk about secrecy. May I give one or two reasons why we have come to the conclusion that we will not publish the terms before they were discussed? No peace terms, no measure of any kind ever devised or promulgated, can hope to satisfy everyone. There will be some people who will say you have gone too far. There will be others who will say you have not gone far enough. There will be probably in each country people who say that the interests of that country have been sacrificed for some other country. If all that is published, who will benefit by it? Nobody but the enemy." Mr. Lloyd George, however, who thus strenuously opposed publicity before the presentation of the police terms to the enemy, was no less emphatic in his estimate of the propriety, and, indeed, the necessity, of the knowledge and approval of Parliament as representing the nation, of the terms of the Peace Treaty before its final conclusion. "I know," he said, "that Parliament can repudiate the treaty when it is signed, but it will be difficult to do that once British signatures are attached to it. It can be done. Parliament can do it; but it would be more difficult. Before anyone goes there [to Paris as the representative of Great Britain], Parliament must feel, or, at any rate, know, that whoever is there will carry out his pledges to the utmost of his power and his gifts." Mr. Lloyd George's pronouncement was an admission, albeit unconscious, that henceforth the discretion of the executive in foreign affairs, hitherto unlimited, will be confined within narrow bounds, while the provisions of the Covenant of the League of Nations as to treaties, while not trenching in letter or in spirit on the internal affairs of this country or any other member of the league, will, having regard to the strong dislike in this country of the system of secret diplomacy render inevitable the presentation to Parliament for its information and approval of all treaties before being formally concluded. Mr. Bagehot nearly half a century ago advocated the course which is now likely to be adopted owing to the force of constitutional development, the trend of public opinion in this country, and the making of the system of the League of Nations. "If we require," Mr. Bagehot said, "that in some form the assent of Parliament shall be given to treaties, we should have a real discussion prior to the making of such treaties. . . . We should have the reasons for the treaty plainly stated and the reasons against it. . . . We should have a manlier and plainer way of dealing with foreign policy if Ministers were obliged to explain their foreign contracts before they were valid, just as they have to explain their domestic proposals before they become laws." The views thus enunciated have received remarkable confirmation from an incident which took place after this article had been thus far written. Mr. Bonar Law as Leader of the House of Commons was asked on the 20th inst. as to whether the position of the House of Commons, so far as any control over the Peace Treaty is concerned, is that when it comes forward for ratification the House must "take it or leave it without any power of amendment." He replied: "That, in my opinion, exactly represents the position, and I do not see in what other way any treaty could ever be arranged." The extent of the control of Parliament over the Peace Treaty thus enunciated by Mr. Bonar Law was stated in terms practically identical, to which reference has been made, by Mr. Lloyd George in the House of Commons on the 16th ult.: "I know that Parliament can repudiate the treaty when it is signed." In the circumstances which will attend the conclusion of the Peace Treaty, "the all but unlimited discretion of the executive in foreign affairs," to use the words of Viscount Bryce, has disappeared, and the working of the League of Nations will, as we have shown,

render the conclusion of any treaty by this country without the knowledge and approval of Parliament impracticable. The position thus arrived at realizes the desire embodied in a resolution which on the 19th March, 1886, was all but carried in the House of Commons—it was defeated by four votes only—declaring that all treaties should be laid before Parliament before being finally concluded. The fact that Parliament has now been placed virtually in control of foreign policy and the great advance thus made in the substitution of open for secret diplomacy may be most accurately gauged by the caution with which a statesman so sympathetic with the genius of constitutional development as Sir Edward (Viscount) Grey thus expressed himself, when Foreign Secretary, on the question of the sanction of Parliament to treaties before their ratification. "The question," said Sir Edward Grey in the House of Commons on the 12th April, 1911, "of the ratification of treaties opens a very grave constitutional question much too serious to be dealt with by anybody but the head of the Government. It means a great change in our Constitution to lay down definitely that no treaties are to be ratified until they have been first submitted to and sanctioned by the House of Commons. I only say it is a great constitutional change." Again, on the 13th May, 1913, Sir Edward Grey said: "The point has often been raised that all treaties should be subject to the ratification of Parliament. This is a point very interesting to people who have constitutional minds. It used to interest Mr. Gladstone very much, and he was always a strong opponent of what he considered a grave change in the Constitution. It is a constitutional point and I could not go into it on the Foreign Office vote." The great constitutional change from which Mr. Gladstone shrank, on which Sir Edward Grey refrained from definite expression of opinion, has now been effected.—*Law Times.*

Cases of Interest

Liability of Carrier as Affected by Inability of Passenger to Read English.—That a passenger cannot read the English language in which a carrier prints a notice required by statute, warning passengers not to ride upon the platforms of the cars, does not relieve him from the operation of a statute providing that, in case a passenger is injured while on the platform in violation of the printed regulations, the company shall not be liable for his injury, if the statute does not require the printing of the notice in other than the English language. It was so held in Bane *v.* Norfolk, etc., R. Co. (N. Car.) 97 S. E. 11, reported and annotated in 2 A. L. R. 90, wherein Clark, C. J., said: "The evidence was uncontradicted and the jury found that the defendant had complied with the statute by posting up in a conspicuous place the required notice, forbidding passengers to ride upon the platform while the train was in motion, and that there was room within the car for the accommodation of the plaintiff and all other passengers. The court correctly told the jury that it was immaterial whether the plaintiff was a Hebrew and read Yiddish, but could not read English, for the statute did not require the notice to be printed in any other language."

Failure to File Certificate of Partnership as Affecting Right to Sue in Tort.—In Denton *v.* Booth (Mich.), 168 N. W. 491, it was held that the failure of a partnership to comply with a statute requiring the filing of a certificate containing information as to the details of the partnership did not prevent it from maintaining an action for the wrongful conversion of firm property by a stranger. Said the court: "Can it be said that the members of a copartnership who have failed to comply with the law in filing a certificate in writing with the county clerk, containing the required information as to the details of the copartnership, are prevented from using the courts of the state for the purpose of redressing a wrong? We think not. It would, we think, hardly be claimed that, had defendants stolen the thirteen horses from a barn of the plaintiffs, the plaintiffs, even though they had not filed the certificate required by law, could not have maintained an action in replevin or for a wrongful conversion of the animals. We are not unmindful of the fact that we have held (Maurer *v.* Greening Nursery Co. (Mich.), 165 N. W. 861) that the members of a copartnership who have not complied with the act cannot prosecute an action under a contract. We do not think, however, that the effect of this statute should be extended, it being in plain derogation of common-law rights."

Refusal to Sell to Price-Cutters.—In United States *v.* Colgate & Co., 39 Sup. Ct. 465, the Supreme Court held that a manufacturer does not violate the Sherman Anti-Trust Act in refusing to sell its product to a person who has in the past resold them at prices below those fixed by the manufacturer, provided the manufacturer does not require the purchaser to enter into an agreement to maintain a fixed selling price. The court said: "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell. 'The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases.' United States *v.* Trans-Missouri Freight Association, 166 U. S. 290, 320, 17 Sup. Ct. 540, 551 (41 L. Ed. 1007). A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade."

Fraud of Landlord as Affecting Estoppel of Tenant to Deny Landlord's Title.—In Gray *v.* Whitla (Okla.), 174 Pac. 239, reported and annotated in 2 A. L. R. 356, it was held that fraudulent representations by a landlord as to his ownership made to the tenant in leasing the premises preclude him from relying on the estoppel of the tenant to deny his title. The court said: "Many authorities are cited by the plaintiff in error to the effect that the tenant cannot deny the title of his landlord. This is the general rule, and the same is well established by the authorities of this jurisdiction; but there are many exceptions and qualifications to the rule, which are of as much importance as the rule itself, and must be observed in the administration of justice between the landlord and the tenant. In the findings of fact as made by the trial court, the court found that the representations of the plaintiff in error, made to the defendant in error in leasing said premises to the defendant in error, amounted to fraud on the rights of the defendant in error by plaintiff in error. . . . In 16 R. C. L. p. 658, it is said: 'The application of the principle that a tenant is estopped to deny his landlord's title is restricted to cases in which the lease has

been fairly obtained, and a lease obtained through fraud and misrepresentation will not prevent the lessee from contesting the title of the lessor. This is a well-settled doctrine, resting on the most satisfactory grounds. The relation of landlord and tenant arises out of contract, and this, like other contracts, is vitiated by fraud, overreaching, or imposition. Therefore, if fraud is used to induce the tenant to accept the lease, no estoppel arises.'"

Liability of Carrier for Delivery of Goods to One Whose Authority to Act for Consignee Has Terminated.—In L. Kommel & Son *v.* Champlain Transportation Co. (Vt.), 105 Atl. 253, reported and annotated in 2 A. L. R. 275, it was held that a common carrier was liable to the consignor for delivering goods to one who purchased the business of the consignee without the knowledge of the consignor or the carrier, although the sale of the goods was made to the purchaser of the business under the belief that he was acting as agent for the consignee, and such purchaser had frequently received goods from the carrier for the consignee while he was in the latter's employ. The court said inter alia: "This state has never departed from the common-law rule that the common carrier stands in the relation of insurer of the property intrusted to him, and is liable for any damage to the goods while in his custody, by whatever cause, unless by act of God or the public enemy, though entirely faultless (Blumental *v.* Brainerd, supra); and for the delivery of goods to the wrong consignee he is liable, unless the consignor's negligence or misconduct induced the misdelivery by the carrier. See Vermont cases above cited, and Joslyn *v.* Grand Trunk R. Co. supra, 4 R. C. L. 846, ¶ 298. The bill of lading in this case required the goods to be delivered to the consignee, B. J. Fayette, named in the bill of lading; and though Fayette had no knowledge of that fact, nor interest in the goods shipped, that fact in no way justified the defendant in delivering them to one not entitled to receive them. Without authority of the plaintiff the defendant was not justified in delivering the goods to anyone but the consignee or to his order; and it was the duty of the defendant to hold the goods until called for by the consignee or the plaintiff, and a delivery to one not entitled to receive them, though induced to make such delivery through the fraud of a third party, will not excuse the carrier. Winslow *v.* Vermont & M. R. Co. 42 Vt. 700, 1 Am. Rep. 365; Southern Exp. Co. *v.* Van Meter, 17 Fla. 783, 35 Am. Rep. 107; Pacific Exp. Co. *v.* Shearer, 160 Ill. 215, 37 L. R. A. 177, 53 Am. St. Rep. 324, 43 N. E. 816; Price *v.* Oswego & S. R. Co., 50 N. Y. 213, 10 Am. Rep. 475. The facts of this case are so similar to those in Winslow *v.* Vermont & M. R. Co., supra, that to sustain the judgment in this case would overrule that case, besides being in conflict with the great weight of authority outside of this state This rule may seem harsh in some cases; but experience has firmly established the fact that in a great majority of cases this strict requirement imposed upon the common carrier is for the public good."

Recovery Under Accident Policy for Death Resulting from Unexplained Poisoning.—In Riley *v.* Interstate Business Men's Acc. Assoc. (Iowa), 169 N. W. 448, reported and exhaustively annotated in 2 A. L. R. 57, it was held that under an accident policy relieving the insurer from liability for death resulting from poison voluntarily or involuntarily taken no recovery could be had for death from strychnine mixed in some unaccountable way, without the knowledge of the insured, in medicine taken by him. The court stated the facts and its conclusions thereon as follows: "The case was tried upon an agreed statement of facts, from which it appears that the insured, on January 16, 1912, went to a drug store in Germania, Iowa, owned and conducted by one, Dr. T. S. Waud, a regularly licensed and practicing physician and surgeon, and stated to him that he was still suffering from a bowel trouble, for the alleviation of which he had previously obtained Squibb's cholera mixture, and requested Dr. Waud to mix him up a 'hot one,' by which the doctor understood him to mean a strong dose of Squibb's cholera mixture. The mixture was poured by the druggist into a graduate, from which the same was drunk by deceased. It is further stipulated that Squibb's cholera mixture did not contain strychnine, or other drug producing the effect thereof, but that it did contain tincture of opium and chloroform, both of which are poisonous. In less than an hour after taking the mixture, insured went into convulsions and died. It is conceded that his death was due to poison from strychnine received in the mixture. The presence of strychnine in the mixture is not accounted for. No claim is made by counsel for appellee that deceased committed suicide, or that he consciously or intentionally took a fatal dose of poison. For defense, defendant relied upon the following, among other provisions of the policy, to wit: 'This association shall not be liable to any member of the accident department, nor to any person claiming by, through, or under any certificate issued to a member, for the payment of any benefits or indemnity on account of disability or death resulting from poison voluntarily or involuntarily taken, administered, absorbed, or inhaled. . . . The word 'involuntary,' as defined in Funk & Wagnalls New Standard Dictionary, means: 'Lacking will or power to choose; not under the control of the will or volition; taking place independently of one's will or volition; not willed.' Deceased could not have intended to take a fatal dose of strychnine. He did not voluntarily do so. Its presence in the mixture was unknown to him. There was no exercise of the volition of the will in the act of taking the poison, except in so far as the same was a necessary part of the taking of the concoction. The poison was taken independently of his will or volition, and therefore involuntarily. Thus construed, the language employed in the exception contained in the policy is given its usual and ordinary meaning. We cannot, therefore, escape the conclusion that the poison contained in the mixture and which caused the death of the deceased was involuntarily taken by him, and that the facts bring the case clearly within the exception of the policy, and that no recovery can be had thereon."

Baggage Porter as Person Acting in "Official Function" Under Federal Statutes.—In U. S. *v.* Krichman, 256 Fed. 974, it was held that a baggage porter employed in the baggage room of a railroad under federal control is a person acting in an "official function" under section 39 of the federal criminal code (7 Fed. Stat. Ann. [2d ed.] 603) making it an offense to attempt to bribe "any person acting for or on behalf of the United States in any official function." Judge Learned Hand said: "It was proved upon the trial that the defendant had approached one Zwillinger, who was then engaged as a baggage porter in the baggage room at the Pennsylvania terminal in the city of New York, and offered to bribe him to deliver to the defendant from time to time trunks containing furs, which were checked from the Pennsylvania station to points outside the state of New York. Zwillinger, after the first interview, reported to his superiors, who directed him not to alarm the defendant, and to let him proceed if he would. Afterwards the defendant paid Zwillinger a sum of money and obtained from him delivery of a trunk containing valuable furs, which he took with him to the Grand Central terminal in the city of New York. Shortly after he was apprehended by the Pennsylvania detectives, who had kept him under obser-

vation from the time he entered the Pennsylvania terminal. . . . In principle it seems to me that this case is within the law. The Director General of Railways is an officer or department of the government charged with the operation of the railways of the United States, and Zwillinger was acting under his authority. It is, of course, true that he was appointed and discharged by subordinates who were in turn not appointed by an 'officer' of the United States. . . . Nevertheless, although at several removes, he was acting under the authority of the Director General. Moreover, in caring for and dispatching baggage intrusted to the railroad, he was acting on behalf of the United States, since the dispatch of baggage was a duty which the United States had assumed and which only baggage porters could discharge. So the sole question is whether he was acting in an 'official function.' It must be conceded that the section would as well cover the case if the words 'official function' were omitted, and that it is something of a strain upon the ordinary use of language to speak of a baggage porter's duties as 'official.' Yet the business of operating a railway is nothing more than that of moving persons and things from one place to another, and a baggage porter actually performs a part of that movement. It is quite impossible to establish any consistent line, based upon the importance of his duties, which will make them any the less 'official.' Nobody, I should think, would say that a traffic manager had no official functions, or indeed a freight dispatcher, or a ticket seller. At least about them I can see no plausible doubt. . . . No doubt we ought not to press logic to its conclusions, for we are only dealing with common words, but we ought to execute the purposes which the words contain. If we look at the purpose of the section, there seems to me every reason not to draw any line based upon the supposed inaptitude of the words 'official function.' The section is full of verbiage, no doubt, but its very presence shows its desire for comprehension. The draftsman certainly wished to include all efforts by corruption to impede the success of the United States in any of its enterprises. All such enterprises are official as soon as the United States lawfully undertakes them, and any interference with them, by debauching those on whom any part of their execution is imposed, is a prejudice to the United States, whether the impediment be grave or trivial. This result is the evil against which the statute is clearly aimed, and it seems to be covered by the use of a phrase like 'official function,' without undue violence to a common use. Indeed, if the importance of the duty delegated be a test, the custody and correct dispatch of valuable baggage is certainly not a trivial function."

New Books

American Year Book. A Record of Events and Progress. 1918. Edited by Francis G. Wickware, B.A., B.Sc. New York and London: D. Appleton & Company. 1919.

This is the ninth issue of the *American Year Book.* Its fundamental purpose as defined in the preface to the first issue is to help the needs of writers and searchers of every kind by selecting from the enormous mass of details in various fields those things which in the judgment of experts in each field are most significant, most permanent in value, and most likely to answer the searchers' questions. The material is subdivided into departments, by putting cognate subjects into close association, and there are liberal cross-references. There are one hundred and seventeen contributors to the present issue and the outstanding feature is the history of the collapse of the Central Powers in the war, but the volume carries the customary comprehensive review of American events and progress in politics, economics, sociology, the sciences, the arts, and the humanities.

Present Problems in Foreign Policy. By David Jayne Hill. New York and London: D. Appleton & Company. 1919.

In this interesting and instructive little volume Mr. Hill discusses such subjects as the entente of free nations, Germany's pose for peace, international law and policy, the corporate character of the League of Nations, the treaty-making power under the constitution of the United States, the obstruction of peace, the débâcle of dogmatism, and the President's challenge to the Senate in the matter of its powers concerning the ratification or rejection of treaties. The volume sets forth a number of important documents, namely President Wilson's "points," the peace covenant and the Senate's "round robin." No writer is better informed on the subjects herein considered than Mr. Hill, who combines with broad diplomatic experience rare scholarly abilities and a deep insight into international problems.

Jewett's Election Manual. By F. G. Jewett. Twenty-seventh edition. Revised by John T. Fitzpatrick of the Albany Bar. Albany, N. Y.: Matthew Bender & Company.

Jewett's Election Manual is too well known to require extended notice. The fact that this is the twenty-seventh edition attests its usefulness. The statutes are given as amended to May 19, 1919, together with annotations, forms and instructions.

News of the Profession

Texas Judicial Changes.—Harry Tom King of Abilene has been appointed judge of the forty-second judicial district, Texas.

Kentucky Jurist Dead.—Judge Graham of Litchfield died July 5. He was one of the oldest members of the bar of his home city.

Osage Indian Council Names Attorney.—Judge Preston A. Shinn of Pawhuska, Oklahoma, has been selected by the Osage Indian Council to be tribal attorney.

Nebraska Lawyer Dead.—Albert E. Howard, aged 64, a practicing attorney in Lincoln for 32 years, is dead. He was born in Washington county, New York.

Illinois Bar Association.—Judge Oscar E. Heard of Dixon, Illinois, has been elected a member of the Board of Governors of the Illinois Bar Association.

Chicago Attorney Speaks to Saskatchewan Bar Association.—Henry R. Rathbone of the Chicago Bar Association addressed the Saskatchewan Bar Association at its annual meeting July 11.

Death of Texas Attorney.—Judge Hiram Glass, prominent railroad attorney of Texas, died at Texarkana, Arkansas, his former home, recently. His home at the time of his death was Austin.

DEATH OF MISSOURI JUDGE.—The death of J. D. Stoker of Springfield, Missouri, sixty years old, and formerly juvenile court judge of Greene county occurred recently.

THE KENTUCKY BAR ASSOCIATION held its annual two days' session at Lexington the latter part of June. Louis Apperson of Mt. Sterling was elected president of the association.

DEATH OF COLUMBIA, OHIO, LAWYER.—Fred S. Haynie, a well known Columbia, Ohio, attorney, died recently in that city. During the recent war he was connected with the Judge Advocate General's Department.

DEMISE OF PROMINENT INDIANA LAWYER.—Austin L. Kumler, for more than fifty years a practicing attorney of Lafayette, is dead. He participated as counsel in a number of important murder trials.

THE JOINT MEETING OF THE MINNESOTA AND WISCONSIN BAR ASSOCIATION was held July 1, 2 and 3. An important address was made by the former president of the United States, William H. Taft. Dr. William J. Mayo also addressed the meeting.

DEATH OF OKLAHOMA JURISTS.—Judge Melvin G. Bailey of Muskogee, Oklahoma, died recently in that city. Judge Milton Brown of Oklahoma died at Dallas, Texas. The latter was born in Indiana.

THE OHIO STATE BAR ASSOCIATION met at Cedar Point July 8 and 9. President Ensign N. Brown, presided. Wendell Phillips Stafford, Chief Justice of the Supreme Court of the District of Columbia, addressed the meeting on "The League of Nations."

DEMISE OF CHICAGO LAWYER.—General William B. Doster, prominent financier and attorney of Chicago, died at Bethlehem, Pennsylvania, at the age of eighty-two years. He was a graduate of Harvard of the class of 1857.

NEW JUDGE ADVOCATES OF G. A. R.—E. C. Baugher of Webb City, Missouri, has been appointed by the department commander of the G. A. R. for Missouri, a judge advocate for that state, and M. J. Briggs of Wisconsin has been appointed a judge advocate for the department of Wisconsin.

IOWA BAR ASSOCIATION.—At the recent convention of the Iowa Bar Association at Davenport, Emmet Tinley of Council Bluffs was elected president and A. C. Narack of Iowa City secretary and treasurer. It was decided to hold the 1920 convention at Cedar Rapids.

NEW DEAN OF MISSOURI LAW SCHOOL.—J. P. McBaine, professor of law in the University of Missouri Law School, has been made dean of that school. He succeeds Professor George L. G. Clark, who has been acting dean since former dean Eldon R. James left a year ago to act as legal adviser to the King of Siam.

IOWA JUDGES' ASSOCIATION.—Judge Thomas Guthrie of the district court of Polk County, Iowa, was elected president of the Iowa Judges' Association at a meeting held in Davenport in conjunction with the recent meeting of the Iowa Bar Association.

THE MICHIGAN STATE BAR ASSOCIATION held its annual meeting at Ann Arbor June 20 and 21. Former Governor Samuel McCall of Massachusetts delivered an address on "League of Nations." Dean Henry M. Bates of the University of Michigan and George T. Page, president of the American Bar Association, also made addresses. Detroit was chosen as the place for the next convention. Claude S. Carney of Kalamazoo was chosen president.

THE CHICAGO BAR ASSOCIATION has a new president in the person of James M. Sheehan, counsel for the United States government in the packers' cases and for the Corn Products Refining Company in its dissolution. The two important committees of the association are the constitutional convention committee, and that in relation with the press, and are headed by George A. Cook, ex-supreme court justice, and Alfred G. Welch, respectively.

DEAD ATTORNEY PLACES CURSE ON WILL MEDDLERS.—Frank A. Chaffin, an Ohio attorney who died recently, sought in his will, which has been filed for probate, to place a curse upon the person who seeks to interfere with the carrying out of certain provisions therein. He declares that any one who seeks to set aside or modify or in any way interfere with the terms of the testament, shall be visited with a curse, and "shall have troublesome days and weary, sleepless nights." It is understood that the Chaffin will distributes a considerable estate.

THE INDIANA BAR ASSOCIATION met July 9 and 10 at Indianapolis. The annual address was delivered by the president, Judge Everet R. Keith of that city. One of the important addresses was delivered by Benjamin F. Bledsoe, judge of the United States district court for the southern district of California. Charles N. Hepburn, dean of the Indiana University School of Law, read a paper on "The Widening Scope of Legal Education in America," and Judge William W. Thornton, a paper on "The Welter of Reports and Court Opinions."

THE TEXAS BAR ASSOCIATION met at Galveston for its annual convention July 1 and 2. The convention was in charge of its president, Cecil H. Smith of Sherman. Former United States Attorney General Thomas W. Gregory delivered an address on "Legal Problems Growing Out of the War." Henry M. Bates, dean of the law department of the University of Michigan, had intended making an address on "The Dangerous Spread of Nationalism" and Carbajal Y. Rosas of Mexico City, Mexico, an address on "The Mexican Want of Habeas Corpus," but both were unable to attend. The convention ended with a banquet at the Hotel Galvey.

AMERICAN BAR ASSOCIATION.—The American Bar Association has announced that its annual meeting, one of the most important in the history of the organization, will be held in Boston, September 3, 4 and 5. It was originally planned to hold this meeting in New London, Conn., but owing to lack of accommodations for so large a body there, the executive committee decided to change the place of meeting to Boston.

Among the speakers will be Gov. Coolidge, Judge George T. Page of Illinois, president of the association; David Jayne Hill of New York, Hon. Robert Lansing, Secretary of State; Albert C. Ritchie of Maryland and Robert L. Batts of Texas.

The first session of the meeting will be addressed by Governor Coolidge and by President Page. Secretary Lansing will talk on "Some Logical Questions of the Peace Conference."

Mr. Ritchie, who is Attorney General of Maryland and former general counsel to the War Industries Board, will talk on "Power of Congress to Tax Securities Under the 16th Amendment." This address will be followed by general discussion of the subject by the members present.

One of the features of the meeting will be the general debate on the law of courts-martial, to be held during the session of September 4. The debate will include a discussion of the report of the special committee on courts-martial, appointed by Presi-

dent Page to investigate the charges that sentences imposed by the military authorities during the war were unfair and unecessarily severe. This committee, which comprises Chairman S. S. Gregory of Chicago, William P. Bynum of Greensboro, N. C., Martin Conboy of New York, Andrew A. Bruce of Minneapolis, and John Hinckley of Baltimore, has been at work for several months making an exhaustive study of the subject.

The annual conference of Bar Association Delegates for the discussion of problems relating to the administration of justice and the practice of law will be held September 2.

Hon. Elihu Root will preside at this meeting. Other allied bodies which will meet in connection with the American Bar Association are the National Conference of Commissioners on Uniform State Laws and the American Institute of Criminal Law and Criminology.

English Notes*

The Right of Sanctuary in Scotland.—The destruction the other day of an old building, once a tavern, within the precincts of Holyrood, Edinburgh, recalls the time when "to take lodgings within the abbey"—so the euphemistic phrase ran—was the sole resource of the impecunious Scotchman who desired to avoid imprisonment for debt. The right of sanctuary existed for many centuries, but to be entitled to protection the debtor was obliged to be enrolled in the books of the Bailie of Holyrood within a certain time, and, of course, he could only go outside the jurisdiction of that official at his peril. Many are the cases recorded in Morison's Dictionary of Decisions in which incensed creditors endeavored at times to inveigle their debtors beyond the protected territory, the whole throwing a curious light on the social history of the past. It may be recalled that Sir Walter Scott, when threatened, after the financial crash of 1825, with extreme measures by some rapacious bill-holders, contemplated taking refuge at Holyrood; but, happily, the crisis passed without this step being rendered necessary. Somewhat later, however, another writer distinguished in English literature, Thomas de Quincey, actually spent some time within the abbey precincts to place himself beyond the reach of his creditors, who declined to take into account the Opium Eater's innocently thoughtless and "feckless" mode of life. Only by the practical abolition of imprisonment for debt in Scotland, now nearly forty years ago, did the functions of the Bailie of Holyrood become obsolete.

The Reverend John Horne Tooke.—The recent ceremony of the unveiling at Ealing Church by the American Ambassador of a memorial to Horne Tooke is not without interest to lawyers, for although "Parson Horne," as "Junius" called him, was not a member of the Bar, he was a student of the Inner Temple, and would have been called had it not been for his political views. He raised a fund for the widows and dependents of Washington's soldiers, and the memorial is to commemorate this act, the cost being borne by Americans. There is already a memorial to the philologer-politician in the church, and he is buried in the neighboring ground. As is pretty well known, this remarkable man—and he was remarkable in every sense; as a boy at Eton he was, at the outset, asked what his father was, and the reply, "a Turkey merchant," permitted him to pass through the school as the son of a Turkey merchant, although his father was a poulterer—found himself in 1794 at the Old Bailey on a charge of treason. Scott (afterwards Lord Eldon) who, like John Bright's Assyrian monk, could "weep as easily as he could perspire," prosecuted, and he concluded his address to the jury to the effect that his desire was not to leave a great fortune behind him or to make a great name, but his object was to do his duty to his God, his country, and his King. Mr. Attorney then sat down and wept. Tooke, who had commenced his reply, heard one of the Junior Bar observe, "What is Mr. Attorney weeping for?" The man on trial for his life stopped, and, turning to the interlocutor, observed, "Mr. Attorney, sir, is weeping, thinking of the small fortune he is likely to leave," and then resumed his speech. In his controversy with "Junius," no one can admit that Horne was worsted; in fact, some writers have expressed the view that Horne and "Junius" were one. His ability was such that the speculation is at least pardonable, notwithstanding Macaulay's considered judgment, and it must not be forgotten that "Junius," in the edition of his letters, which he revised for the benefit of the printer, admits that the letters signed "Philo-Junius" were written by himself. Then, again, we have the Recreations of Purley, which so pleased Dr. Johnson that he said he wished they would send the rogue to prison again, if it would be productive of further "Recreations." Certainly further evidence in support of the view that the Rev. John Horne Tooke was a remarkable Purley man.

Analogy Between League of Nations and British Constitution.—The framing of the Covenant of the League of Nations in accordance with the genius of constitutional development as manifested in the growth of British governing institutions, to which attention has heretofore been called in these columns, may be still further demonstrated. To take an illustration. "Private war," says the official commentary, "is only contemplated as possible in cases when the council fails to make a unanimous report or when (the dispute having been referred to the assembly) there is lacking the requisite agreement between all the members of the council and a majority of the other States. In the event of a State failing to carry out the terms of an arbitral award without actually resorting to war, it is left to the council to consider what steps should be taken to give effect to the award; no such provision is made in the case of failure to carry out a unanimous recommendation by the council, but it may be presumed that the latter would bring pressure of some kind to bear." The reluctance in the one case to specify a remedy, and in the other case to make reference to any remedy in the contingency, which is scarcely contemplated, of a glaring violation of the essential principles on which the League of Nations is based has its analogy in the British Constitution, with whose genius it is in accord. Thus in the case of violations of the conditions to which under the provisions of the Act of Settlement the right to the Crown is subject, in which event the people are absolved from their allegiance and the Crown goes to the next in succession, being Protestant, as if the person who incurred the disability was dead, there is, as Macaulay and Anson have pointed out, not merely a vagueness, but an actual absence of any specification of the methods by which such violations of the statute are to be rectified. So, too, again, in the statutory provisions under 6 Will. & M. c. 2, still in force (but never called into operation owing to the need of the appropriation of Supply and of the Army Act, which makes it legally necessary for Parliament to sit every year), providing that we shall not be more than three years without a Parliament, there is no statement as to what is to happen if the Crown fail to carry such provisions into effect. It was in fact considered disloyal to provide for the contingency that the Crown might not fulfill the law,

* With credit to English legal periodicals.

just as the framers of the Covenant of the League of Nations refrain from express provisions for remedies in the event of the violation of that Covenant by a member of the League, which is regarded as beyond the sphere of reasonable contemplation.

The Right to Die.—"The right to die" controversy, which has been accompanied with several suicides of persons who were, or believed themselves to be, suffering from incurable maladies, renders the words of the coroner at a recent inquest in Lewisham, at which the verdict of "Suicide during temporary insanity" was returned, of interest. "There was no such thing as the right to die. Man did not make his own life, and had no right to take away what he did not make. He quite agreed with the doctors when they said they would not like the responsibility of having to deprive a fellow-being of his life." Suicides and the aiders and abettors of suicide are, according to the law of this country, which is in consonance with public opinion, murderers. "Suicide," writes Sir Fitzjames Stephen, "is held to be murder so fully that anyone who aids or abets suicide is guilty of murder. If, for instance, two lovers try to drown themselves together and one is drowned and the other escapes, the survivor is guilty of murder." Sir Fitzjames Stephen, albeit unconsciously, as a jurist scouts the "right to die" doctrine and the right to put any human being to death at his own instance, however dreadful his sufferings may be. "It would, I think, be a pity," he writes, "if Parliament were to enact any measure tending to alter the feeling with which it [suicide] is and ought to be regarded. As an instance of popular feeling on the subject, I may mention a case I once tried at Norwich, in which a man, I think drunk at the time, tried to poison himself in a public-house. When called on for his defense, he burst out with all the appearance of indignant innocence: 'I try to kill myself? I cannot answer for what I might do when drunk, but I was all through Central India with Sir Hugh Rose in 1857. I was in so many general actions and so many times under fire, and can anyone believe that if I knew what I was about I could go and do a dirty, cowardly act like that?' He was acquitted." Sir Fitzjames Stephen is pronounced in his estimate of the moral obliquity of aiders or abettors of suicide. "The Draft Penal Code," he writes, "proposed to make the abetment of suicide a special offense subject to penal servitude for life as a maximum punishment. . . . The abetment of suicide may, under circumstances, be as great a moral offense as the abetment of murder. . . . The difference between such offenders and accessories before the fact to murder is that their conduct involves much less public danger, though it may involve equal moral guilt. 'Suicide' is the only offense which under no circumstances can produce alarm."

Shifting of the Onus of Proof.—The burden of proof may shift continually in the course of a trial, according as the evidence preponderates in favor of one side or the other: (Medawar *v.* Grand Hotel Company, 64 L. T. Rep. 851 (1891); 2 Q. B. 11; Abrath *v.* North-Eastern Railway Company, 49 L. T. Rep. 618; 11 Q. B. Div. 440). A good example of the shifting of the onus of proof is to be found in the recent case of Coldman *v.* Hill in the Court of Appeal. The plaintiff sent some cattle to the defendant to be agisted. Two cows were stolen without any default of the defendant. When the loss shortly afterwards became known to the defendant, he, in the mistaken but unwarranted belief that the plaintiff had himself taken away the cows, neither informed the plaintiff nor the police of the theft. If he had done so, the cows might or might not have been recovered. The onus was first on the plaintiff to prove that he had sent the cows to the defendant, and that the defendant no longer had them in his possession. Then the defendant proved that they had been stolen without his default. If the plaintiff had sued only in detinue, this defense would, on the authorities, apparently have been sufficient, but the plaintiff sued also on negligence as bailee. The question then arose whether there was any duty on the defendant to inform the plaintiff of the theft, and the court held that there was. As Lord Justice Warrington put it: "By proving that without default of his the cattle were driven off, the defendant established a *primâ facie* case of complete loss, but the defendant failed to take a step which a reasonable man would have taken, which might have prevented the apparent loss from becoming complete." Then came the final question: Was the onus on the plaintiff to show that if the defendant had given timely notice of the theft the cattle would have been recovered, or was it on the defendant to show that they would not have been recovered? The court took the latter view, basing their decision to a considerable extent on Travers *v.* Cooper (111 L. T. Rep. 1088 (1015) 1 K. B. 73). In that case a bailee of goods had them in a barge. His lighterman left the barge unattended, and the barge was either mud-sucked or caught under a projecting bolt, and flooded. It was doubtful whether the lighterman, if he had been on board, could have prevented the loss. Lord Justice Buckley said: "The defendant as bailee of the goods is responsible for their return to their owner. If he failed to return them, it rested on him to prove that he did take reasonable and proper care of the goods, and that, if he had been there, he could have done nothing, and that the loss would still have resulted." Applying that decision, and the decision in the unreported case of Morrison *v.* Walton in the House of Lords (10th May, 1909), the court held that the final onus of proof in the present case rested on the defendant, and, as he had failed to show that if he had given timely notice the cows would not have been recovered, he was liable.

Can an Infant Make a Valid Gift of Personal Chattels?—There does not appear to be any very conclusive authority as to the capacity of an infant to make a gift of personal chattels. In that excellent work, Stephen's Commentaries on the Laws of England, 16th edition, by Mr. George Jenks, vol. 1, p. 71, it seems to be suggested that an infant could retract a gift of corporeal personal property, though attention is called to the case of Taylor *v.* Johnston 46 L. T. Rep. 219; 19 Ch. Div. 603), hereinafter mentioned. As long ago as the case of Earl of Buckinghamshire *v.* Drury (2 Eden, 72) Lord Mansfield said: "If an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again" (in other words, he can give it); "if he receives rents he cannot demand them again when of age." In Manby *v.* Scott (1 Mod. 137) it is stated in the argument of Mr. Justice Hyde in the Exchequer Chamber: "If an infant give or sell goods, and deliver them with his own hand, he shall have no action of trespass against the donee or vendee by reason of the delivery." The point came before Vice-Chancellor Bacon in Taylor *v.* Johnston, in which it was decided that a gift of bank notes made by an infant, and perfected by delivery, could not be set aside by the legal personal representative of the infant, in the absence of fraud or undue influence. The learned judge in the course of his judgment, after alluding to the incapacity of infants to enter into contracts, said: "But I am not aware of any law which prevents an infant from making a donation of any chattels or personal property in his actual possession. There is, indeed, a special law, the creation of courts of equity in this country, and the same law, with somewhat wider scope, prevails in other European systems of jurisprudence by which persons who stand in, what is called, a fiduciary relation to infants are precluded from obtaining, or at least from retain-

ing, donations or benefits of any kind from their actual, or quondam, wards." In Bowman *v.* Secular Society, Limited (117 L. T. Rep. 161; (1917) A. C. 604), Lord Parker of Waddington in the course of his judgment said: "At common law the conditions essential to the validity of a gift are reasonably clear. The subject-matter must be certain. The donor must have the necessary disposing power over, and must employ the means recognized by common law as sufficient for the transfer of the subject-matter; and finally the donee must be capable of acquiring the subject-matter. If these conditions be fulfilled, the property in the subject-matter of the gift passes to the donee, and he becomes the absolute owner thereof, and can deal with the same as he thinks fit." It is a matter of every-day experience that infants frequently make gifts of personal chattels belonging to them, and the authorities appear to support the view that such gifts are valid, in the absence of fraud or undue influence. In connection with the subject of gifts reference may be made to the recent decision of Mr. Justice P. O. Lawrence (Re Stoneham, 120 L. T. Rep. 341). There the donee was in possession of the donor's house, with the consent of the donor. The donor, by parol, gave some of the furniture in the house to the donee, and confirmed the gift by will, and appointed the donee one of the executors thereof. His Lordship, after reviewing the authorities, held that there was sufficient delivery to complete the gift notwithstanding the chattels were in the possession of the donee at and prior to the time of the gift; and, further, that, even if the gift had been incomplete, the confirmation by will and the appointment of the donee as executor made the gift complete.

The Confiscation of Enemy Merchant Vessels in Port.—Mr. Bonar Law recently said in answer to a question that he regretted he was not in a position to make any reply at present as to the particular Hague Convention and the particular article of that convention, under which the United States based its claim to German shipping which took refuge in the United States ports as a result of British sea power. In reply to a further question as to "the points of international law involved," Mr. Bonar Law said: "I am not an authority on international law, but I believe it is the fact that, in the case of a country that goes to war and has ships of the enemy in her ports, the custom of international law is that they have the right to claim them." Assuming that the word "they" in Mr. Bonar Law's reply refers to the country in whose ports are the ships of a country against which war has been declared, Mr. Bonar Law's statement of the custom of international law as unaffected by the Hague Convention seems incorrect. Mr. Hannis Taylor, the eminent American jurist, writing in 1902, says: "It is not likely that any civilized nation would now confiscate the property of private enemies within its limits on the outbreak of war. . . . The United States Supreme Court has, indeed, declared confiscation to be a war right, not effective, however, until Congress enacts a statute for the purpose—something Congress has been careful never to do except during the Civil War. . . . Ships in port were formerly confiscated, but the universal rule now is to allow them time to finish loading and make their home ports if they do not contain contraband." The Lord Chancellor thus expounds and explains the position of enemy merchant vessels in port at the outbreak of war according to the modern practice which prevailed before the Hague Convention: "The question," he writes, "of merchant vessels found at the outbreak of hostilities in enemy ports has received special treatment. It was the old custom to place an embargo on these before war broke out, thereby condemning them as good prize in advance under the name of 'droits of Admiralty.' From the middle of the nineteenth century, however—a period in which several important departures from old international practice were made—it became customary to allow them a certain length of time for loading or unloading and clearing. Thus, in the Crimean War the merchantmen of Russia and Turkey were allowed to leave each other's ports, and England and France gave Russian vessels six weeks' grace, Russia bestowing a similar exemption. The same practice was adopted in subsequent wars, including the Austro-Prussian War 1866, the Franco-German war 1870, the Russo-Turkish War 1877, the Spanish-American War 1898—a month being granted by the United States and the immunity interpreted by the American courts as extending to merchantmen that had left port before the outbreak of war—and the Russo-Japanese War 1904. At the Hague Conference in 1907 the modern practice was embodied in a convention (No. VI. of 1907), with an additional declaration that vessels and cargo unable to leave within the time allowed by the enemy should not be confiscated, but merely detained during the war or requisitioned on payment of compensation. Enemy merchant vessels on the high seas, in ignorance of the outbreak of hostilities, are only to be detained, and, if requisitioned or destroyed, compensation must be paid and provision must be made for the safety of persons and papers on board. The United States objected to the convention, which she held to be of a retrogressive character, while Germany and Russia declined to agree to the provisions with regard to enemy merchant ships on the high seas, considering that they imposed too heavy a burden upon States which did not possess naval stations to which such vessels can conveniently be taken."

Obiter Dicta

Nervy.—Kidd *v.* Thomas A. Edison, 239 Fed. 405

Bugs on the Coast.—Roach *v.* Francisco, 138 Tenn. 357.

Trouble in the W. C. T. U.—Primm *v.* Wise, 126 Iowa 528.

An Action By the Anti-Saloon League.—Goodman *v.* Converse, 43 Neb. 463.

The Cart Before the Horse.—A judgment for the defendant in Karthaus *v.* Nashville, etc., R. Co., 140 Ala. 433, was reversed on appeal.

Who Would Want To?—"The judges say that one cannot throw stones moliter." 2 Rolle's Abr. 548, as quoted in Pierce Oil Corp. *v.* City of Hope, 39 S. Ct. 172.

So Mote It Be.—"A lawyer may not succeed in his case, but this is no reason for refusing to pay him."—Per Kelly, J., in Strong *v.* Dutcher, 174 N. Y. Supp. 359.

But It's Got Nothing on Labor.—"Capital is as sensitive as a mimosa plant."—Per Bond, C. J., in State *v.* Consolidated School District (Mo.), 209 S. W. 96.

Epigrammatic Nonsense.—"You cannot substitute something for nothing."—Per Martin, J. A., in Granger *v.* Brydon-Jack, 25 British Columbia Rep. 526. Mere words! It's done every day.

Our Omniscient Courts.—"When a woman permits a man to take her on his lap, the belief that he had made some progress in her affections is certainly natural."—Per Grey, V. C., in

Sinclair *v.* Sinclair, 57 N. J. Eq. 222. Apparently there is no limit to judicial knowledge.

Superlatively Speaking.—In Slicker v. State, 13 Ark. 397, the defendant was convicted and fined for preventing the execution of process by a constable. So, while the defendant may have been "slicker" than the constable, certainly the state was the slickest of all.

Lawyers Included?—"I venture to suggest that these parties have had enough law and would be wise to drop all contention without costs, remembering what was said long ago: 'He who loves law dies either mad or poor.'"—Per Middleton, J., in Glass *v.* Glass, 44 Ont. L. Rep. 236.

In Other Words, a "Squealer."—"The accomplice is the modern product of evolution from the common law approver, who being indicted of treason or felony, and arraigned, confessed his guilt before plea pleaded, but said that another was his accomplice in the very same crime, in order to procure his own pardon."—Per Riddell, J., in Rex *v.* McCranor, 44 O. L. R. 482.

Just a Few Names.—Purely by way of illustrating the ramifications of American nomenclature as revealed in the law reports, we append a few case titles, recently noted:

State *v.* Whiteneck, 176 Ind. 404;
State *v.* Hug, 44 Mo. 116;
Slob *v.* De Mots, 153 Iowa 411;
Chronic *v.* Pugh, 136 Ill. 539;
Ek *v.* Phillips Fuel Co., 157 Iowa 433.

Payment in Advance.—An elderly gentleman of Celtic birth, who had unexpectedly fallen heir to a substantial inheritance, immediately acquired a costly and high-powered car.

After a few instructions, he sallied forth on the streets of his home town. In a short time he was hauled before the local judge and accused of speeding. During his trial his persistence in interrupting the proceedings so exasperated the court that it instructed the clerk to fine him five dollars for contempt of court.

With a dignified air, the old gentleman peeled off a number of greenbacks from a monstrous roll and handed them to the clerk with the following remark: "Here is twenty dollars, for five dollars don't begin to show my contempt for this d—— court."

The Vehemency of Counsel.—Says the *London Law Times:* "Besides the Commentaries, Blackstone left some valuable reports which were first published after his death. These afford at least one gleam of humor, and that is when, after setting out the argument for the plaintiff in Roe on the demise of Bree *v.* Lees, he says 'Hill, *totis viribus* for the defendant,' and then summarizes the contentions advanced by that learned counsel, who was often facetiously termed Serjeant Labyrinth. A new interest, and indeed piquancy would be added to law reports were the reporter to indicate the vehemency or otherwise of counsel in presenting their arguments."—This might be a good idea as far as England is concerned but it would seem to be rather unnecessary in America. Quite enough space in our law reports is already devoted to the "vehemency of counsel," generally resulting in reversals.

A "Get."—It seems to be an exceedingly simple matter for Hebrews to "get" a divorce. Our knowledge of the subject is derived from the following portion of the opinion in a recent New York case which we pass along for the enlightenment of our readers: "The plaintiff testified that in 1910 the defendant told him she wanted a divorce, that he consented, that they both went to a rabbi, and that he gave her what is known in their religion as a 'get, a Hebrew divorce'; that she then went back to Odessa, and he has never seen her since. Proof was presented that she thereafter in Odessa married another man and was living with him as his wife. A 'get' is defined to be: 'A bill of divorce among the Jews. Like the Ketuba, or marriage contract, this document is drawn up in the Aramaic language, uniformly worded and carefully written by a proper scribe. The orthodox form must contain twelve full and equal lines (neither more nor less) to agree with the numerical value in Hebrew of the letters G T. After certain preliminary ceremonies and questionings by the rabbi, particularly as to whether both parties agree to the divorce, the husband hands the get to his wife in the presence of ten witnesses. In the get is contained the date, the names and surnames of husband and wife and of their fathers, and also the name of the city and its location (whether near a river or sea). After the first lines, containing the date, it runs: 'I, N., son of N., of the city of N., situated on the river N., set thee free, my wife, N., daughter of N., of the city of N., etc. Thou art set free and art at liberty to marry any man whom thou mayst choose. This document from me is a letter of divorcement and liberty according to the law of Moses and Israel.'"—Per Tierney, J., in Shilman *v.* Shilman, 105 Misc. 461.

Delmonico's.—Though not actually appertaining to the law, the following extract from the recent opinion of a New York judge should be of interest to all lawyers either because they have eaten at Delmonico's or because they belong to that larger class who would like to have eaten there: "This is an application by the receivers, Maurice P. Davidson and Grosvenor Nicholas, for leave to continue the business of Delmonico's, now being conducted by them, until a sale thereof or until the election of a trustee. . . . During the operation of the business by the receivers, all rent and taxes which have accrued during their occupancy have been paid. The business is substantial, and there are about 200 employees, many of whom have been at Delmonico's in one capacity or another for many years. 'The Delmonico tradition of conservatism and excellence,' the receivers state, has been 'carefully preserved.' In addition to the gratifying results obtained by the application of good business methods, it is probably true that the business of this old-time restaurant has improved, to some extent at least, because of sentimental reasons. Delmonico's dates back to 1825, and was established about 1845 at what later became the site of the old Stevens hotel at 7 Broadway. When Croton water was introduced into the city, the occupants of the houses fronting on Bowling Green erected a fountain, consisting of a rough stone structure, over which the water was conducted by means of a pipe. The design called forth considerable adverse criticism from visitors from out of the city, and the incident and mention of Delmonico's are thus recorded by the poet John Godfrey Saxe:

"And now Mr. Brown,
Was fairly in town,
In that part of the city they used to call 'down,'
Not far from the spot of ancient renown
As being the scene
Of the Bowling Green,
A fountain that looked like a huge tureen
Piled up with rocks, and a squirt between.

. . . . . .

And he stopped at an Inn that's known very well,
'Delmonico's' once—now 'Stevens' Hotel';
(And to venture a pun which I think rather witty,
There's no better Inn in this Inn-famous city!"

"(Note.—*The Greatest Street in the World—Broadway.* By Stephen Jenkins, Knickerbocker Press.)"

About 58 years ago, in 1861, Delmonico's moved from the Bowling Green section to Broadway and Fourteenth Street. In

1876 the next move was made to Twenty-sixth Street and Fifth Avenue, and in 1897 the establishment again moved, this time to Forty-fourth Street and Fifth Avenue, where it now is. These moves of this famous restaurant mark the progress of the active life of the city as it gradually developed toward the north, although each move was attended with the usual foreboding prophecy that the location was too far uptown and ahead of its time. Throughout these many years of existence, now rapidly reaching a century, the effect of Delmonico's has been to adhere to some simple and comfortable traditions. The theory is that the relation of host and guest still exists. Some of the well-known figures have gone, such as the white-haired John (quite typical), who, it is said, after three score and ten of a life of urbanity towards the patrons and thrift for himself, now spends a vigorous and happy old age on his New Jersey farm. The guest still continues to have identity. He is respectfully, but cheerfully, greeted by name as he enters his favorite room or takes his favorite seat. While across the table he is discussing the affairs of the day, or closing a business transaction, or telling his tribulations to his lawyer, the waiter does not hover about, but approaches only when he is beckoned. In the quiet and dignified room in which at the end of the day busy men of the city are wont to dine with each other, one may hear oneself think as well as talk, without the din of the orchestra, and with only the occasional faint sound of the strains of music from the more pretentious rooms where those disposed to be more formal may gather. In the banquet halls great and important addresses have been made at public gatherings by leaders of thought in their day and generation. Here, too, many young folks have gone forward into life with the good wishes of their relatives and friends. Within these walls the debutante has attended her first formal party, under circumstances different only as to time and dress from those which her mother and grandmother remember. Throughout all the years, the effort has been to keep for the New Yorker and the visitor from elsewhere a place of dignity and quiet, and to resist those innovations, some of which have resulted in eliminating the individual and depriving the patron of that individual attention for which at least some guests still crave. Those who know this history and these characteristics have been loath to see Delmonico's go. It is their loyalty which in part, at least, has been responsible for possibilities of a future, and the hope (in which this court will assist) is that the business may continue, and go on, so that the institution may be kept alive, and not merely find its place on a page of some book reminiscent of New York. Application granted."

Correspondence

RESERVATIONS AND THE LEAGUE OF NATIONS.

To the Editor of LAW NOTES.

SIR: No reservation by the United States Senate either of the Monroe Doctrine or of the United States' reserved right to withdraw from the League would be effective unless at the time such reservation were attempted to be exercised the executive council of the League then approved of its exercise.

Such reservation might be as worthless and ineffectual as the like reservation of the alleged right of Virginia, New York and Rhode Island to secede from the Federal Union contained in the respective ratifications of the United States Constitution by those states, was held to be during the Civil War. By the sword of war, and later by the decision of the Federal Supreme Court, it was decided that notwithstanding express reservations in their ratifications of the Constitution of the right of those states to secede, the Federal Union was perpetual and indissoluble. Texas *v.* White, 7 Wallace, 700, 722, 725-6.

Virginia's ratification of the Federal Constitution does "declare and make known that the powers granted under the Constitution being derived from the People of the United States may be resumed by them whensoever the same shall be perverted to their injury or oppression." 2 Documentary History of the Constitution of the United States, p. 145.

New York's ratification of the Federal Constitution declares: "That the powers of Government may be reassumed by the People, whensoever it shall become necessary to their happiness." 2 Documentary History, pp. 190, 191.

Rhode Island's ratification declares: "That the powers of Government may be reassumed by the People, whensoever it shall become necessary to their happiness." 2 Documentary History, p. 311.

The Executive Council of the League of Nations is an autocracy like the Holy Alliance without any Supreme Court or any other council or legislative body to hold it in check. It is the sole judge of its own powers. It is a union of the executive, legislative and judiciary merged into one body. If its decision, however erroneous, is disregarded, an international boycott, embargo or taboo will be followed by an international war in which it is the duty of every member state to support the international war to the utmost of its strength. There is no more reason to believe that in an emergency the Monroe Doctrine would be respected because reserved or the reserved right to secede peaceably allowed, than was the like reserved right in the case of Virginia (likewise of New York and Rhode Island) in 1861.

HENRY A. FORSTER.

New York City.

HOW SHOULD LOGS BE MEASURED?

To the Editor of LAW NOTES.

SIR: I have before me *Scribner's Lumber and Log Book*, of the 1918 edition, which is published by S. E. Fisher, P. O. Box 197, Rochester, N. Y. On page 71 et seq. thereof is given a log table, by which round logs are reduced to inch board measure by Doyle's Rule.

Section 5072 of the Code of Mississippi provides for the measurement of saw logs and square timber. It reads as follows: "The table known as "Scribner's Lumber and Log Book, by Doyle's Rule" is the standard rule of measurement by which logs and square timber shall be measured. The use of any other rule of measurement is unlawful; and any person who shall use any other rule which gives less number of feet in a given log, shall be guilty of misdemeanor and punished accordingly, and be liable to any person injured for triple damages."

The lumber men in this section contend that logs should be measured by taking the diameter at the small end of the log the shortest way across, within the bark. On the other hand, the property owners are contending that the logs should be measured by taking the diameter at each end of the log, the shortest way across, within the bark, adding them together and dividing by two; in other words, taking the mesne diameter to get the board measure, and they support their contention by quoting a paragraph to be found on page 72 of *Scribner's Book*, aforesaid, which reads as follows: *"It is customary* in measuring logs, to take the diameter in the middle of the log, inside the bark. This is obtained by taking the diameter at each end of the log, adding them together, and dividing by two."

While all of the lumber men state that the paragraph last quoted was not to be applied, they could give no reason why it should be disregarded. They urge that trees growing in the swamps in this country flange out at the base very abnormally, and that to apply the paragraph last quoted would mean disaster to the purchaser of logs.

Note that the paragraph in question says "it is customary." Is it to be understood that, while it may be customary, that it is not a part of the rule?

Knowing how careful you are and how exhaustive and intelligent your publication is in treating all subjects, I thought that you might be in a position to throw some light on the subject.

JNO. BRUNINI.

Vicksburg, Miss.

THE EXECUTION OF WORLD CRIMINALS

To the Editor of LAW NOTES.

SIR: I have noticed in your admirable publication (June number) to which I have for many years subscribed a discussion by Mr. Upson of the question whether there is any precedent or procedure for the execution of world criminals and I have written a short suggestion of the principles involved as follows:

"The proposition that William of Hohenzollern is entitled to escape punishment because there is no written law applicable to crimes committed by a sovereign is an amazing fallacy. The truth is that all laws imposing penalties for crime are solely for the benefit and protection of the criminal and if a man is above the law he is beyond the pale of its protection. In the absence of law any man who has seen his home burned, his wife abused and his children murdered, may with his friends pursue the offender and inflict his own measure of punishment to avenge the villany and vindicate his sense of wrong and outrage.

"To prevent mistakes and to restrain this right by regulation is the object of law which requires a trial to give the offender a chance to be heard in his defense and to mete out the penalty that would otherwise be left to the unregulated vengeance of the sufferers. All this operates solely to the benefit of the criminal.

"Society in thus taking away the right of private vengeance does so under an implied obligation to inflict a proper punishment. When society by miscarriage or delay of justice fails to keep this promise, there is a relapse to a state of nature and the indignant sufferers resume their right to redress their grievances in their own way, which explains lynching and Vigilance Committees.

"The Kaiser is therefore in the position of one who has committed the most frightful crimes (for he who does not exercise his power to prevent is guilty of what is done with his consent) and there exists no law to protect him. He is then left liable to any form of trial that to the injured people may seem fit and to such punishment as they may deem appropriate. There being no law to regulate either his trial or punishment any form of trial may be extemporized and no punishment can be said to be excessive or unlawful. It is a matter for the general sense of right and justice implanted by God in mankind.

"Humanity has risen to its present state of safety and security from oppression, tyranny and wickedness on the part of its rulers by the trial and execution of Charles I of England and Louis XVI of France, for neither of which was there any formulated law. These two great examples have ever since caused kings to tremble at the thought of an aroused and indignant people.

"There needs now the final blow at the divine right of monarchs to shed blood; the great spectacle of the last great criminal of this type dangling on the end of a rope. This lesson would do more for all time to quench that lust for conquest that mounts to the head of ambitious sovereigns than anything that has happened in a hundred years.

"For authority there is no need to go farther than the natural sense of justice. And there being no positive decree of law one the subject this recourse remains entirely intact and unimpaired in its pristine vigor."

CHARLES M. CIST.

Cincinnati, Ohio.

"Every litigant, whether he be morally good or bad, is entitled, in a court of justice, to have his rights passed upon and his evidence weighed by an unprejudiced tribunal. Bias improperly created during the progress of a trial is as hurtful as that which lurks in the minds of jurors before being impaneled."—Per Hodges, J., in S. A. Pace Grocery Co. *v.* Guynes, (Tex.) 204 S. W. 797.

"Those who from choice make a livelihood of debt collecting only from the poor, the miserable, the broken, are likely to use torture in some form of pressure, and the more refined the sensibilities of their victims the greater the chance of success."—Per Lamm, J., in Lipscomb *v.* Talbott, 243 Mo. 40.

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Law Notes

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Defending the Kaiser.

CAN it be possible that an American lawyer would assist in the defense of William Hohenzollern? Press reports have gone so far as to assert that several American practitioners will be employed to assist in the defense of the arch criminal of all times. Unless some confirmation is forthcoming LAW NOTES prefers to believe that the statement is a libel on the American bar. True there were some lawyers—few in number and in some instances associated with ultra radical propaganda—who defended during the war persons charged with sedition, draft evasion and the like. For these there was at least the excuse that every accused man has a constitutional right to the assistance of counsel. But to go beyond the utmost stretch of professional duty, to go across the sea and engage in the defense of the man whose orders set in motion and maintained the most awful orgy of rapine and slaughter that this blood-stained world has ever seen—we cannot believe that a man born under the flag of the United States would do it. What would induce him to do it? Not the noble desire to espouse the cause of the defenseless. From his own land William Hohenzollern can command the services of learned and cunning advocates, men steeped in all the sophistries of the "Kultur" of a nation of intellectual criminals. For the money or the notoriety? It is absolutely unthinkable. Out of a perverse pride in the opinion that some technical view of the law presents an obstacle to the proposed trial? At the beginning of the war some lawyers from such a motive contended that the Constitution forbade sending troops across the sea, but the present proposition goes far beyond that suicidal contention. The punishment of the Kaiser is demanded in the interest of all humanity to stand as a perpetual memorial of the world's condemnation of aggressive war, a perpetual warning to any man who may in the future dream of being war lord of the world. If that punishment is not inflicted, if kings are left free to believe that in making war they gamble with the lives of their subjects and not with their own, on the heads of those responsible for that miscarriage of justice will rest the responsibility for the next war which devastates the globe. Is there an American lawyer who will volunteer to take his share of that responsibility?

The End of the War.

THE fact that there has been considerable discussion in the recent cases as to when in legal effect the war ends indicates that the question is not wholly free from doubt. In *Southwestern Tel. Co.* v. *Houston,* 256 Fed. 690, decided April 13, 1919, it was said: "The signing of the Armistice did not terminate the war. We are still at war although active hostilities have been suspended and may not be renewed." This is in accord with the general rule established in *Hijo* v. *U. S.,* 194 U. S. 315, and declared by several of the statutes enacted in the course of the present war, that the proclamation of the President determines the date when the war terminates. But on November 11, 1918, the President in announcing to Congress the signing of the Armistice, read its terms and said: "The war thus comes to an end, for having accepted these terms of armistice it will be impossible for the German command to renew it." In *U. S.* v. *Hicks,* 256 Fed. 707, it was held that these words constituted a presidential proclamation of the close of the war and the court set aside a conviction of maintaining a house of ill fame near a military camp on December 7, 1918, on the ground that with the termination of the war the federal power to regulate against such houses ended. The court said: "In advance of a treaty it is, of course, possible for the war to break out again; but if it does not do so, then certainly it was in fact ended. If the announcement of the President was true and correct, then the 7th day of December, 1918, came after the war was at an end, and was not 'during the present war,' as that phrase is used in the statute under which this prosecution was begun. The accuracy of this proposition would seem to be obvious. Again, the President's official statement was either true or it was mere rhetorical optimism. This court is by no means at liberty to yield to the latter alternative, for it is clearly of opinion, in view of current public history, that the President's statement was, in fact, correct when made, even if an agreed upon treaty of peace has been delayed in the making." According to the press reports this argument was urged on Judge Hand in *Commercial Cable Co.* v. *Burleson,* 255 Fed. 99, involving the taking over of the cable lines on November 16, 1918. It was however ignored, the court stating the law as follows: "They rely upon the fact that after November 11, 1918, the war was from a military aspect closed, and that the powers of the President had changed. By virtue of what fact did they change? Not by the intent of Congress,

because the resolution expressly extends the powers until peace has been declared. Had they intended that a suspension of hostilities should terminate the right, they would not have said precisely the contrary. Nor did they change by any limitation of the Constitution that I know. Even if I were to assume that the power were only co-extensive with a state of war, a state of war still existed. It is the treaty which terminates the war." It would seem that the court in the Hicks case attributed to the President a formality and finality which was far from his intent. Clearly his language to Congress imported only mutual congratulation at the practical cessation of our sacrifice of blood and treasure, and not a formal declaration that the Armistice should have a legal effect which no jurist has ever attributed to such an instrument. Certainly if the words of the chief executive on such an occasion are to be given the effect of an official proclamation it will be expedient to continue "secret diplomacy" a little longer.

The English vs. the American Constitution.

THE *Canada Law Journal* referring to a recent statement in LAW NOTES that the American government, however imperfect, is the best the world has ever seen, says: "We who belong to the British Empire demur to the statement that it is the best constitution the world has ever seen. That should not however be laid to the charge of those who formulated it; they did the best they could at the time. The British constitution is the result of development for a thousand years or so, and ought to be, as it is, the best." The remark thus demurred to was aimed, not at our British cousins, but at the nations whence come those who seek to repay our hospitality by destroying our institutions. Having borrowed our common law and many of our other institutions from Britain, we are certainly estopped to criticise harshly her governmental system. What our contemporary forgets however is that it was after about nine hundred of those thousand years of British development that men, chiefly of British birth or ancestry, took all that they deemed good of British institutions, and used it as the basis of the American constitution. Many of the archaic fragments which then clung to the ancient institutions of the British Isles, England herself has since discarded, until at the present time but two radical differences exist, elective as compared to hereditary sovereignty and a written as compared to a traditional constitution. In respect to the first of these England has in effect adopted the American system by relegating the King to the position of a highly respected figurehead and vesting the real executive power in the Premier. Even with this done, the possibility of a strong and evil king coming to the throne argues in favor of the American system. Our written constitution certainly gives a fixity to personal rights which no mere tradition can insure, and the fact that it has been eighteen times amended shows that it is not too inflexible. This leaves us free to boast of the absence of an established church and a hereditary nobility, relics of the past whose right to present existence few thoughtful Englishmen will maintain. But over and above these differences and such friendly argument as may be indulged in with respect to them, the fact remains that between the two great governments of Anglo-Saxon origin there should exist no contention "save that noble contention, or rather emulation, of who best can serve and best agree" in the evolution and establishment of a system of just law.

Referendum on Constitutional Amendments.

A NEBRASKA jurist whose letter is published in another column, contributes an interesting argument in opposition to the view that in the states which have adopted the referendum an amendment to the federal constitution must be submitted to popular vote. The crux of the whole question is the interpretation to be given to the word "legislature" as used in the federal constitution to designate the body having the power to ratify. It certainly cannot be that it is never to be extended beyond the legislature as it existed at the adoption of the constitution. More than thirty new legislatures have since been created. The powers of legislatures, the number of members and the mode of their election are constantly changing, and are subject to unrestricted change at the discretion of the states. The constitution of the United States "was not intended to provide merely for the exigencies of a few years but was to endure through a long lapse of ages the events of which were locked up in the inscrutable purposes of Providence" (Story, J., in *Martin* v. *Hunter,* 1 Wheat. 326). The term must therefore intend the legislative power as it shall at the time of the ratification in question be constituted. It is true enough, as Judge Pemberton says, that the federal constitution cannot be amended by amending a state constitution. But when the federal constitution refers to a state constitution which the state is at liberty to change at will, its application must change with the changes in that institution. If it does not it will have no application, and the state instead of amending has repealed the federal constitution. Of course the makers of the constitution knew nothing of the referendum. For that matter, they knew of no means of carrying the mails except by "post roads," but that fact did not constrain the government to transport mail perpetually by stage coach. The argument in favor of the necessity of submitting an amendment to a referendum was put with what seems unanswerable logic by the Washington court in *State* v. *Howell,* 181 Pac. 920, wherein Chadwick, C. J., said: "If we are to stand upon the word 'legislature'; if that word, and that alone, is the Alpha and Omega of our inquiry—it follows that the controversy is at an end; but we are cited to no instances where a great question involving the political rights of a people has been met by such technical recourse; where any court has so exalted the letter or so debased the spirit of the law. . . . It may be set down as a truism that the Congress of the United States has no concern of the manner in which the people of the several states pass upon the proposed amendments. It is the act of ratification or rejection by the legislative power in a state, and not the manner of doing, that makes for the result to be accomplished. . . . It is provided in the federal constitution that proposed amendments shall be ratified by the legislatures of the states or by conventions assembled for the purpose of considering them. It cannot be urged successfully that the framers of the constitution used the words 'legislatures' and 'conventions' as terms describing then present institutions, for it is well known that at the time the constitution was adopted some of the states did not have legislative assemblies."

Trust Busting.

WITH the restoration of industry to a peace basis has come, as might have been anticipated, a renewal of the agitation against the "trusts," and the present inordinate cost of the necessities of life will add a great deal of force to the movement. Whether the trusts should be extinguished is an economic rather than a legal question. If we may follow the example of the courts and indulge in a little digression, it is far from being certain that the large business concerns have any particular connection with the high cost of living. If the zealous "trust buster" would look around his own home town, he would find representatives of the petty profiteers and price raisers who in their aggregate are responsible for a great deal more of the present trouble than is "big business." But leaving that issue to those whose constitutional duty it is to pass on it, it is to be hoped, for the credit of the American judicial system, that the ancient farce of "dissolving" the trusts will not be re-enacted in the presence of a derisive world. Trust after trust has been dissolved by the solemn adjudication of the highest court in the land, with no effect whatever that the ordinary citizen can discern. In Dogberry's famous charge he said with respect to the miscreant who would not stand when so ordered: "Why then take no note of him, but let him go, and presently call the rest of the watch together and thank God you are rid of a knave." If we are to have an anti-trust law on the books it should be enforced in such a manner as not to bring the administration of justice into popular contempt and give point to Bolshevist clamor about the power of wealthy men to evade the law. Every time that a combination is judicially declared to be unlawful every man responsible for its creation should go to the penitentiary for a long term of years. In connection with the rigid penal enforcement of the law there should be, to avoid injustice, some opportunity for a declaratory judgment. If business men in the best of faith desire to form a business combination, they have no means whatever in the present state of the law of knowing whether it will be considered illegal. They must either forego their plan or take their chances. A provision whereby on application to the Attorney General an issue could be framed in every doubtful case and the opinion of the court evoked thereon, would make possible helpful combinations of capital while checking those which are contrary to the policy of the law. It should not be necessary either to tolerate evil combinations or to discourage beneficial ones, but it will require some amendment of existing laws to avoid doing one or the other.

The Biggest Trust of All.

WHETHER trusts shall be prohibited or regulated is purely an economic question, and since there is to be a renewal of agitation on the subject it is to be hoped that its political animus will be enlightened with some small measure of economic knowledge. At the present time our anti-trust laws cannot command the respect of any thinking man, for the reason that they apply only to combinations of capital and not to combinations of labor. Between the two there is no possible distinction in principle. With respect to their effect, the combination of capital sometimes increases directly the price to the consumer, while the labor combination accomplishes the same result indirectly but surely by increasing the cost of production. As to the matter of methods, the capitalistic trust usually confers some benefit on the public by reductions while endeavoring to put a rival out of business. Organized labor knows no method of establishing a monopoly except by a stoppage of industry, often accompanied by destruction of property and assaults on individuals. There are two possible industrial theories, that of efficiency gained by the stress of unfettered competition and that of efficiency gained by combination under a single management. There is something to be said in favor of each. One thing however is certain, no sound industrial structure can be reared on the basis of capital organized according to one theory and labor organized according to another. The original argument in favor of the labor union was that the individual worker was at a disadvantage in dealing with an employing corporation and that collective bargaining was necessary to secure fair dealing. Now the shoe is on the other foot. The employer of a thousand men, in case of a dispute with them, is confronted with the threat that a million men in all parts of the United States will boycott his product unless he yields something that he does not think is justly due. The government should either remove its inhibition from all industrial combinations in restraint of trade or impose it equally on all combinations. For either course reasons may be adduced, but for the present policy of leaving unregulated only the combination which manifests the most brutal disregard of the rights of others nothing but political expediency can be pleaded.

Automobile Owner's Liability Insurance.

A CORRESPONDENT whose letter is published in this issue takes exception to the views recently expressed in LAW NOTES (June, 1919, p. 44) as to the provision permitting the insurer against automobile owner's liability to control the settlement with an injured person. His contention is that if an owner who could have settled for a sum within his insurance is prevented from so doing and is eventually subjected to a judgment above the face of the policy and compelled to pay the difference, the result is due to his fault in not taking out more insurance. From the viewpoint of the insurance companies this is an excellent idea, but the auto owner of modest means will view it somewhat differently. It is not, as our correspondent states, a matter of substituting the "untried judgment" of the insured for that of "experienced adjusters," though the former is often an experienced business man and the latter often a petty clerk. The idea is to make the adjuster use his judgment with some respect for the interests of the policy holder. A refusal to settle which would be politic from the standpoint of the limited liability of the insurer might be most unwise if the unlimited liability of the insured is considered. A man might well refuse to settle for $700 if $1000 was the utmost possible recovery when he would decide differently if there was a chance of his being held liable for $10,000. Since the interests of the insurer and the insured are thus at variance, any form of policy which puts the policy holder at the mercy of the insurer is fundamentally unjust. There seems to be no merit in the proposition that it would be an infringement of the constitution to enact

that every policy shall contain a provision that while no settlement can be made without the consent of the insurer, if the latter refuses to make a proffered settlement its liability shall extend to the full amount of any judgment that may be recovered. Of course there is no power to compel a company to write a policy containing this or any other provision. But if any company desires to engage in the insurance business it must do so on such terms as the legislature may prescribe. It is on this theory that the statutes prescribing standard policies are sustained (see 14 R. C. L. 859). The conducting of an insurance business is not a right but a franchise *Ins. Co.* v. *Warren,* 181 U. S. 73; *Boston Ice Co.* v. *Boston, etc., R. Co.,* 77 N. H. 6.

Honorary Degrees.

THE practice of conferring the degree of LL.D. on distinguished lawyers is commented on in a recent issue of *Bench and Bar,* the editor saying in part: "We have no doubt that the clergy and Christian laity would raise their hands in holy horror should any institution of learning undertake to confer the degree of Doctor of Divinity on the most distinguished of our statesmen. We can imagine the vociferous rage of the medical profession should such an institution confer the degree of Doctor of Medicine on the most valiant and successful general. Yet the action of a Pennsylvania college in conferring on a distinguished naval officer, in recognition of his valiant and useful services during the war, the degree of Doctor of Laws, is accepted as a matter of course, and there are probably few who will even notice the crowning absurdity that the institution which undertakes to confer this honor is a medical college." A protest against this practice is certainly in order. It seems strange that institutions of learning should thus cheapen their own certificates of scholarship, more strange that those who have earned their degrees should tolerate the gratuitous bestowal of like honor on others, and most strange of all that men who have deserved well of their country should accept recognition in the form of a patent falsehood. The custom doubtless had its origin in the day when the degree of a great university carried with it certain civil privileges and has persisted like the gift of the "freedom of the city," once a thing of no small importance but now a meaningless form in a land where cities are free to all who come. The matter is rather more than one of taste. It is a subject of frequent complaint that scholarship at the bar is on the decline. What incentive is there to the laborious acquirement of that scholarship when a prosperous layman may wear its insignia? Men are so constituted that the outward and visible signs of achievement are a spur to heroic endeavor. If the Victoria Cross was conferred on wealthy soap manufacturers in recognition of their prominence, what pride would remain to those who won it on the bloody field of battle? In a land which professes to value the victories of peace and the fruits of scholarship, "LL.D." should be as jealously guarded as "V.C." and should be bestowed with the same attention to its significance.

Confidential Communications.

THE present state of the law with respect to the communications which are privileged from disclosure on the witness stand is not wholly logical. The rule of privilege rests wholly on public policy, and the doctrine is that the public welfare requires that a man shall be able in confidence to talk with his wife and to seek legal, medical and spiritual counsel. The theory seems a sound one, despite the vigorous effort of Mr. Wigmore to minimize it in some respects, but if it is to be admitted, there are other occasions of confidence which stand in like reasons. If a man confesses his sins to a priest, the communication is privileged, but if he follows the divine injunction to go into his closet and shut the door and pray to his Father which is in secret, a listener outside the closet door may repeat the prayer in court. *Woolfolk* v. *State,* 85 Ga. 69. Some of the great fraternal orders play a large part in our social organization and establish for many men not only the most confidential personal relation but the most potent religious influence in their lives. Certainly public policy requires the maintenance of that fraternal tie, yet it has been held that a communication made in reliance on the Masonic obligation is not privileged. *Owens* v. *Frank,* 7 Wyo. 467. A striking illustration of the denial of a privilege which is demanded by every consideration of reason is found in the case of *Lindsey* v. *People,* 181 Pac. 531 (abstracted elsewhere in this issue), wherein it was held by a divided court that Judge Lindsey of the Juvenile Court of Denver could be compelled to testify to disclosures made to him in confidence by a juvenile delinquent under his jurisdiction. It is hard to imagine a requirement of public policy more stringent than that which protects and promotes the work of a well conducted juvenile court. It is hard to imagine a relation more confidential than that between Judge Lindsey and the boys whom he is seeking to rehabilitate or one that is used for nobler ends. That a communication made in the confidence of that relation should not be privileged, while those of a profiteering merchant seeking to learn from his attorney how far he can gouge the public without getting into jail are privileged, may be law but it certainly is not justice. If it is conceded that any communication is to be privileged from the demands of a legal inquiry it is time that the privilege should be extended to other relations produced by modern civilization which stand on the same footing in point of reason as those now recognized. The commitment of the entire matter, including privileges now legislatively established, to judicial discretion, might be the ideal solution, but it is probably useless to expect any legislature to show that much confidence in the judges on whose intelligence and integrity the entire administration of justice depends.

High Wages and the Legal Profession.

AT the present time workers at trades requiring but moderate intelligence and skill are receiving remuneration exceeding that of the average young lawyer. Just what effect is this going to have on the future of the legal profession? The average healthy young man of eighteen can see how with a few months' preparation for a trade he can become the recipient of a "union scale" wage of thirty or forty dollars a week. Four years in college, three in a law school and two or three starvation years waiting ethically for clients may bring him an equal income at the bar. Will not a great many "take the cash and let the credit go"? There is of course the feeling

which makes a man prefer a ten dollar "position" to a thirty dollar "job" but it is steadily weakening under the pressure of increasing prices. Talk with the young men of this generation discloses an increasing tendency to regard education as of little value in the struggle for success. If this condition persists it will mean that the legal profession will in the future be recruited largely from the sons of the wealthy, a condition far from desirable, and one which tends rapidly to the establishment of a caste system. The solution of the problem, if problem there be, is somewhat difficult. It is not to be found in the reduction of wages or in the increase of fees. It lies rather, as does the solution of many of our problems, in the cultivation of an ideal; in the increase of the belief that learning is worth while for its own sake, that service and not acquisition is the law of life, and that professional position is worth effort and sacrifice not for its financial rewards but for the unequalled opportunity which it offers to serve the common good. When the man who maintains the nation's justice in peace receives something of the honor paid to him who maintains its honor in war the bar will never lack for worthy candidates, however poor its financial reward may be.

STRIKES AND THEIR CONDUCT

THE relative rights of labor and capital are always of great interest, involving as they do the very life of the nation. Capital long reigned supreme, being the dominating and labor the dominated class. The employer by the abuse of his power and refusal to accord to the employee in the past a recognition of the latter's rights by way of proper compensation, working conditions, and the like, has created a feeling of unrest and antagonism which is not beneficial to the public as a whole. The United States is not the only nation affected. The dissatisfaction and unrest are practically world wide. The differences between the plutocrat and plebeian, between the employer and employee, are not being harmonized but rather seem to be widening. Dissatisfaction is on the increase rather than diminishing. However, as time has passed labor has demanded and received increased recognition in many ways. More particularly has it advanced in the last century. The guild of the medieval ages has been almost entirely succeeded by the unions and federations of to-day. The arrogance of capital has been superseded by the domination of labor. No longer is the worker of the humble, subservient and petitioning class. No longer is capital commanding and labor compelled to obey. Rather it is the reverse. The unsatisfactory position assumed by the former, viewed in its social and economic aspects, is being approached by the stand taken by the latter in the present age. The evolution which was slow in its earlier stages has progressed of late years with startling rapidity, so that at the present time the employer is often compelled to lend an unwilling ear and legislators to accede to many demands made on them.

The position which labor occupies to-day is the result of co-operation in the form of unionism and federations often nationwide in character. The right thus to organize for its betterment with respect to the terms and conditions of employment has been repeatedly recognized by the legislative and judicial departments of government. Furthermore the right to cease work with a view to enforcing certain demands is unquestioned. This has developed into what is known as the calling of a strike, which is in reality the growth of the last century, concerning which it is said in the New International Encyclopaedia under the title "Strikes": "Any combination of laborers to raise wages was illegal in England until 1824, and in France until 1864. In the United States strikes as such have never been illegal, but until after 1830 it was not definitely settled that strikers could not be arraigned for civil and criminal damages under the conspiracy laws. In the United States there are a few records of strikes previous to 1800, such as those of the journeymen bakers in New York in 1741, and of the journeymen shoemakers in Philadelphia in 1796, 1798, 1799, and 1805. Something like a modern strike occurred in New York in 1802 among the sailors. They paraded the streets and compelled others to join them, but were dispersed by constables, and their leaders were punished. From 1821 to 1834 there are accounts of only a few strikes each year, the records being doubtless very incomplete. These were generally among the building trades, hatters, tailors, shoemakers, and laborers on the Chesapeake and Ohio Canal. 'In 1835,' says the report of the Commissioner of Labor (1901, p. 721), 'strikes had become so numerous as to call forth remonstrant comments from the public press.' A number of strikes for a ten-hour day occurred in the thirties, while strikes for eight hours were general in 1872-73.' "

The purposes of a strike are many, among others being to prevent reduction of wages, to obtain better remuneration, shorter working hours, more favorable conditions for work, recognition of a union, discharge of nonunion men, or to assist some other union in enforcing its demands, the last named being characterized as a sympathy strike. That the employment of the strike has been greatly beneficial in aiding labor to improve its standing and conditions generally is unquestioned. Without the unions and the use of this means capital would still have been dominant and dictatorial, and the demands of the worker been accorded scanty recognition.

The late world's war has been productive of many labor troubles and some sensational strikes. Profiteering on the part of capital has been charged and the charge cannot be disputed. Increased cost of living has caused discontent among the working class, while fortunes were being accumulated by the favored ones. In some instances the demand for men resulted in the voluntary payment of higher wages than had ever been known. But all branches were not affected alike. In many employments, and especially was this true and still is among those employed in lines not affected by the war's demands or where the employees were not unionized, wages were not increased so as to enable the employee to meet the added expense of living although the employer was receiving an additional profit. Discontent has resulted and many strikes have ensued, frequently accompanied by disorder and sundry violations of law. In fact in almost all strikes where any considerable number of men are involved, there is an attempt at intimidation or the use of violence towards others who are endeavoring to perform the same services in place of those refusing to work. It also often happens that property of the employer is injured or destroyed.

In such cases police protection should be afforded to all parties with a view to enforcing the law, and prosecuting officers should see that police officials perform their duty and that they suffer the penalties of the law for refusing or failing to do so. Yet how often do we find them ignoring riotous acts on the part of strikers. Thus, for instance, we have a ludicrous situation depicted in a late case in a federal court. We will state it in the language used by the judge: "Although the police department knew by the middle of the afternoon that trouble was threatened at the Atlas Hotel, the record is barren of evidence of any attempt to prevent the assembling of the crowd, or to disperse or control it. It was allowed to grow until it became what the chief of police terms 'a mob.' Twelve policemen were present in the evening. What a squad of courageous policemen or deputy sheriffs, bent on the performance of their duty, could have done to preserve the peace, we do not know, because no effort in that behalf was made. On the contrary, the chief of police called on members of what he characterized as 'a mob' to aid him in conducting in safety to the depot men who had committed no offense and whose legal right to be unmolested on the streets could not be questioned. The rare spectacle was witnessed of unoffending men, deprived of the protection guaranteed by law, being marched to the depot with uplifted hands, to be sent out of town, while the offending crowd that provoked such a situation was suffered to remain undisturbed." *Niles-Bement-Pond Co.* v. *Iron Molders' Union,* 246 Fed. 851, 858.

Now, while the right to strike is generally recognized, the use of means to make it effective is confined to those which are lawful. A proper regard for the rights of the public should be observed. As was said in a recent case in a federal district court: "The employee and the employer each have their functions, their respective duties and obligations. Neither may transgress the right of the other, and a court of equity will not be moved unless the rights of one of the parties are violated, or, by the conduct of one or both of the parties, the interests of the greater party the public, which is always the sufferer during a strike, needs the court's strong arm." *Puget Sound Traction Light & Power Co.* v. *Whitley,* 243 Fed. 945, 947. That rights of the public are frequently ignored is shown by a recent strike in a southern city, the report of which states that electricians struck in sympathy with street car men after throwing out all the switches in the power plants, leaving homes, streets, and hospitals without lights. In that case the mayor declared that such acts were outrages against an innocent and helpless public, and another local union refused to support the electrical workers on the ground that the safety of the public was directly involved. Of course in nearly all such cases the participation of the strikers in any unlawful acts is denied by the unions, although any attempt by the authorities to enforce law and order is resented. Thus in a strike which lately occurred on a street railway line in an eastern city in which men were pulled from cars and assaulted by others in uniform, and property destroyed, the action of the local authorities in declaring that police would be put on the cars for protection of employees and persons thereon was referred to by the attorney of the union in language which certainly contains a strong vein of humor. He was credited in various papers as saying:

"If the police man the cars it will be an outrage. The functions of the police are strictly defined by law to protect life and property. Officials of the union are discouraging any acts of violence.

"In view of the fact that the strike is being conducted in a peaceable and lawful manner, if it is true that the police are to be placed on cars, we consider that the citizens and taxpayers' money is being illegally spent to hire official strikebreakers. Such action would seem to show a desire on the part of the police officials to arbitrarily help . . . to break a successful strike."

In this connection it might be well to ask why the strikers should object to such action if they were acting in accordance with law and guilty of no disorderly conduct. Certainly there was no reason to object.

The right to strike for a lawful purpose is conceded, but labor in exercising this power and in handling the situation must have due regard for the rights of others, not only as to the public as a whole but also as to the individuals, including the employer and others willing to work in place of the strikers. The fact that labor has a grievance does not justify violations of law any more than it does in any other case. If men are willing to work at a certain wage or under certain conditions it is a violation of their rights to intimidate them, by threats or force, in order to cause them to refrain from doing so. Conditions unsatisfactory to some may be agreeable to others. The needs of one man may be such as to justify him in accepting employment which is not satisfactory to another. Thus in *Niles-Bement-Pond Co.* v. *Iron Molders' Union,* 246 Fed. 851, 855, the court said: "Labor has a right to strike. The strike is sometimes the only weapon laborers may wield to obtain their just deserts. The molders were at liberty to contend for the employment of union labor only at the Tool Company's plant, this being one of the principal points in controversy; but the company has the right to run an open shop, employing without discrimination both union and nonunion labor, when and as such labor offers itself to meet the company's needs. The union men were not required to work for the company, but they had no right to say that no one should take the places which they had left, or that those places should not be filled by nonunion men. The right to form and join a union exists. The right to prevent another man from working, if he does not belong to a union, does not exist. This is still a free country. Every man may use his labor, his acquired or God-given talents, of whatever worthy kind, in an honest way to earn a livelihood and gain a competency. In the eyes of the law the rights of a union man are no higher and no more sacred than those of the nonunion man. The rule of equality prevails. A person may join a union or not, as he pleases, and no one has a right to deny him the privilege of working, or to harass, annoy, abuse, or maltreat him because he works, or is willing to work, in the place made vacant by a striker. Whenever either labor or capital resorts to discrimination, oppressive conduct, or words or deeds of violence, it discredits and weakens itself, and invites the accompanying defeat which usually follows."

The unions, however, do not adopt this attitude towards the nonunion man. They profess to regard him as an outcast, an exile to be shunned as one would avoid a person infected with a loathsome and contagious disease. In their eyes he has no rights. He deserves no protec-

tion. Their union is their law. They can do no wrong. By some, assault and even murder are justifiable so long as they may help to accomplish the object in view. It is this lawless conduct which the courts condemn, and which causes lack of sympathy on the part of the public. It also meets with the disfavor of the better class of union men. When such means are employed it is then the duty of the government through its various branches to protect those who are injured thereby, and to endeavor to prevent the continuance of lawless acts. "Society itself is an organization and does not object to organizations for social, religious, business and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence and power that come from such association. By virtue of this right, powerful labor unions have been organized. But the very fact that it is lawful to form these bodies, with multitudes of members, means that they have thereby acquired a vast power, in the presence of which the individual may be helpless. This power, when unlawfully used against one, cannot be met, except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the constitution; or by standing on such rights and appealing to the preventive powers of a court of equity. When such appeal is made it is the duty of government to protect the one against the many as well as the many against the one." *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 439.

The general principles of law relating to the right to call a strike and its conduct have been frequently announced by the courts and may be regarded as settled. Unions cannot excuse violations of law on the part of their members by pleading ignorance. Nor do they gain sympathy on the part of the public by such acts. Threats, intimidation and violence are but steps in the direction of anarchy. No good can result by conduct of this character, and the cause of labor is not advanced to a better plane. Unions have accomplished much in the past for their members by resorting to lawful means for the attainment of their purposes.

Furthermore the object should be proper with due regard to the rights of all. We have heard capital accused of profiteering, but does it benefit the working class as a whole for some portion of it to demand its share of ill-gotten gains? Is not a particular branch profiteering when, although its members pay seventy or eighty per cent more for the needs of life, as others are paying, they receive two and even three times what their compensation was before the war for the same work and in addition perhaps are required to work less hours? And yet demands along these lines are reported almost every day. For instance, the writer has just read that drivers of milk wagons in a certain city who are now receiving thirty-five dollars a week and a commission on collections have organized and are to demand fifty dollars per week and double the present commission. Before the war a compensation of slightly over a third of this was not objected to and men were eager to obtain such positions. Much the same thing has occurred in the transportation field. This condition does not help the situation. It may benefit some but not the great body of wage earners. Shorter working hours, excessive pay such as has been mentioned, and decreased production are bound to result in higher prices to the entire public. This does not solve the real question in which the public is as a whole interested, namely, the high cost of living. The situation seems to be that each organization is striving to better its own condition regardless of other lines of labor. Some succeed far better than others because in the particular trade or business in which they are employed there is a greater necessity of service to the public, as for instance railroad and street car lines. Rather it would seem that there should be a union of effort to benefit all producers and workers, aiming to include not only the railroad man or the mechanic but also the clerk, the stenographer, the bookkeeper, the office man and municipal and government employee, many of whom have not been advanced in income to keep pace with the advance in the cost of living.

The breach between capital and labor should not be widened. Each is entitled to a just return for the part it takes in the production of the world. Their interests are mutual and the great problem must be worked out on lines of co-operation, each having a due and proper respect and regard for the rights of the other and in addition recognizing the interests of the great mass of the people and the welfare of the nation. A satisfactory solution can be reached but not by a selfish, all profit grasping spirit on the part of capital or by unreasonably excessive demands on the part of labor. Harmony, reason and justice to all must underlie and be the basis of any practical and satisfactory result to both.

HOWARD C. JOYCE.

"CONCURRENT JURISDICTION" NOT THE SAME AS "CONCURRENT POWER"

IN LAW NOTES of August is found an article by Mr. Bronaugh, in which he points out problems which will arise under article 2 of the 18th amendment. Unfortunately for his contention, he bases them upon a misstatement of the contents of section 2.

He says that section 2 of the 18th amendment provides that, "The Congress and the several states shall have concurrent *jurisdiction* to enforce this article by appropriate legislation."

This is not the wording of section 2. This section provides that Congress and the states shall have *concurrent power* to enforce this article by appropriate legislation. "Concurrent power" and "concurrent jurisdiction" do not mean the same thing.

His argument is based entirely upon the decisions relating to concurrent jurisdiction and is not in point. He relies mainly on the Oregon case 212 U. S. 315. In this case the two states were given concurrent jurisdiction over the river. Oregon passed a law prohibiting purse nets. Washington enacted a law licensing persons to do the thing which the Oregon legislature prohibited. Oregon demanded the arrest of a citizen operating a purse net in the state of Washington. The court simply held that Oregon could not enact a law to apply to a citizen of another state when he was in that state and not violating the laws of that state. If the state of Oregon had the legislative power to enact a law for both of these states, just as the federal government has the power to

enact a law to apply to all of the states, and then Oregon had been denied power to enforce the law in Washington, the case would be in point.

The reason why the operator of a purse net could not be convicted in Washington was because there was no law in effect in the state of Washington that he was violating. When Congress enacts a law, it applies to all of the states, and any person who violates it cannot set up the defense that there is no law prohibiting the act which he was doing in that particular jurisdiction.

The opponents of prohibition are mistaken when they claim that the 18th amendment cannot be enforced until the state and federal government enact identically the same laws on this subject matter, and that concurrent power means joint action or exactly the same action on the issue involved. The friends of the 18th amendment insist that concurrent power simply means equal power or authority on the part of the state and federal government to enact prohibition legislation and that the use or failure to use this power by one does not prevent the other unit of government from using its full power or part of its power to carry out the manifest purpose of the 18th amendment.

WHAT IS POWER?

Power is simply the right, ability or the authority to do something. In constitutional law, power is simply the right to take action in respect to a particular matter. The power referred to in this amendment is the governmental power to enact legislation to enforce the prohibition amendment.

WHAT DOES CONCURRENT MEAN?

In the long line of decisions the word "concurrent" has been construed to mean the following: "Contributing to the same event or effect"; "co-operation"; "seeking the same objects." These and many other similar constructions make it clear that the two units of government are given authority or power to carry out the purpose of the 18th amendment. There is no limitation on this power except that these units of government only use that authority in harmony with the purpose of the 18th amendment.

There is nothing in the 18th amendment to require concurrent legislation to be enacted. It simply confers concurrent power upon the state and federal government. There is a vast difference between two units of government having power to do a thing and making the enforcement of a constitutional provision contingent upon the state and federal government enacting concurrent legislation.

HOW THE AMENDMENT WILL BE ENFORCED

Congress, having the power as well as the obligation to enact legislation to enforce the amendment, will doubtless prohibit the manufacture and sale of intoxicating liquor for beverage purposes and place the obligation upon the federal courts to enforce the prohibition acts and outline the procedure for its enforcement. It is pointed out by the opponents of prohibition that this policy will result in a conflict between the federal and state laws, and that concurrent power under such a condition is impossible. The constitution must be construed together. Article six of the constitution was not amended or repealed by the 18th amendment. It says: "This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the superior law of the land and the Judges in every state shall be bound thereby; anything in the Constitution or the laws of any state to the contrary notwithstanding."

The Supreme Court in construing this has said: "It must always be borne in mind that the Constitution and laws of the United States are as much a part of the law of every state as its own local laws and Constitution." This power of the federal government over the state government was recently illustrated in the West Virginia case decided by the Supreme Court in January, 1919. The court said: "When Congress exerts its authority in a matter within its control, state laws must give away in view of the regulation of the subject matter by the Superior power conferred by the Constitution."

While the state is given equal power within its jurisdiction to enact laws prohibiting the liquor traffic, if it does not use that power to the full extent this will not prevent the federal government from carrying out the full purpose of the 18th amendment as authorized in the constitution. Each unit of government will accept final jurisdiction of cases which are prosecuted under laws enacted by it. There will be no more conflict than there is now between offenses on the same subject matter which are defined by the federal and state government. There are varying and even conflicting standards between the state and federal laws as to what is intoxicating liquor, adulterated foods, drugs, etc. A citizen of a state who is inclined to break these laws will have to inform himself as to the provisions of both federal and state enactments and conform to both. The 18th amendment notifies him that the beverage liquor traffic is prohibited and there is no limit on the power of the state or federal legislative bodies in passing laws which have a reasonable relation to the end authorized. The federal courts enforce the federal acts. The state courts will have at least as much authority to make arrests and help to enforce this federal law as any other federal law. See sec. 1014 R. S.

The state courts, with the larger number of officers and more adequate enforcement machinery, will enforce the laws enacted by the states in order to make prohibition effective within their borders. When a state and a municipality have concurrent power to prohibit the liquor traffic, each enacts its own laws. The municipality enforces its own laws within the municipality. The state enforces its state law, not only in the municipality but throughout the whole state. Each unit of government enforces its laws throughout the entire territory within its jurisdiction. Many states give not only concurrent power to the municipal council and the state legislature to prohibit the sale of liquor but they confer concurrent jurisdiction on city, township, county and district courts to enforce the law. The court which accepts jurisdiction first has exclusive jurisdiction of that case, but this does not prevent other courts from authorizing arrests of the same defendant for other offenses. Concurrent power causes no confusion or conflict. It will simply result in harmony of action between the two governments and

makes law enforcement sure. The federal government may establish additional courts or confer additional authority on judicial officers to enforce the prohibition act if it becomes necessary, just as state officers have this authority conferred upon them by state law.

WAYNE B. WHEELER.

RATIFICATION OF THE PEACE TREATY

PEACE being signed *more suo*, Me. Edouard Clunet has lost no time in giving an exposition of the immediate situation, and, although written for the benefit of laymen, it will doubtless prove not without interest to lawyers. The former president of the Institute of International Law writes:

"The transition from war to peace supposes generally, as I have before written, three steps: The armistice, the preliminaries of peace, the Treaty of Peace." [*Vide Law Times*, Oct. 23 last, p. 55.] "Thus they followed the closing of the previous Franco German war: Armistice, Jan. 28, 1871 (Versailles); preliminaries, Feb. 26, 1871 (Versailles); Treaty of Peace, May 10, 1871 (Frankfort). On the present occasion in the re-establishment of pacific relations between the belligerents the intermediate step of the preliminaries has been passed over (*brulée*). They cease to be enemies officially by two steps: Armistice, Nov. 11, 1918; Treaty of Peace of Versailles, June 28, 1919.

"But in what conditions does a Treaty of Peace become a definitive diplomatic instrument? The draft (*projet*) of the treaty having been duly communicated to the high contracting parties, and the abundant exchange of notes provoked by this communication having been exhausted, a *rendez-vous solennel* has been held for the signature. Upon the diplomatic instrument for which the elegance—and more so still—the solidity of the paper are commendable, the plenipotentiaries accredited by their respective Governments affix their personal seals. In principle only the signature of the chief of each delegation will be operative (*opérante*). In tradition all the delegates append their signatures (*paraphes*). The Treaty of Frankfort of 1871 was completed with the names of Jules Favre, Pouyer-Quertier, and E. de Goulard, on the side of France, and by Count Bismarck and Count d'Arnim on behalf of Germany. But the signing the treaty is not sufficient in itself; it is only a preliminary step towards the treaty definitive. Its juridic perfection, and consequently its obligatory force depend on a supreme ceremony, the ratification. The ratification is the formal acceptance by the sovereign power in the country signatory. The conditions of the validity of this acceptance depend on the prescriptions of the constitutional law of each State. In some cases, becoming more and more rare, the head of the State finds in his prerogatives the power of approving diplomatic treaties without any concurrence [of the Legislature]. To-day in the *plerumque fit* it is the appanage of the legislative chambers. Below will be found some of the requirements of the Constitutions of the signatory Powers of the Treaty of Versailles of the 28th June, 1919.

"GERMANY.—Art. 11 of the constitution of the German Empire of the 16th April, 1871, contains: 'The Emperor represents the Empire in international relations, declares war, and makes peace in the name of the Empire.' Since the eclipse—total or partial—of the imperial *régime*, the provisional constitution of the 10th Feb., 1919, decides that treaties to become definitive must be approved by the National Assembly and the Commission of the States. But the Prussian Assembly and the Bavarian Assembly will certainly claim the right to express their approval (*le droit dire leur mot*).

"ENGLAND.—In principle the Crown is invested with the sovereign power of concluding all treaties, on the advice of the Ministers responsible. But in practice of the Parliamentary Government the Chambers intervene on every occasion that a treaty affects an important interest. Treaty of Commerce, etc. (A. Todd, Parliamentary Government in England, 1892, I. p. 132 *et* 5).

"BELGIUM.—Art. 68 of the Belgian Constitution of the 25th Feb., 1831, says: 'The King makes the treaties of peace, of alliance, and of commerce,' but it adds: 'The treaties of commerce and those which may encumber (*grever*) the State, or bind individually the Belgians, have effect only after they have received the assent of the Chambers.' But our eminent Belgian confrère, Edmond Picard, considers that 'the State, the whole nation, could not be bound when its natural delegates have not freely given their assent to the engagements subscribed in its name.' This is the theory followed: (V° Convention internationale nos 80 *et seq.*: Pandectes belges, Bruxelles 1838.—Léon Dupreiz, le role constitutionnel du Roi, Revue générale, déc. 1888, p. 860).

"BRAZIL.—According to the Constitution of the 24th Feb., 1891, which governs the Republican United States of Brazil, it belongs exclusively to Congress (Chamber of Deputies and Senate) to decide (*statuer*) definitely as to the treaties with foreign Powers.

"UNITED STATES.—The Federal Constitution of the 17th Feb., 1787, still in force, enacts as follows: "He (the President) shall have the power to conclude treaties, upon the advice and consent of the Senate, provided that two-thirds of the Senators then present consent.' The practice is conformable to the constitutional text, which, moreover, according to the commentators, does not lend itself to controversy (Story, Commentaries on the Constitution of the U. S., Boston, 1883, t. iii, p. 34).

"FRANCE.—Article 8 of the constitutional law upon the *rapports des Pouvoirs publics* says: 'The President of the Republic negotiates and ratifies Treaties. Treaties of Peace . . . are definitive only after having been voted by the two chambers.' This parliamentary approbation must precede the ratification and authorize it. The articles of the Treaty are not remitted in discussion, but only those of the bill of approbation. In the discussion on the Treaty of Peace of Frankfort it was thus at the National Assembly of Bordeaux of the 18th May, 1871, (cf. Reglements du Senat, art. 73, de la Chambre, art. 32—E. Pierre, Traité de droit politique, etc. Paris, 1893, p. 879.—L. Michon, les Traites internationaux, etc., Paris, 1901, p. 204 *et seq.*).

"ITALY.—The ancient *Statut fondamental sarde* of the 4th March, 1848, extended by degrees to all Italy, contains upon the matter in art. 5: 'He (the King) makes treaties of peace, of alliance, of commerce, and other matters by bringing them to the knowledge of the Chambers. . . . Treaties which involve a charge upon the finances, a change (*modification*) of territory, shall only have effect after the consent of the Chambers has been given.' There has been controversy to determine when and how and how much of such and such a treaty should enter into one or other of these categories. In fact, treaties of peace have been submitted to the vote of the Italian Parliament in their integrity. (Dr. Carlo Schwanner il Diritto de Guerra, etc., Torino, 1891, p. 143.—M. Mancini, Norme de Parlamento, etc., 1887, p. 646.)

"JAPAN.—According to the Constitution of the 11th Feb., 1889, spontaneously granted by the Mikado, the Emperor declares war,

concludes peace, and all treaties. The Treaty of Shimonosaki of the 17th April, 1895, closing the Chino-Japanese War, obtained the Imperial ratification on the 20th May, 1895. On the occasion of the treaty signed at Portsmouth, under the auspices of the United States, on the 23d April, 1905, which put an end to the Russo-Japanese War, Parliament was consulted. [The order in which the Powers appear above being somewhat chaotic, it should be stated that Me. Clunet places them alphabetically, but when translated this order becomes disarranged.]

"As a treaty signed but not ratified is still, in the language of lawyers, only an *obligation sous condition suspensive*, it signifies that the sacrament of the confirmation must be administered with promptitude. There are in the history of treaties some examples of 'Ratification which have marched *pede claudo*. The treaty to amend the Convention de Paris of the 20th March, 1883, relative to the protection of industrial property was signed at Washington on the 2nd June, 1911, and ratified . . . the 1st April, 1913. It is an example not to follow. On the other hand, the Franco-German Treaty of Frankfort of the 10th May, 1871, stipulated for the exchange of ratification after a delay of ten days (art. 18). This steam-like procedure was observed. The National Assembly at Bordeaux approved the treaty on the 18th May, 1871, and the *procès verbal* of the exchange of the ratifications was drawn up at the hour named at Frankfort, the 20th May, 1871. The Treaty of Versailles of the 28th June, 1919, does not contain any such fixed time; it contents itself with a very just wish (*voeu*): 'Art. 440.—The present treaty, of which the French and English are both authentic, shall be ratified. The deposit of ratifications shall be made at Paris as soon as possible.'

"However, in view of the number of high contracting parties some delays may occur—even involuntarily. To remedy this recourse has been had to *un mode abreviatif:* 'Art. 440. A first *procès verbal* of the deposit of ratification will be drawn up as soon as the treaty has been ratified by Germany on the one part and by three of the principal Allied and Associated Powers on the other part.' At this moment the Treaty will be incorporated in international law positive and become executory (*exécutoire*). 'Art. 440. From the date of this first *procès verbal* the treaty will come into force between the high contracting parties.'

"Some accessory means, such as the maintenance of the blockade, the deferred sending back of prisoners of war, will hasten, perhaps, the goodwill of Germany. Some sad minds are not convinced of this goodwill. They are wrong without doubt. Have not the German plenipotentiaries affirmed that they have signed without mental reservation of any kind? Have not the German Press, of all shades of opinion, exhorted their fellow-citizens to fulfil the engagements taken? Better than anyone, Germany, the scrupulous guardian of the pledged word, knows this fundamental rule of human relations, formulated a long time ago by the *raison écrite:* 'Conventions legally formed take the place of law with those who have made them. They must be executed in good faith.' It is true that it is in the French code that this high moral law has found asylum."—*Law Times.*

"Under the liberal legislative enactments and judicial rulings completely emancipating the wife from her husband in all property and business relations, it seems to me that there is no longer a vestige of law, reason or justice left upon which to base a claim for damages against the husband for the separate torts of the wife."—*Per* Woodson, J., in Boutwell *v.* Shellaberger, 264 Mo. 81.

Cases of Interest

BETTING ON RESULT AS DISQUALIFYING JUROR.—One who has made a wager on the conviction of a man charged with murder is not fit to sit as a juror at his trial. See State *v.* Warm (Vt.), 105 Atl. 244, reported and annotated in 2 A. L. R. 811, wherein the court, after reviewing certain affidavits filed in connection with a petition for a new trial which tended to show that one of the jurors had some time previous to the trial wagered that the defendant would be found guilty, said: "Many people regard betting as fun, and the fact that the juror regarded it as a joke to bet on the conviction of a man charged with murder does not commend him to us as a man fit to be a juryman in a case in which he had made that kind of a wager. A grave question of public policy is here involved, and it admits of but one answer. The amount of the wager in this instance is immaterial to the answer. Courts will not consider how large a wager must be to disqualify the wagerer. Public policy will not permit verdicts to stand which are rendered by jurymen who have bet on the issue, be the stake great or small. It is not for us to inquire whether or not the result of the trial was in any measure due to the situation that existed. The due administration of justice is the question at stake."

RIGHT TO COMPEL WITNESS TO TESTIFY AS EXPERT.—In Pennsylvania Co. for Insurers, etc., *v.* Philadelphia, 262 Pa. St. 439, 105 Atl. 630, reported and annotated in 2 A. L. R. 1573, it was held that a witness cannot be compelled against his objection to testify as an expert in favor of a private litigant. The court said: "The process of the courts may always be invoked to require witnesses to appear and testify to any facts within their knowledge; but no private litigant has a right to ask them to go beyond that. The state or the United States may call upon her citizens to testify as experts in matters affecting the common weal, but that is because of the duty which the citizen owes to his government, and is an exercise of its sovereign power. So also where the state or the United States, in her sovereign capacity, charges the citizen with crime, she may, if need be, lend her power in that regard to the accused; for she is vitally interested, as such sovereign, that public justice shall be vindicated within her borders. Perhaps, also, under like circumstances, she may also lend her power in civil cases. But the private litigant has no more right to compel a citizen to give up the product of his brain than he has to compel the giving up of material things. In each case it is a matter of bargain, which, as ever, it takes two to make, and to make unconstrained."

VALIDITY OF AGREEMENT NOT TO DEFEND DIVORCE SUIT.—An agreement between married people that one of them shall bring an action for divorce and the other shall fail to defend it, especially where the alleged ground for divorce is not the real one, is a collusion to defraud the courts and is void and unenforceable. It was so held in Edleson *v.* Edleson, 179 Ky. 300, 200 S. W. 625, reported and exhaustively annotated in 2 A. L. R. 689, wherein the court said: "The public policy of this state, as well as that of all others, so far as we know, is to foster, protect, and encourage marriage, as it is the foundation of the family relation, without which, an observation of the history of the human family shows, there can be no civilization. The state is interested in the permanency of the marriage relation, and its interest finds expression in the various statutes which prescribe the grounds for which divorces may be granted, and

the requirement that the county attorney should examine the record of a proceeding for divorce and resist its granting unless the applicant is entitled to it under the laws of the state, and in the requirement that the grounds for divorce must be proven, whether there be a defense or not. Hence, a husband and wife cannot lawfully enter into a contract for a divorce, and any agreement made by them to facilitate the procurement of a divorce is held to be void and illegal, as contrary to public policy. The contract to facilitate the granting of a divorce is a fraud upon the courts, as they are the only tribunals which are authorized to dissolve the marriage relation, when it has once been established, and then only upon the grounds and for the reasons provided for by law."

STATEMENT TO JUVENILE COURT JUDGE AS PRIVILEGED COMMUNICATION.—In Lindsey v. People, 181 Pac. 531, the Colorado Supreme Court held, three judges dissenting, that a statement made by a twelve-year-old boy to a juvenile court judge (Judge Ben B. Lindsey of the Denver Juvenile Court) to the effect that he had killed his father was not a privileged communication and that on the subsequent trial of the boy's mother for the murder of the father, the refusal of the judge when called as a witness to disclose any matter communicated to him by the boy was a direct criminal contempt of court. A judgment imposing a fine of $500 was affirmed. In a strong dissenting opinion, Bailey, J., said: "No more important and wholesome benefit in general is possible of attainment than that of making wayward and delinquent children clean, upright and useful citizens. That any relationship which tends to promote this highly desirable object should be encouraged goes as a matter of course. It is equally plain that anything which tends to destroy the trust of the child in the court which has jurisdiction over such matters must necessarily nullify all possibility of good which otherwise might thereby be accomplished. To permit the violation of a confidence made by a delinquent to the judge of the court having such matters in charge would at once remove the cornerstone of his faith in the one to whom he is authorized to appeal for help and protection. It may be that the broad powers and authority conferred by statute upon judges of juvenile courts are such that, in rare and exceptional cases, some judges may take advantage of them for ulterior motives, still, in determining the questions involved we are not dealing with isolated cases, or with any individual judge, but in a general way, with a most important system of jurisprudence, highly designed to promote the public welfare through the reclamation and betterment of delinquents, and which as maintained and ordinarily administered is a vast power for good, concerning which no narrow construction should be indulged tending to weaken or discredit its work. In view of the wise and humanitarian object of the statute, which should be supported and upheld to the utmost legal extent, we are of the opinion that the communication in question falls within well recognized limitations governing privileged communications, and should, in the interest of the general good, be so treated by the courts."

NECESSITY OF CONSIDERATION TO SUPPORT OPTION UNDER SEAL.—In Thomason v. Bescher, 176 N. C. 622, 97 S. E. 654, reported and annotated in 2 A. L. R. 626, it was held that an option under seal to purchase standing timber within a specified time requires no consideration to support it. Said the court: "It is the accepted principle of the common law that instruments under seal require no consideration to support them. Whether this should rest on the position that a seal conclusively imports a consideration, or that the solemnity of the act imports such reflection and care that a consideration is regarded as unnecessary, such instruments are held to be binding agreements, enforceable in all actions before the common-law courts. Speaking to the question in Harrell v. Watson, 63 N. C. 454, Pearson, Ch. J., said: "A bond needs no consideration. The solemn act of sealing and delivering is a deed; a thing done, which, by the rule of the common law, has full force and effect, without any consideration. Nudum pactum applies only to simple contracts." A similar position is stated with approval in Professor Mordecai's Lectures, at page 931, and Dr. Minor, in his Institutes (pt. 1, vol. 3, p. 139), says: "In all contracts under seal a valuable consideration is always presumed, from the solemnity of the instrument, as a matter of public policy and for the sake of peace, and presumed conclusively; no proof to the contrary being admitted, either in law or equity, so far as the parties themselves are concerned. While there is much diversity of opinion on the subject, we think it the better position, and sustained by the weight of authority, that the principle should prevail in reference to these unilateral contracts or options when, as in this case, they take the form of solemn written covenants under seal; and its proper application is to render them binding agreements, irrevocable within the time designated, and that the stipulations may be enforced and made effective by appropriate remedies, when such time is reasonable, and there is nothing offensive and unconscionable in the terms of the principal contract."

RIGHT TO HABEAS CORPUS OF ONE ARRESTED ON SUSPICION OF HAVING CONTAGIOUS DISEASE.—In Ex p. Hardcastle (Tex.) 208 S. W. 531, it was held that habeas corpus would lie to inquire into the legality of the detention of one who had been arrested on the warrant of a health officer without a hearing, as being suspected of being afflicted with a contagious disease. The court said: "This is a habeas corpus proceeding in which the relator is held under an order of the city health officer of San Antonio, by virtue of quarantine regulations established in accord with chapter 85 of the Acts of the Fourth Called Session of the Thirty-Fifth Legislature, under a statement of the order of arrest that, according to the information of the health officer, relator is affected with gonorrhea. The form of the order is not involved, the agreed statement of facts containing the following: 'It is further agreed that the sole issue in the case is whether or not the decision of the proper health officer is final, or whether the same can be inquired into by writ of habeas corpus.' The legislature, under the police power, has authority to authorize the establishment of quarantine regulations for the protection of the public against contagion from those persons whose condition is such as to spread disease, and, incident thereto, to authorize the arrest and detention of such persons; and such, we understand, is the purpose of the statute in question. Under its terms, the proper health officer may issue a warrant by virtue of which a lawful arrest may be made without, preliminary thereto, affording the person affected a hearing; but if, after arrest, such person challenges the right of the authorities to continue the detention, the fundamental law accords him the right to have the legality of his detention inquired into by a proper court in a habeas corpus proceeding. The law denies to no one restrained of his liberty without a hearing the right to prove in some tribunal that the facts justifying his restraint do not exist (6 R. C. L., p. 435, § 449). The health authorities causing the arrest of relator derive their power to do so from the alleged existence of the fact that the relator is affected with the disease mentioned, and that her detention is required in the public interest, to prevent contagion. If those facts do not exist, the officer has no jurisdiction to continue the restraint, and the court in the habeas corpus pro-

ceeding has authority to inquire whether the facts essential to jurisdiction exist."

REFERENDUM ON PROHIBITION AMENDMENT.—In State *v.* Howell (Wash.), 181 Pac. 920, the court held that under a constitutional provision for a referendum on "acts, bills or laws" a joint resolution of the legislature ratifying the 18th amendment to the federal constitution was subject to a referendum. After discussing at length the opposing contention the court said by way of a *reductio ad absurdam:* "Keeping in mind our present 'bone-dry' condition, or plight, if that term be preferred, suppose the Congress of the United States should propose an amendment to the federal constitution providing that it shall hereafter be lawful to ship into and sell in all of the states of the Union wines and beers containing not to exceed a certain minimum of alcohol—that it has the power so to do will not be denied; then suppose that the state legislature did by resolution, as in the present instance, ratify the amendment, and that it was ratified by a sufficient number of states only, including our own, to meet the demands of the federal constitution. We would then have a law that was not a law before; that would wipe out pro tanto the present law; that would work such an exception to it that, so far as the policy of our citizens had been expressed by their direct vote, would defeat its purposes. In such event—and it is a reasonable postulate—would it be urged for one moment that the people of this state could be denied a right of referendum to determine for themselves, under their reserved powers, whether they would desire their own law to be thus overcome? Would they have to stand by helplessly, while the fruits of their victory were swept away, and their sovereignty surrendered in degree, by resolution of the legislature? I opine that we would find some way to declare that the right to refer the matter to the people, who had theretofore exercised their reserved power upon the very subject of the proposed legislation, could not be thus defeated. It is no argument to say that a referendum in that event would operate to promote a good cause, while this demand comes from those who would defeat all liquor legislation. We are here to declare the law, not to maintain or defend policies; and it is enough to say that the relator is within the law as declared by the whole people, and as such his right should not in conscience be denied. We cannot fit a rule to meet a particular case; it must apply to all alike, whatever the cause and whatever the character of those who invoke it."

LIABILITY IN TORT OF PUBLIC SERVICE CORPORATION ATTEMPTING TO USE POWER OF EMINENT DOMAIN FOR PRIVATE PURPOSES.—The attempt by a public service corporation to exercise its right of eminent domain for a private purpose under the guise of a public one renders it liable in tort to one injured thereby, although there is no interference with the physical possession of the property. It was so held in Sidelinker *v.* York Shore Water Co. (Me.), 105 Atl. 122, wherein the court said: "Did the filing by the defendant in the county commissioners' court of a notice of taking, stating that the defendant 'has taken and hereby does take' the plaintiff's land, such act being ostensibly for a public and lawful purpose, but really for a private and unauthorized purpose, render the defendant liable in this action of tort? A private individual, enjoying no special privileges, who, without malice, wrongfully asserts, and presses, by suit or otherwise, a claim to the property of another, provided he do not physically interfere with such property or its possession, is not, under the common law, guilty of tort. But a different and stricter rule should be applied to a corporation armed with the right of eminent domain. Authority in some measure determines accountability. Responsibility is a corollary of power. Privileges and duty grow on the same stem. The high standard demanded in the conduct of trustees, the rule of trespass ab initio applied in the case of public officers, and the extraordinary degree of care required of common carriers, are some of many illustrations of the broad application of this principle. The defendant was intrusted by the state with the power of taking property by eminent domain. This power is an attribute of sovereignty. Its possession is a privilege of high import. While nothing in this case shows that it is so used by this defendant, it may be made an instrument of oppression. Its exercise should be sedulously guarded. Atonement should be made for its abuse. While counsel have not cited, nor have we discovered, any authority directly in point, we hold that, when this defendant filed in the office of the county commissioners its notice of taking the plaintiff's land, stating therein that it 'has taken and hereby does take' such land, professedly for public, but in fact for private, purposes, and also filed its petition for determination of damages, it committed an act tortious as to the plaintiff, notwithstanding it did not by any physical means interfere with the plaintiff's possession."

PRESENCE OF OWNER AS AFFECTING LIABILITY FOR NEGLIGENCE OF ADULT SON IN DRIVING CAR.—In Zeeb *v.* Bahnmaier, 103 Kan. 599, 176 Pac. 326, it was held that the owner of an automobile was not liable in damages for the tort of his adult son who was in the possession of and had the control and management of the car, on the mere ground that the owner was present when the son, although an experienced driver, committed a tort by momentary negligence in driving the car. The facts of the case were as follows: The defendant owned an automobile which his son, an adult in business for himself, was accustomed to use for business or pleasure with the defendant's permission. The son was wont to use it to drive to church. Sometimes the defendant or other members of the family, or all together, accompanied the son. At such times the son always drove and exclusively operated the car. On the day of the accident the son invited his parents to accompany him to church. On the return journey the son, while operating the car at a speed of 2 or 3 miles an hour, overtook and collided with a buggy through his negligent failure to give the occupants of the buggy sufficient time to get their vehicle to the side of the road, and one of the occupants of the buggy, the plaintiff, was injured. The jury specially found that the father, who owned the car had nothing to do with its operation or control at the time of the accident. The court said: "The law imposes no liability on a father for the tort of his son on the mere ground of paternity. This is the law, even where the tort is that of a minor son. Mirick *v.* Suchy, 74 Kan. 715, 87 Pac. 1141, 11 Ann. Cas. 366; Smith *v.* Jordan, 211 Mass. 269, 97 N. E. 761. Unless some rational theory of principal and agent, or of master and servant, supported by substantial evidence, can connect the father with the act or delict of the son, the father is no more liable than a stranger. And this principle holds true, whether the father is present or absent when the tort of the son is committed. If I do no more than permit my adult son to use my horse or my shotgun whenever he cares to do so, and if my son is conceded to be experienced in the management of horses and in the handling of shotguns, and is not known to be careless therewith, shall I be held liable if he, in a moment of negligence, rides down a pedestrian or shoots a neighbor's cow, merely because the horse or shotgun is mine, and because I was personally present when the negligent mishap occurred? There is no such rule of law in any 20th century textbook. Any such rule of liability attaching to mere ownership of an automobile, if found

in the decided cases, must have been announced when the judiciary were less familiar than now with that distinctively modern invention. Why should the mere presence of the owner of the automobile, which was in the possession, control, and exclusive management of another responsible adult at the time of the tort, subject the owner of the car to liability in damages? An automobile is a more safe and dependable chattel than a horse, and it is not an inherently dangerous instrument; certainly much less so than a shotgun."

FORFEITURE BY CONDITIONAL VENDOR OF AUTOMOBILE USED BY VENDEE IN VIOLATION OF LAW.—In H. A. White Auto Co. *v.* Collins, (Ark.) 206 S. W. 748, reported and annotated in 2 A. L. R. 1594, it was held that one selling an automobile on credit, retaining title as security, could not recover the machine in case it was forfeited by the public because used for the illegal transportation of intoxicating liquor, although he had no notice that it was to be used for an unlawful purpose. The court said: "Prior to October 8, 1917, the appellant company sold to one Jones, in Memphis, Tennessee, an automobile for jitney and taxi service, retaining the title to the car until the purchase price had been paid. But the payment had not been made on the date aforesaid. After purchasing the car, Jones, without the knowledge or consent of appellant, fitted the car with copper tanks having an aggregate capacity of 70 to 80 gallons of liquid, and, with the car thus camouflaged, proceeded to transport intoxicating liquor from Caruthersville, Missouri, into and through Mississippi county, Arkansas, in violation of the laws of this state. The sheriff of that county arrested the occupants of the car, who were fined for their violation of the law, and an order of the court was made confiscating the car. Appellant brought replevin against the sheriff to recover the car, and the cause was heard upon an agreed statement of facts, containing, in addition to the above recitals, the statement that appellant was not a party to any of the procedure above outlined, and had no knowledge of the tanks or of the use to which they were put, but, on the contrary, had no reason to believe the car was being used for any purpose other than that for which it was sold to Jones, to wit, for taxi and jitney service. Appellant has prosecuted this appeal to reverse the judgment of the court refusing to award it the possession of the car. The car was confiscated under the provisions of § 6 of Act No. 13 of the Acts of 1917, vol. 1, p. 41, prohibiting the shipment of intoxicating liquors into this state, and otherwise restricting the sale or transportation of intoxicating liquors. The relevant portions of the section referred to are as follows: 'That no property rights of any kind shall exist in the liquors mentioned in section 1 of this act, . . . or in any vessel, fixture, furniture, implements, or vehicles, when the said liquors or other property mentioned are kept, stored or used for the purpose of violating any law of this state, nor in any such liquors, bitters and drinks when received, possessed, kept or stored at any forbidden place; and in all such cases the liquors, bitters and drinks aforesaid, and said property herein named are forfeited to the state of Arkansas and may be seized, or searched for and seized, under the laws of this state and ordered to be destroyed in the manner and under the rules prescribed by law respecting contraband liquors, or by order of the judge or court after a conviction. . . .' There are a number of cases in the Federal courts, upholding the right of seizure and confiscation of property used for an unlawful purpose, under statutes forfeiting property rights in property so used. . . . There appears to be no question about the constitutionality of statutes similar to our own. Indeed, under the common law, property thus illegally used would be forfeitable, ipso facto, without a statute. We conclude, therefore, that, as the appellant company had voluntarily parted with the possession of the car, it cannot complain against the judgment of confiscation rendered against it because of the unlawful use made of it by persons who were in possession of it with the appellant's knowledge and consent."

News of the Profession

THE COMMERCIAL LAW LEAGUE had a convention in Cincinnati, Aug. 18-20.

THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY held its eleventh annual meeting in Boston, Sept. 2-3.

MISSOURI JUDGE DEAD.—Judge James T. Neville, for eighteen years district judge of the twenty-third district, died Aug. 8.

DEMISE OF CLEVELAND ATTORNEY.—Theodore M. Bater, a prominent Cleveland attorney and land valuation expert, died recently.

THE DUNKLIN COUNTY, MISSOURI, BAR ASSOCIATION was addressed by James C. Jones, president of the Missouri Association, July 14.

REAPPOINTMENT OF CREEK NATIONAL ATTORNEY.—The reappointment of James C. Davis to the office of Creek national attorney has been announced.

DEATH OF PROMINENT MICHIGAN ATTORNEY.—Everett Clark Eastman of Marinette died Aug. 8. He was general counsel of the Wisconsin and Michigan railroad.

CHANGE IN PERSONNEL OF DISTRICT ATTORNEYS OF TEXAS.—Frank S. Morris of Stephenville, Texas, has been appointed district attorney of the 29th judicial district in that state.

GRAND RAPIDS LAWYER PASSES AWAY.—George L. Williams, one of the oldest lawyers of Michigan, died recently at his home in Grand Rapids. He was born in New York state.

THE NORTH CAROLINA BAR ASSOCIATION met August 5-7. Among the speakers were Lieut.-Col. Samuel T. Ansell, former Judge Advocate General of the army, and former Attorney-General T. W. Gregory.

DEATH OF FORMER NEBRASKA JUDGE.—T. O. C. Harrison, at one time chief justice of the Nebraska Supreme Court, died at Grand Island after a short illness. He had held many offices in that state.

NEW CIRCUIT JUDGE IN ALABAMA.—W. H. Evans of Saline County, Arkansas, has been appointed circuit judge of the seventh district, succeeding Judge John C. Ross, deceased. Judge Evans formerly held the same office.

APPOINTMENT OF UNITED STATES DISTRICT ATTORNEY FOR TEXAS.—D. E. Simmons has been appointed United States attorney for the Southern district of Texas, succeeding John E. Green, whose assistant he formerly was.

BROOKLYN LAWYER DEAD.—John F. Clarke, a prominent Brooklyn attorney and former district attorney of Kings county, died suddenly at Belgrade Lakes, Maine, where he was spending a vacation.

NEBRASKA JUDICIAL CHANGES.—Judge Dorsey of the district court of Nebraska has resigned his office to accept a place as commissioner of the Supreme Court. George W. Tibbets of Hastings has accepted a similar appointment.

DEATH OF CHICAGO JURIST.—Circuit Judge Frederick A. Smith of Chicago is dead. He was at one time a partner of Judge C. C. Kohlsoot and was one of the original trustees of the University of Chicago.

THE COUNTY JUDGES AND COMMISSIONERS' ASSOCIATION OF TEXAS met in Galveston, Aug. 4, and continued three days. One of the important addresses was by Judge F. D. Lowe of Georgetown on the subject of the state inheritance tax law.

THE COUNTY AND PROBATE JUDGES' ASSOCIATION OF ILLINOIS held a special meeting July 16. Judge Henry H. Orr of Carthage was one of the speakers, delivering an address on "Late Decisions of Supreme Court Affecting Probate."

FORMER UNITED STATES ATTORNEY OF ARKANSAS DEAD.—James Frayer Read, formerly United States district attorney at Fort Smith, Arkansas, died August 1 at Little Rock where he had lived since his retirement from practice several years ago.

OHIO LAWYER RESIGNS FROM STATE BOARD OF CLEMENCY.—Price Russell, member of the State Board of Clemency of Ohio, has announced his intention of resigning his place on the board in order to resume the practice of law at Creston, Wayne county.

WOMAN ON NEW YORK DISTRICT ATTORNEY'S STAFF.—Miss Rose Rothenberg of New York city is now on the legal staff of the district attorney of New York county. She is the first woman to become a member of a district attorney's staff in that county. She has been assigned to duty in the women's court.

FEDERAL JUDGES TO RETIRE ON ACCOUNT OF AGE.—Judges D. P. Dyer of St. Louis, and John W. Warrington of Cincinnati, have been retired under the law permitting federal jurists to retire on a pension on reaching the age of 70, provided they have served on the bench for a period of at least ten years.

NEW ASSISTANT ATTORNEY-GENERAL OF UNITED STATES.—Charles B. Ames of Oklahoma City, Oklahoma, was recently appointed as assistant to United States Attorney-General Palmer. For many years Mr. Ames was pending judge of the Oklahoma Supreme Court Commission and he was also at one time president of the Oklahoma Bar Association.

THE SOUTH DAKOTA BAR ASSOCIATION held its annual meeting in Aberdeen July 30 and continued three days. The address of welcome was made by Judge McCoy of the Supreme Court. The president, George N. Williamson, delivered the annual president's address, and C. A. Severance of St. Paul spoke on "The Duty of the Bar in the Present World Crisis."

THE OHIO BAR ASSOCIATION at its annual meeting held at Cedar Point in July elected Smith W. Bennett of Columbia president. With but three negative votes the association recommended the abolition of the unpartisan judicial ballot law which was declared to be a failure. A midwinter meeting will be held in Dayton during the Christmas holidays.

ADDITIONAL UNITED STATES JUDGE IN GEORGIA.—Samuel H. Sibley of Green county, Georgia, has been appointed an additional United States judge for the northern district of that state to lighten the duties of Judge William T. Newman who requested the appointment of an additional judge. Judge Sibley was until recently president of the Georgia Bar Association and was for some years judge of the City Court of Greensboro.

THE ILLINOIS BAR ASSOCIATION has elected for the coming year the following officers: President, Frederick Brofn, Chicago; first vice-president, Logan Hay, Springfield; vice-presidents, Silas H. Strawn, Chicago, and Bruce A. Campbell, East St. Louis; secretary, R. Allan Stephens, Danville; treasurer, Franklin L. Velde, Pekin; board of governors, Roger Sherman, Chicago; Robert P. Vail, Decatur.

THE COLORADO BAR ASSOCIATION which met in Colorado Springs July 12 elected officers as follows: President, W. L. Dayton, Denver; first vice-president, C. C. Balreich, Pueblo; second vice-president, John L. Bennett, Colorado Springs; secretary and treasurer, W. W. Grant, Denver; assistant secretary, W. D. Cobb, Denver. A resolution endorsing the League of Nations was turned down as not falling within the province of the association.

INDIANA BAR ASSOCIATION.—Oscar H. Montgomery of Seymour was elected president of the Indiana State Bar Association at its recent meeting. Other officers elected were: Elmer E. Stevenson, Indianapolis, vice-president; George H. Batchelor, Indianapolis, secretary; Elias D. Salsbury, Indianapolis, treasurer. Three members elected to the board of governors were George O. Dix of Terra Haute; Edgar M. Blessing, Danville, and Allison E. Stuart of Lafayette.

English Notes*

THE PRINCE OF WALES AND THE BAR.—On Wednesday, the 2d of July, the Prince of Wales was called to the Bar by the Middle Temple and elected a Master of the Bench of that Inn, of which his grandfather, his late Majesty King Edward VII was also a Bencher. The connection of the Royal House with the Inns of Court is an intimate one. His present Majesty is a Bencher of Lincoln's-inn, H. R. H. Prince Albert of the Inner Temple, and H. R. H. the Duke of Connaught of Gray's-inn.

THE POPE IN COURT.—His Holiness Pope Benedict XV figured as a litigant in the Chancery Courts in Dublin recently. In the case of Moore *v.* Pope Benedict, before Mr. Justice Powell, the question had to be determined whether a gift of £10,000 "to His Holiness the Pope" was a valid charitable gift. It was contended on behalf of the residuary legatee that the gift was bad on the ground of uncertainty; that it was bad, further, on the ground that it might be used for purposes contrary to law in upholding or supporting some monastic order which under statute law was unlawful. On behalf of the defendant it was contended that the court must assume that it would be used for general religious purposes, and that this would constitute the gift a valid charitable one. The learned judge took time to consider his decision, and subsequently in a long judgment he laid down that the gift must fail on the ground of uncertainty. His Lordship reviewed all the authorities in his judgment. It is stated that the case will go to the Court of Appeal, and ultimately to the House of Lords.

* With credit to English legal periodicals.

JUDICIAL ROBES.—The decision of the judges of the Superior and Circuit Courts of Chicago to assume the traditional judicial robe, and the approval of this determination given by the American Law Review, are significant, says the *Law Times*, as recognizing that in so democratic a country as the United States dignity and prestige may be given to a court by the costume of its judges. For many years the judges of the Supreme Court of the United States have been accustomed to wear black gowns, and in a certain number of the States the appellate judges have followed their example, but the rule has not obtained universal acceptance. A judge arrayed in a distinctive costume is doubtless more picturesque and more impressive than one clad in what in America is known as "Jeffersonian simplicity," but there is little likelihood of our kin beyond sea adopting the extensive and expensive judicial wardrobe with which English judges have to provide themselves. The history of the robes, as well as the times and seasons when they are to be worn, are dealt with at length and in interesting fashion by Pulling in his Order of the Coif, and by the Comte de Franqueville in his extremely valuable work, Le Système Judiciare de la Grand Bretagne. As we have said, the English High Court judge's outfit is both extensive and expensive, and in this connection it may be recalled that a former judge noted for his somewhat gloomy views on things in general, meeting a friend whose promotion to the Bench had just been announced, offered him the cheering observation, "Your robes will cost you a lot of money."

TESTAMENTARY LAW AND THE BIRTH-RATE.—In certain proceedings before him recently Lord Coleridge quoted the answer of the American lawyer who, when asked what would happen in his country if a man chose to entail a great landed estate, instantly replied, "Set aside the will on the ground of insanity." This remark was used many years ago by Matthew Arnold, in his essay on Equality, in which, with his marked tendency to exalt things foreign over things English, he sought to demonstrate that the higher civilization he discovered among the French peasantry was due entirely to the testamentary law established by the Code Napoléon—the law which forbids entails, and insists upon the principle of practically equal division of property among a testator's children. There were those among Arnold's critics who declared that the essayist saw the French peasantry through rose-colored spectacles, and entertained grave doubts whether he and George Sand, whom he called in as corroborating his views, were justified in claiming that France was the most civilized of nations, and that its pre-eminence in this respect it owed to the principle of equalty. It is certainly significant that not a few later writers, and several of them French, have been questioning the wisdom of the testamentary law as it exists. In his standard work on France Mr. Bodley says that one of its disadvantages is "that its operation after several generations has caused such an excessive subdivision of landed property that peasant proprietors meet the inevitable difficulty by limiting the number of their children. Whence the shrinking birth-rate of France, which is a further check on colonial enterprise, and in the days of universal conscription on the Continent is a menace to French security in the face of the steady growth of the armed nation beyond the Vosges." It may be, now that the League of Nations is set on its feet, which its sponsors fondly hope will put an end to war—we hope it may, although we have our doubts—the last point touched on by Mr. Bodley has lost some of its force; but, be that as it may, it is interesting to observe that a law intended to secure an equitable distribution of property has in the past so operated as seriously to affect the growth of a nation. No doubt there have been other causes at work tending in the same direction, as has been the case in England, where the law of bequest is different, but recent French observers have pointed to this as the chief determining cause of the alarming decrease in the birth-rate.

SCOTTISH MARRIAGES.—Many years ago Lord Neaves, one of the judges of the Court of Session, who cultivated letters as well as law, thus maintaining the literary traditions of the Scottish Bench and Bar, wrote some capital verses under the title "The Tourist's Matrimonial Guide Through Scotland," in which with equal humor and accuracy he sang the elegant simplicity of the law of Marriage then prevailing north of the Tweed. As he said, "It isn't with us a hard thing to get woo'd and married an'a'." Those were the days when Gretna Green marriages were popular with romantic young couples from England, who to effect their object had only to cross the border, exchange words of consent, and behold they were married. Then came Lord Brougham's Act of 1856 which destroyed at one blow the staple industry of Gretna Green by enacting that after the December 31, 1856, "no irregular marriage shall be valid in Scotland, unless one of the parties has lived in Scotland for twenty-one days next preceding the marriage, or has his or her usual residence there at the time." The existence of this statute is sometimes forgotten, perhaps intentionally, and a form of marriage is gone through in Scotland although the requirements of the law have not been complied with. This appears to have occurred only recently, and, as false statements were made as to residence in Scotland in order to obtain the registration of the marriage, the parties and certain others who aided and abetted them found themselves charged before the sheriff and were severely dealt with. In addition to this, the marriage is, of course, a nullity, as neither party has resided in Scotland for the requisite period nor had his or her usual residence there. Curiously enough, the schedule which by the recent Marriage (Scotland) Act 1916 has to be filled up by those who have contracted an irregular marriage contains no question as to the length of residence in Scotland of either party. It is true that the schedule assumes the fact of the marriage having been contracted, but it would have been well to insist upon a statement as to residence as well as on the various other matters regarding which information has to be furnished. While the whole procedure in Scotland in connection with the celebration of marriage is lax when compared with that which obtains in England, it cannot be too much emphasized that the laxity is not so pronounced as it once was, and that certain conditions must be complied with before a legal marriage can be contracted.

SUPERSTITIOUS USES AND GIFTS FOR MASSES.—The House of Lords has now reversed the decision of the Court of Appeal in Re Egan; Keane *v.* Hoare (119 L. T. Rep. 618; (1918) 2 Ch. 350) by which gifts for masses, bequeathed by a testator, who was a Roman Catholic, were held invalid. These gifts are now decided to be valid, and the long standing rule of law in England, under which a gift for masses to be said for souls of the dead was void as a superstitious use, has been abrogated. The Law Lords who heard the appeal were the Lord Chancellor, Lord Atkinson, Lord Wrenbury, and Lord Buckmaster, of whom Lord Wrenbury dissented from the opinion of the majority. The Lord Chancellor described the case as "difficult" and "extremely important." The case is certainly important from a social and economic point of view, for the Roman Catholic community in the country has now been placed in the same position with regard to freedom of bequest for religious purposes as other religious communities. The law of England on the subject has also been brought into line with the law of Ireland and the

oversea dominions, and thus a uniform rule established for those parts of the Empire where the common law is in force. The case is, however, principally important—as well as difficult—on purely juridical grounds, and will form a landmark in the field of law relating to the limits within which the House of Lords should exercise its competency to overrule long-standing decisions of inferior courts. The cases first decided on the effect of the Chantries Act, 1547, have stood for more than 300 years. The case of West *v.* Shuttleworth has stood for eighty-four years, and has, moreover, been recognized as authoritative both in the Privy Council and the House of Lords itself, though this recognition does not, of course, constitute anything like a binding decision: (see Yeap Cheah Neo *v.* Ong Cheng Neo, L. Rep. 6 P. C. 381, 396; Bowman *v.* Secular Society, 117 L. T. Rep. 161 (1917); A. C. 406, 437). . . . It does not follow, however, that all questions on the subject of gifts for masses are at rest. It has still to be decided in the English courts that such gifts are charitable, and therefore (when tending to a perpetuity) not void on that account. This question has been decided already in the Irish courts, the latest case apparently being O'Hanlon *v.* Logue (1906, 1 I. R. 247), and in Ireland gifts for masses, even if creating a perpetuity, are still valid as being charitable. Now that the supposed authority of the Chantries Act, 1547, and West *v.* Shuttleworth is out of the way, there seems every reason to expect that the English courts will follow the rule laid down in Ireland and hold gifts for masses to be charitable gifts, and so not obnoxious to the rule against perpetuities.

AUTHORITY OF AGENT TO MAKE CONTRACT OF SALE.—It is important for the principal and the agent that the limit of the authority of the agent who is instructed to find a purchaser or a vendor should be known. A man, for instance, wishes to sell his house and puts down the description of the house at some house agent's. Clearly the house agent's duty is to find a purchaser, not to bind the intending vendor by entering into a contract with the purchaser. He has to suggest the purchaser and then let the parties make their own terms (see judgment of Mr. Justice Parker in Thuman *v.* Best, 97 L. T. Rep. 239). The question as to the solicitor's authority is more difficult to answer. In Daniels v. Trefusis (109 L. T. Rep. 922; (1914) 1 Ch. 788) Mr. Justice Sargant referred to what he called the well-known case of Smith *v.* Webster (35 L. T. Rep. 44; 3 Ch. Div. 49) and said that it "really decided that the authority of a solicitor to prepare a draft contract did not include and indeed was inconsistent with an authority to state in a binding form and so as to constitute a contract the rough heads of information which had been given by the client to the solicitor as material on which to draw the formal contract." In the case before Mr. Justice Sargant the solicitors had authority to sign some letters inclosing certain statements. This signature was not intended to be the signature of a note or memorandum of a contract sufficient to satisfy the Statute of Frauds, but Mr. Justice Sargant held that nevertheless it had that effect. The question of the solicitor's authority to bind his principal has been brought up again in the recent case of North *v.* Loomes (120 L. T. Rep. 533 (1919); 1 Ch. 378). The intending purchaser sent the receipt which the vendor had given him for the deposit, in which the purchase price, the name of the house, and the date for completion were all mentioned, to his solicitor, instructing him to carry out the agreement. When the vendor's solicitor suggested a formal contract, the purchaser's solicitor replied in writing: "I need not trouble you to send me another contract, as the one which your client has signed is, I think, quite sufficient." Mr. Justice Younger decided that this was a note or memorandum signed by the purchaser's solicitor and satisfied the requirements of the Statute of Frauds. He held that the purchaser's instructions were to complete, not merely negotiate, a sale. Consequently, the solicitor was by necessary implication authorized to affirm on behalf of his client the existence and validity of the contract which he was instructed to carry out. The distinction between instructions to negotiate a contract and those to complete a contract already formed is a very real one. The vendor or purchaser, as the case may be, does not wish to make or answer requisitions or prepare the draft conveyance himself, but he does wish to have a voice in settling the purchase price and in making arrangements about the property which may materially affect his comfort or the value to him of the property or the neighboring property (if he is the vendor and retaining any).

LIFE ASSURANCE POLICY EFFECTED AND PREMIUMS THEREUNDER PAID BY BANKRUPT.—In Re Phillips; Ex parte Official Receiver (110 L. T. Rep. 939 (1914); 2 K. B. 689) this question was raised: Whether the circumstance that a policy of assurance was effected by a bankrupt on his own life without the knowledge of the trustee in bankruptcy, and with similar secrecy the first premium was paid by him thereon while he was still an undischarged bankrupt, rendered the case distinguishable from that of Tapster *v.* Ward (101 L. T. Rep. 25, 503). For in that case, the policy was effected, and the first premium, and one only, was paid before the bankruptcy, without the existence of the policy being disclosed to the trustee in bankruptcy. It was there decided by the Court of Appeal, affirming the decision of Mr. Justice Eve, that the trustee having been absolutely ignorant of the existence of the policy, and the payments for premiums in respect thereof having been made by the debtor himself without the knowledge of the trustee, the official receiver was entitled to the policy moneys on the death of the bankrupt as against the legal personal representative of the deceased. Mr. Justice Horridge, before whom Re Phillips (ubi sup.) came on to be heard, did not see why the difference in the period in which the policy was effected by the bankrupt and the first premium was paid—nor a further difference that the dispute arose there between the creditors in two bankruptcies, whereas in Tapster *v.* Ward (ubi sup.) it arose between the creditors in the bankrutpcy and the personal representative of the deceased bankrupt—ought to lead him to a different conclusion. The learned judge distinguished Re Tyler; Ex parte Official Receiver (97 L. T. Rep. 30 (1907); 1 K. B. 865) as the Court of Appeal had done in Tapster *v.* Ward (ubi sup.). And his Lordship did so for identically the same reason—that is to say, that there was knowledge in Re Tyler (ubi sup.) of the trustee in bankruptcy of the execution of the policy and the necessity for paying the premiums: (see also Re Hall; Ex parte Official Receiver, 97 L. T. Rep. 33 (1907); 1 K. B. 875). That is the crux of the whole matter. Knowledge or want of it on the part of the trustee in bankruptcy is the dominant factor to be taken into consideration by the court, and so it was regarded by Mr. Justice Horridge in the recent case of Re Stokes; Ex parte Mellish. There it was established to the complete satisfaction of the learned judge that the original trustee in bankruptcy had no notice of the execution of a policy of assurance which had been effected by the debtor on his life. The fact of the payment by him of the premiums thereunder was equally without the trustee's knowledge. The case therefore was, in the opinion of his Lordship, governed by Tapster *v.* Ward (ubi sup.)—which, as we have already intimated, was followed in Re Phillips (ubi sup.)—and was distinguishable from Re Tyler (ubi sup.), where the

trustee for the time being knew of the payment of premiums. In the present case, the debtor, whose affairs were being liquidated by arrangement under the Debtors Act 1869, insured his life without informing the trustee of the project and paid the premiums under the policy during the liquidation, and after his discharge, until his death. The decision consequently was that the proceeds of the policy did not pass under the debtor's will but belonged to the official receiver as successor to the original trustees. The principle of this decision accords entirely with that on which the conclusion arrived at in Re Leslie; Leslie *v.* French 48 L. T. Rep. 564; 23 Ch. Div. 552) and in Flacke *v.* Scottish Imperial Insurance Company (56 L. T. Rep. 220; 32 Ch. Div. 234) was founded: A person who keeps up a policy which is not his own property cannot claim any lien in the nature of salvage on the proceeds thereof.

SURVIVORSHIP IN AN ACCIDENT.—The question whether, when two persons have perished in the same accident, one can be presumed to have survived the other, has been raised again in the recent case of Re Coupe deceased. A man and his wife were found in their bedroom dead of gas poisoning. The man had left his property to his wife, so if she survived him it passed under her will. He was partly dressed, and was found near to the escaping gas, while she was lying on the bed farther away. It was also shown that he suffered from valvular disease of the heart. The leading case on this subject is Wing *v.* Angrave (8 H. L. Cas. 183), decided in 1860. There a husband and wife and their two children were all swept off the deck of an emigrant ship by a wave. The House of Lords decided that in English Law there is no presumption that two persons who perished in the same accident died at the same time, or as to which of them survived. It is entirely a question of evidence, and if there is no evidence the matter will be treated as being incapable of determination, the burden of proof being on the person who affirms that one survived the other. The wife under a power of appointment had appointed by her will certain property to her husband absolutely and, in case he died in her lifetime, then to W. The husband by his will in case his wife should die in his lifetime had given all his property to W. As it was practically certain that one of the two died before the other, though it might have been only by an infinitesimal fraction of a second, it seems hard on W. that he was not allowed to take the property which the wife had appointed, either as the appointee or as the residuary legatee of the appointee. Lord Chelmsford in his speech said: "It has been proposed also to place the wills of Mr. and Mrs. Underwood together, and to contend that, as under the two Mr. Wing would have been entitled, whichever of them was the survivor, therefore it is immaterial to the decision of this case whether he proves that Mrs. Underwood survived her husband or not. But it is difficult to understand upon what principle the wills of Mr. and Mrs. Underwood can be taken together for the purpose of interpretation. If different persons had been entitled under the two wills, each must have established his claim solely by the will in his favor, independently of the other, and no difference can be made in the rules of evidence because the appellant accidentally happens to be the ultimate legatee in both wills." It would seem that the appellant was in the dilemma, that he could not show that the husband survived the wife or conversely, and so was unable to fix on the will under which he was to claim. The particular suit was for the administration of the appointed property, and it is true that whether the one or the other survived he would have taken the bulk of that property, but, if the husband had survived, it would have been liable to the husband's debts and testamentary expenses, which, of course, it would not have been liable to if the wife had survived. It is interesting to note that the Lord Chancellor, Lord Campbell, differed from the decision of the majority of the House. In Re Coupe Mr. Justice Coleridge held that there was no evidence that the wife survived the husband and dismissed with costs the application of the wife's executrixes for administration of the husband's estate with the will annexed. As there is always the contingency of the husband and wife dying in the same accident, draftsmen should prevent such a misfortune as happened to Wing in Wing *v.* Angrave from occurring. Some draftsmen, it is believed, get over the difficulty by saying: "If he [she] shall not survive me by [say] a calendar month." In most cases that is sufficient, but, if nothing were heard of a ship after it had started on a long voyage, it might be difficult to prove even that. It may be suggested that the following would meet every case: "but if he should not survive me or it should be uncertain whether he survived me or not." To prevent the property passing under the other's will, if that other was known to have survived by a few minutes, which in some accidents is obviously possible, it would be necessary to combine the two forms thus: "but if he should not survive me by a calendar month, or should it be uncertain if he survived me by a calendar month." It would be well, too, to make the legal personal representative[s] of the testator who should prove the will absolute judge[s] of the question of uncertainty. Owing to the practical impossibility of two persons dying exactly at the same moment, a gift over if one person predeceases another is treated as a gift over if that predeceasing takes place in the lifetime of the testator or of the tenant for life (if there is one): See Re Fisher (112 L. T. Rep. 548 (1915); 1 Ch. 302), where Mr. Justice Sargant said: "The death of one of two persons in the lifetime of the other is a certainty not only in common parlance, but, I think, speaking scientifically, for, having regard to the infinite divisibility of time, it seems to me impossible that both should die at exactly the same moment."

Obiter Dicta

SPEEDY JUSTICE.—Hurry *v.* Hurry, 81 So. 376.

"NOT TOO SHORT."—Head *v.* Shaver, 9 Ala. 791.

MUTINY AMONG THE 57.—Bean *v.* Canning, 2 E. D. Smith 419.

SHOPPING EARLY.—Dodge *v.* Rush, 28 App. Cas. (D. C.) 149.

NOT SO LUCKY.—In Lucky Brothers *v.* Phillips, 20 Ga. App. 416, the defendant won in all the courts.

TOO MANY KNOTS.—In Knott *v.* Knott, 51 Atl. 15, nullity of marriage was decreed because the knot by which Knott was bound to another woman had not been untied.

NOT SO DEAR AS EXPENSIVE.—In Jung Back Sing *v.* White, 257 Fed. 416, the court affirmed the necessity on the part of the government of deporting "Dear Shee," a Chinese female, on the ground of immorality.

"OF ALL SAD WORDS," ETC.—"He and the appellee indulged in a social dram, as many other good and worthy people have been wont to do in times now in the glimmering past."—See Com. *v.* Metcalfe (Ky.) 212 S. W. 434.

WORSE THAN THE PEACE CONFERENCE.—"The evidence on the part of the state tended to show that this was a family reunion of the Yount family which had been going on for ten or twelve years."—See State *v.* Starnes, 151 N. C. 724.

"HUMAN LAW" PREFERRED.—"It has often been urged by the preacher that man is judged by every word that proceedeth out of his mouth; human law usually treats speech only as evidence."—Per Hough, J., in Fraina *v.* United States, 255 Fed. 37. Suppose some prominent Americans were actually to be judged by the divine law!

A NEW FIELD FOR INSURANCE.—"I believe it is no uncommon thing for sentimental women, disappointed in love, to linger a moment by the side of an unmarked grave. But does the memory of an old romance, cherished through the years, indicate insanity? If it does then many of us would need an insurance upon our testamentary dispositions."—Per Woodward, J., in Matter of Brand, 185 N. Y. App. Div. 145.

HUMOR AMONG THE GODS.—"A friend of the court appears in the form of a Salt Company and presents an argument in support of the order of the Commission and asserts the right to a special equipment for the transportation of salt in bulk. Little more need be said."—Per McKenna, J., in United States *v.* Pennsylvania R. Co., 242 U. S. 208. Apparently the dignified Supreme Court considered this amicus curiae to be rather a fresh guy.

"THE COMPETITION OF OPPOSITE ANALOGIES."—"To accept and amplify Mr. Chief Justice McBride's homely illustration, this is not a case where any one has suggested to 'cut the dog's tail off by inches.' It is a case where, because one dog has a broken tail which needs amputation, we are asked to drag in the other dogs in the community and mutilate them, because their tails might possibly be broken at some time in the future."—Per Bennett, J., in Olcott *v.* Hoff, 181 Pac. 481.

ONLY "FAIR."—Apparently, lawyers were not held to a very high standard in this country a century or more ago. Rule II of the United States Supreme Court, promulgated February 5, 1790, provided as follows: "Ordered, That (until further orders) it shall be requisite to the admission of attornies, or counsellors, to practice in this court, that they shall have been such for three years past in the supreme courts of the state to which they respectively belong, and that their private and professional character shall appear to be fair."

A NEW ROLE FOR HIS SATANIC MAJESTY.—The idea of Satan as an "inspired patriarch" is both novel and startling. Yet that is the only deduction to be drawn from the following statement by Ashman, J., in Estate of Mortimer, 29 Pa. Co. Ct. 388: "It is as true now as it was in the days of Job that a man will give all that he has for his life. With somewhat of unanimity the rhetoricians, from Isocrates to Ingersol, have agreed with the inspired patriarch that human life, whether of high or low degree, is equally sacred, and every sane man and every court in christendom admits the truth of the proposition." Of course the learned judge must have known that it was Satan and not Job who said: "Yea, all that a man hath will he give for his life." See Job ii, 4.

A RATHER FINE DISTINCTION.—A lawyer from Houston, Texas, writes us the following experience for this column: "I to-day had a valuable proffer of business. A man who had seen me try a case ten years ago in the Justice Court in one of the adjoining counties, came in to see me to-day and told me that he had always wanted to get a good case for me, and that at last he had succeeded in doing it, and his case was this: He said he had been away from home for four months, and when he got back he found that a wealthy banker with plenty of property had circulated on him in his absence that he was in the penitentiary; that it was a villainous slander on him, for which he wanted me to sue the banker for heavy damages; that he had not been in the *penitentiary* and that the only occasion for his being away from home four months was that he had been confined in *jail*. The client had stayed in town two days to wait to see me and he seemed very much down-fallen to be told that we did not think we could make any money out of his case."

"JENNIES."—At numerous times in the history of the journal, LAW NOTES has immortalized by reprinting in whole or in part certain opinions of the courts dealing humorously or satirically with the characteristics and doings of members of the lower animal family. Thus, we have published dog cases, mule cases, cat cases, goose cases, and many other cases of the same species, to the vast edification of ourselves, and we trust, of our readers. Hence our delight in the discovery of a recent decision of the Court of Appeals of Alabama dealing chiefly with "jennies." It is not long and so rich withal that we bow to time-honored custom and give it in full herewith: "BRICKEN, J. Several years ago Richardson sold O'Rear two jennets for $65 cash and a promissory note for like amount due December 1, 1911. We learn this due date from the court's oral charge, and not from the pleadings, evidence, or brief of counsel. The note not being paid when due, the appellee instituted suit thereon, long after the due date, and the cause coming on to be tried, the defendant alleged that he had been deceived, defrauded, and damaged, because, as he claimed, the plaintiff at the time of the sale 'guaranteed' that these two specimens of the equine family were then 'in fold' by a horse and would bring forth mule colts, and that the sire fees for the services rendered by the horse had been paid, all of which the defendant claims was untrue, in that the said animals of feminine gender were then and there more or less impregnated by a 'jack,' and therefore brought forth 'jennet' colts, and, further, that the sire fees were unpaid, but, on the contrary, had to be paid by the defendant, to which, it seems, neither the plaintiff nor the jack made objections. The term 'in fold' so frequently used in the record and in briefs of counsel we construe to mean 'in foal,' for in the connection in which this term is so frequently used it could mean nothing else and would be unintelligible, for 'in fold' means 'to wrap up or cover with folds,' 'to inclose,' 'to clasp with the arms,' 'to embrace'—all of which is manifestly inapplicable and impossible to be consummated by stallions or jacks with jennets. While 'foal' according to recognized authorities, means 'to bring forth young,' 'said of animals of the horse family,' 'to bring forth, as a colt or filly,' 'said of a mare or a she ass,' therefore we may safely conclude that, where the record and briefs of counsel allude to the particular jennies as being 'in fold,' it really means they were in foal by a jack or a stallion, as the case may be. And for like reasons we must hold that the term 'jennies,' as used in the record and in briefs of counsel quite frequently, does not apply to machines used in cotton mills for spinning many threads, etc., as contended by counsel for plaintiff, but must be taken to mean the female of an ass. In fact, this definition is used for the word 'jenny' by several of the recognized authorities. In the case here cotton gin machinery is not involved, but, to the contrary, the cause of action is a promissory note given for part of the purchase price of two jennets. For one time in the history of

this court no question is raised in appellant's brief as to the correctness of the rulings of the trial court on the pleadings; the bridle seems to have been taken off the jennets, the jack, and the pleadings as well, and all parties went to it, and the intimate secrets concerning the ambitions and characteristics of the jennets were ruthlessly exposed by skilled counsel, no doubt to the satisfaction of an impartial judge, an attentive jury, and an interested audience. We would that others may emulate the example of the jennets, and their counsel as well, and remain satisfied that a trial court can sometimes rule on a question of pleading without error. The case was duly tried, and a jury returned a verdict for plaintiff for $84.45, and, being dissatisfied therewith, and intent, no doubt, upon vindicating his position and contention, the appellant filed a $3,000 appeal bond and comes here for review. The amount of the bond probably indicates the degree of the appellant's dissatisfaction with the result of the case in the court below. The first question insisted by the appellant as having been improperly disallowed was leading, invaded the province of the jury, and called for a conclusion of the witness. The second and fourth were objected to by the defendant, and exception reserved by him to the court's action in sustaining his own objection. It is needless to say that the defendant could not invite action by the court and then assign such action for error here. The third question was propounded after this fashion: Q. 'Mr. O'Rear, how is a jennet about breeding to a horse?' And appellant's counsel informs us that his purpose was to show that few jennets would accommodate a horse, the preference of the majority being a jack, and that a jennet that would so far forsake her species as to be served by a horse was considered by those well informed on such subjects, if not by the jack, as worth more in the market than one that stuck to the path of jennetly virtue and manifested due preference for a jack. There was no evidence offered by the defendant or otherwise that the particular jennets involved in this case would not take a stallion, and, however laudable the purpose of counsel may have been in the premises, we are of the opinion that the question was not appropriately framed to elicit the information indicated; furthermore, it should have been confined to the jennets in question, whose preferences and desires and characteristics and whose reputation for equine chastity were being considered. It therefore appears that the rulings of the trial court are free from error. There being no other questions in the record, its judgment is affirmed."—See O'Rear *v.* Richardson, 81 So. 865.

Correspondence

SETTLEMENTS BY INSURERS AGAINST LIABILITY

To the Editor of LAW NOTES.

SIR: I have read with much interest your article entitled "Settlements by Insurers Against Liability" which appeared in the June issue of LAW NOTES, and believe the question is of such importance that it is advisable to point out that the remedy suggested is unfair and impractical, whereas a satisfactory solution exists.

A statute compelling an insurance company to accept a compromise or be liable for the full sum adjudged against the assured regardless of the limits expressed in his policy would be unconstitutional and would be a condition under which any responsible company would refuse to operate. A statute, the effect of which would practically compel an insurance company to compromise every large claim for damages before its merits are established, would be ridiculously unfair and unnecessary.

An insurance company cannot prohibit the insured from settling his own liability above the limits of the policy contract.

In the case cited, which is a rare and exaggerated instance, if he could have secured a settlement for $7500, he could have undoubtedly secured a release from any liability above $10,000 for a very small sum and thus have fully protected himself. The insurance contract merely prevents him from settling his own liability with the funds of the insurance company or settling their liability by substituting his untried judgment in place of the judgment of experienced adjusters and attorneys.

The trouble arises from the fact that a person with a heavy potential liability is willing to accept a limited contract of indemnity in order to effect a slight saving in premium, and because the average loss is well within the contract limits. The assured is unwilling to carry insurance except for average liability, whereas in fact he is grossly under insured.

As all the insurance companies offer additional limits of indemnity for a very reasonable increase in premium, the true remedy for this condition would be for attorneys and insurance brokers to advise their clients to carry insurance in a fair proportion to the possible liability and not be satisfied with partial coverage.

In conclusion, it is submitted that under the Constitution of the United States the freedom of contract cannot be abridged, and a statute of the kind proposed in your article, not coming within the police power of the government, would be a direct infringement of this section of the Constitution.

Chicago, Ill. W. S. HAWXHURST.

REFERENDUM ON PROHIBITION AMENDMENT

To the Editor of LAW NOTES.

SIR: In your last issue in commenting on the Oregon case holding that a ratification of an amendment to the Federal Constitution could not be submitted to a vote of the people of the state under the referendum clause of the State Constitution, you suggest that a larger view of what constitutes the legislature should be taken and that under the referendum clause the people of the state are the real legislature, and therefore the question should be submitted to them. If, as you suggest, the people constitute the real legislature, then it is folly to submit the matter to the inferior legislatures that meet at the state capitals and go through the performance of making laws. There cannot be two final legislatures in the same state and the *real* legislature is the one to which the question of ratification should be submitted in the first place.

But it seems to me that all such discussion is irrelevant. The referendum clause of the State Constitution has nothing to do with the amendment of the Federal Constitution. That must be done, if at all, according to the provisions of such Constitution. The preamble of the Federal Constitution says: "We the *people* of the United States . . . do ordain and establish this Constitution for the United States of America." The original Constitution therefore was ratified by the *people* of the United States, and every amendment thereto must be ratified in the same way. But this is a Republic where the people act not directly but through representatives. The original Constitution was ratified and adopted by State Conventions chosen by the people of the United States and acting for the people of the United

States, and when adopted was the act of the people of the United States. They acted as citizens of the nation and not as citizens of the different states. We must not forget that this is a dual government and that within its sphere each government is supreme. The adoption or amendment of a National Constitution is wholly a national matter and it comes within the exclusive sphere of the National Government, and when the people act upon the question they are acting as citizens of the Nation and not citizens of the State.

The United States Constitution provides how it may be amended, and of course it can be amended in no other way. A proposed amendment may be ratified by the legislatures of three-fourths of the states or by conventions in three-fourths thereof as Congress may determine. It is evident that the two methods are exactly equivalent, and that in ratifying a proposed amendment the legislatures of the states act in exactly the same capacity that conventions would if that method were chosen. It requires no argument to prove that conventions would act just as the original conventions acted, that is, merely as agents or representatives of the people of the United States residing in the different States. Just so, the members of the legislatures in voting to ratify a proposed amendment to the Federal Constitution act, not as state officers or legislators, but as agents and representatives of the people of the United States residing in the different States, just as conventions would have done, and their votes are counted as the votes of the people. When the legislatures of three-fourths of the States have ratified the proposed amendment it becomes a part of the Constitution, not because it has been ratified by the legislatures of three-fourths of the States acting as such, but because it has been adopted by the people of the United States acting through their agents, the members of the state legislatures, *as required by the Federal Constitution.*

It is plain therefore that the referendum clause of State Constitutions has nothing to do with the matter, because it applies to the members of the legislature only when they are acting in their capacity as officers of the State. A ratification by the members of a state legislature can no more be referred to the people of the state than could a ratification by the members of a state convention. When the question of ratification is submitted to a legislature of a state it is, ipso facto, submitted to the people of the United States residing in that state, and when ratified by a legislature is adopted and ratified by the people in that state acting in their capacity as citizens of the United States. How then can it again be submitted to the same people for the same purpose under a referendum clause of the State Constitution?

The word "legislature" as it was used when the Federal Constitution was adopted and as it is used to-day, has a precise and definite meaning. It does not mean the people of the state in their capacity as legislators under the referendum clause of a state constitution. The referendum clause provides for the reference of an act of the *legislature* of the State to the *people* of the State, thus carefully preserving the distinction between the legislature and the people. The Nebraska State Constitution says: "The legislative authority of the State shall be vested in a *legislature* consisting of a senate and a house of representatives, but the *people* reserve to themselves power to reject at the polls any act, item, section or part of any act passed by the *legislature.*" This power is called the referendum. The "legislature" and the "people" are entirely distinct bodies—the legislature consisting of the senate and house of representatives to whose members, acting as representatives of the people, the Federal Constitution commits the power to ratify a proposed amendment to the Federal Constitution.

When they have ratified it, all the requirements of the Federal Constitution have been complied with; and it would seem to require no argument to show that nothing more can be added or required by an amendment to a State Constitution. For the referendum clause is an amendment to most, if not all, of the State Constitutions, and no such thing was in existence among the States when the Federal Constitution was adopted. It is very evident that the Federal Constitution cannot be amended merely by amending a State Constitution. Possibly a State Constitution might abolish the legislature altogether, as you suggest, but that is a question of no present moment; for until that is done a proposed amendment must be ratified by the legislatures of the States as they existed when the present Constitution was adopted and as they exist in all the states to-day. That bridge cannot be crossed until it is reached.

Beatrice, Nebr. L. M. PEMBERTON.

"In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."—Per Miller J., in Watson *v.* Jones, 13 Wall. 728.

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Law Notes

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Discrimination in Favor of Farmers.

There is a strong tendency, which it is difficult to ascribe entirely to nonpolitical causes, to exempt agriculturists from the wholesome regulations which it has been found necessary to apply to other lines of business. The Clayton Act exempts the farmer from the operation of the federal anti-trust law. A like exception is attached to the anti-trust law of New York. With that exception, it may be noted in passing, was coupled one of dairymen, which has been found recently to preclude governmental action against a "milk trust" whose alleged activities were the source of bitter popular complaint. The latest manifestation of the same tendency is the exemption of farmers from the federal bill, pending at the present writing, to prevent profiteering in food. Of course a certain amount of the acquiescence in this sort of discrimination is due to pure superstition. We have heard so much about the "honest farmer" that we picture him as a kindly bucolic simpleton, the perpetual victim of every form of swindle. The stage and the pages of fiction combine to paint him in a form of rude yet genial simplicity. The horse trading proficiency of David Harum was disclosed to the world through a veil of humor which aroused no spirit of condemnation. So it is not singular that the average legislator has been complacent of such discrimination as has been referred to. Surely good old Uncle Josh would not enter any iniquitous combination in restraint of trade; his simple soul would revolt at the very idea of "engrossing and forestalling." It is much like the attitude of the Congressmen of an earlier day who rose from the pages of Fenimore Cooper to legislate on the Indian question, and turned an incredulous ear to such accounts of Apache raids as filtered through to their peaceful New England homes. Without attempting to apportion the blame for the high cost of living among the various possible factors, the acts forbidden by the anti-trust law and the anti-profiteering law are morally iniquitous and economically damaging, no matter by whom committed. There is no just reason for excluding any class of persons from their operation. The Socialist or Bolshevist propaganda is aimed entirely at securing a governmental policy based on class consciousness. Those cults assert in effect that manual labor is the source of all production, and that those who perform it should be the favorites of the law. The opposing contention is that all lawful occupations stand on a level before the law, and that the lawfulness of conduct should be judged by its effect on the body politic, and not by the rank or occupation of the actor. Principles, once admitted, have a fashion of working themselves out to a logical conclusion, and the logical conclusion of an act exempting certain men from a penal law because of their occupation is one that few patriotic Americans care to contemplate.

The Foundations of Personal Liberty.

A correspondent whose letter is published in this issue, taking exception to previous references to prohibition as an infringement on personal liberty, inquires what distinction in principle is to be made between such legislation and that against profiteering, that requiring vaccination of school children or that forbidding the erection of a public nuisance. That distinction was quite clearly pointed out in these columns over a year ago (see Law Notes, May, 1918, p. 21), it being said editorially:

> As a result of the organization of humanity into a social structure growing ever more complex, every act of a man wherein he deals with his fellow-men may be so regulated as to protect the interests of the persons so dealt with. If he manufactures or sells goods, regulations of purity, weights and measures, labelling, and perhaps price are legitimate. If he owns or controls property, he can be compelled so to use it as not to endanger the persons or property of others. Government and the just administration of the law being a common good, any act tending to subvert them may be prohibited. The domestic and economic relations which are the units of social organization may be regulated. But with the regulation of those acts wherein a man deals with his fellows the regulatory power ends. The law may and should protect the rights and interests of every man; it has no power to enforce on any man a standard of conduct approved by his fellows so long as his interests alone are affected. A majority may believe it wrong to eat meat; in Buddhist communities it is so believed. But they have no more right to interfere with another's meat eating than he with their vegetarianism. A majority may believe it wrong to drink wine; in Moslem communities it is so believed. The right of the believer is to continue his abstinence and not to enforce its practice on the unwilling. A man may believe in a certain manner of observance of Sunday if he is a Christian, or of Saturday if he is a Jew, or of Friday if he is a Mohammedan. He has a right to be protected by law from interference with his observance, but none whatever to control the observance of others.

Other lines of legislation were in mind when that statement was written, and to be applicable to the present discussion one further qualification must be added—that the dealing with others which is the subject of just regulation must be such as is beyond the reasonable power of those others to control. If a man sets up a nuisance or spreads contagion his act is of course beyond the physical control

of those affected. If he profiteers in the actual necessities of life it is beyond the practical control of the consumer who must buy in order to live. On the other hand regulation against profiteering in diamond rings would be beyond any just legislative power. There are thousands of people in the United States who believe with sincerity that organized religion is an unmixed public evil. If they should attain political power would they have the right to enact a prohibition of the, to them, obnoxious institution? They would not, for the reason that no one forces the services of priest or pastor on them. There are thousands who believe that the existence of a medical profession is a menace to the public welfare. So long as they are not compelled to employ a doctor except to avoid the spread of contagion, they have no power to compel others to refrain from seeking medical advice. The force of these analogies can be avoided only by the complacent assumption that what the prohibitionist believes is right while what the others believe is foolishness.

The Flaw in the Reasoning.

The fundamental fault in the logic which seeks to compare the prohibition of the sale of intoxicants with profiteering in food or the maintenance of a slaughter house in a residence district is that it regards the sale rather than the purchase. It is not the infringement of the right of the saloon keeper to sell which constitutes the burden of our complaint against the prohibition laws; it is the infringement of the right of the private citizen to buy and use. That right is of course subject to the qualification heretofore asserted; it may be penalized if so exercised as to injure others. If a man becomes drunk and disturbs the peace, he is subject to punishment—he is just as subject thereto if he disturbs the peace without having taken a drink. If he wastes his money on drink and neglects to support his family he is amenable to the law. He would be amenable to the same extent if he starved his children to give his money to foreign missions or the Anti-Saloon League. But if a man desires to take a drink of liquor and his doing so does not lead him to neglect any duty or wrong any person, what right has society to say that he shall not? Perhaps it would be better for him if he did not, but that is his own business. Perhaps it would be better if he went for a walk Sunday morning instead of lying in bed, but is the government going to prescribe his conduct in those particulars? Of course intemperate drinking produces much misery. Is there a factor in our complex civilization which does not do the like? Hundreds of innocent persons are killed or injured annually by automobiles. Is that a reason for prohibiting the use of such vehicles and penalizing the careful and law-abiding many for the acts of the reckless few? It is easy but illogical to center the discussion on the "rum seller" and compare him to one shooting recklessly into a crowd. But no one need buy unless he wishes, and anyone has a right to buy if he wishes, being responsible strictly for any wrong which he does to others by reason of availing himself of that right.

An Excellent Measure.

It has always been a reproach to our judicial system that one person accused of crime was compelled to spend months in jail awaiting trial, while another, accused of the same offense, was able to obtain bail. A law recently enacted in New York (Laws 1919, c. 410) obviates this inequality by providing that "any time spent by a person convicted of crime in a prison or jail prior to his conviction and before sentence has been pronounced upon him shall become and be calculated as a part of the term of the sentence imposed upon him, whether such sentence is an indeterminate one or for a definite period of time, and such time shall, in addition to the time allowed for good conduct and earned as compensation, be deducted from the term of the sentence so imposed." It is further provided that the time so spent in jail shall be deducted in determining the time when the convict shall become eligible to parole. The judge imposing sentence is required to indorse on the commitment the length of time thus to be deducted. In some of the insular possessions of the United States similar provisions have been enacted (see *U. S.* v. *Salazar,* 5 Philippine 500; Ex p. Leroy, 17 Porto Rico 1008) illustrating anew that colonial legislation being more removed from national politics is ofttimes better than that enacted for the mother country. Certainly no such humane provision has ever found its way into our national penal law. Of course it has always been within the power of any judge to impose a reduced sentence because of the confinement prior to trial, and in many instances this has been done. Indeterminate sentences, however, are of increasing frequency, and in such a case legislative authority for the reduction is doubtless essential. Moreover, the statute reduces to a rule that which previously rested in the varying discretion of judges. Obviously, it will always be possible for a judge to nullify the act by imposing a longer sentence, but there is practically no right of a litigant that cannot be subverted by a corrupt judge, and there is no reason to suppose that the act will not be executed in spirit as well as in letter. So executed, it is a reform worthy of general adoption.

Reparation for Crime.

Further consideration of the suggestion made some time ago in Law Notes (May 1918, p. 22) has confirmed the opinion then expressed that no system of punishment for crime is adequate or logical which does not involve reparation to the victim of the crime. The punishment of crime has a twofold purpose—to reform the offender and to deter others from crime. There is a strong resemblance between the moral irresponsibility of a criminal and that of a child. Every parent knows that no punishment is so effective with a child as that which its mind comprehends as a just and natural consequence of its act. Even the most blunted conscience can grasp the force of the proposition that, having injured a person by an unlawful act, he must make good that injury. Imprisonment for a fixed term may seem to him arbitrary and merely vengeful, but imprisonment until by his labor he has earned the money to repay what he stole or make compensation for the personal injury which he inflicted will be recognized by any man as logical retribution which, in the words of the Hindu aphorism, follows the act as the cart wheel follows the ox. Moreover, such a system would perform a function which has heretofore been sadly neglected—the ameliorating of the shock to the social system caused by crime. A murder may evoke headlines in the papers for a few days, but after the criminal is apprehended and sent to prison, no thought is taken of the

long years that the widow of the murdered man must toil to earn a livelihood for herself and her children. If her breadwinner had been run over by a railroad train there is ample legal machinery to enforce compensation to the widow, but because he was killed by a penniless assassin society lets her toil or starve while the cause of her deprivation is kept from productive work lest his product come into competition with that of some labor union.

Too Speedy Justice.

Complaint of delay in the administration of criminal justice is familiar to all. While much of that complaint may be well founded, it is often forgotten that a measure of deliberation is essential to the fair and impartial trial of a criminal case, particularly where the crime is one which arouses intense popular indignation. This is well illustrated in the recent case of *Fountain* v. *State* (Md.) 107 Atl. 554, where the chronology of the prosecution was stated in the brief of counsel for the appellant as follows:

April 1, 1919. Crime committed.
April 9. Defendant arrested.
April 12. Special Term of Court convened (though the regular term began May 19th).
April 12. Special Grand Jury drawn.
April 12. Presentment and indictment found.
April 21. Trial begun.
April 21. Attempts to lynch the accused.
April 21. Accused escapes from the mob.
April 22. Court offers five thousand ($5000) reward for his return "Unlynched."
April 22. Man hunt through two States.
April 23. Accused captured.
April 24. So-called trial resumed.
April 24. Verdict Guilty and Death Sentence.
April 24. Taken out of county for safekeeping.
May 3. Appeal filed.
May 26. Extension of time to July 15 to prepare appeal and bills of exception.
June 9. Case specially assigned for argument in Court of Appeals for June 24, 2 P. M.
June 20. Typewritten transcript of record reached Court of Appeals.
June 23. Printed record filed.
June 24. Printed briefs filed.
June 24. Case argued.

It apeared that at the trial there was such excitement that a military guard was maintained around the court house. In ordering a new trial the appellate court said: "There can be no doubt that the court below made earnest efforts to protect the defendant's right to a fair trial, but the conditions with which the court had to deal appear to have rendered such a trial at that time and place impracticable. In such an extraordinary situation as that in which the lower court was placed in this case, and with such vital issues involved, its ruling upon the application to have the trial deferred could not properly be held to be so far discretionary as to be beyond the scope of appellate review." The speedy administration of justice is of value not only to the public but to the innocent accused. But the case cited illustrates anew that justice must not be sacrificed to speed, that there must be no yielding to a mere clamor for vengeance.

A Self-Governing Bar.

The bar in the aggregate is unique in respect to its close relation to the administration of justice and its exclusive possession of knowledge in respect thereto. Yet the bar is without any practical organization through which to exercise its power, and as a result many matters which pertain chiefly to its province have passed to other hands. Admission to the bar is left to a few official examiners appointed under a law passed by laymen. Exclusion from the bar is delegated to a few overworked judges. The selection of judges, a subject on which few outside the bar have any competency whatever, is in the hands of laymen guided by politicians. The establishment of the rules of procedure under which judicial business is transacted is vested in legislatures which give it some cursory attention after matters of political importance have been attended to. All this has come to pass because of the want of an organization to mobilize the profession. "The lawyer has been scolded and exhorted so long that he would feel neglected if his critics should cease. But nobody has ever suggested the practical steps to be taken to enable him to work out his salvation. The time has come to stop moralizing and consider a definite plan for integrating the bar so it can realize its highest ideals." Journal of American Society of Judicature, Dec., 1918. The membership of the existing bar associations is a small minority of the bar, and their powers are confined largely to electing officers, holding dinners, and passing resolutions. That they have been able to accomplish anything toward reform in procedure is due to the heroic efforts of a comparatively few men. Suppose, however, there should be created bar associations in which every lawyer was ipso facto a member, having the control of admission to and expulsion from the bar, and of nominating all candidates for judicial office. To such an organization could likewise be committed the power to enact, by proper formulating committees and a referendum, all rules of judicial procedure. These are extensive powers, it is true, and liable to abuse, but they must be exercised by some one, and it is submitted that not one of them is to-day in hands so competent or so trustworthy as those of the bar. It may be noted that in Minnesota the district court judges have recently appointed a permanent committee to act on proposed changes in court rules and procedure, and to consider legislation. This is a step in the right direction, albeit a short one. To be really effective the committee should be representative of a fully organized bar, and that bar should have much power with respect to the regulation of procedure which is now committed to the legislature.

Unauthorized Practice of Law.

A collateral advantage which would flow from a better organization of the bar is the check which might thereby be put on the many petty encroachments on the domain of the legal profession. Probably the great majority of the deeds and mortgages made in the United States are drawn by real estate brokers and the like. Sometimes, of course, nothing more is required than the mere clerical ability to fill out a blank form. In other cases the utmost care and skill in the use of technical phrases is necessary to carry out the intention of the parties, and neither the average grantor nor the average real estate

dealer is able to recognize such an instance when it arises. The security of land titles and the avoidance of legal disputes in respect to them is a matter which deeply affects the public interest. The evils of allowing a layman to conduct a proceeding in court are in some respects less than those of allowing him to draw an instrument on which depends the title to landed property—perchance a modest home, the product of years of industry and thrift. There are few lawyers who cannot recall a case where a title has been thrown into litigation, if not lost, because of an error in the deed which no member of the profession would have committed. There is possible, of course, the cynical view that the amateur draftsman brings into the profession fees for the litigation created by his blunders far exceeding those which could have been charged for the original service. This does not, however, represent the attitude of the profession, which has repeatedly shown by its advocacy of workmen's compensation acts and similar measures, its willingness to sacrifice its financial interest to the public welfare. Apart from the injury to the public from the blunders inevitable in the drawing of instruments of title by laymen, the practice works a distinct hardship to the younger members of the profession. The young lawyer, precluded by the code of ethics from soliciting employment, is forced to see this class of work which he has been specially trained to perform go into the incompetent hands of laymen who are bound by no restrictions of professional ethics, and to lose thereby not only the small though sorely needed fees, but also the valuable opportunity to lay the foundations for future employment by his skilful performance of these minor services. A suggestion recently made, which may go impracticably far yet is deserving of serious consideration, is that every lawyer should be *ex officio* a notary public, and that the office of notary should be confined to members of the legal profession. While the position of notary has lost much of its ancient dignity it still retains functions which are capable of use in the perpetration of fraud. The restriction of those functions to members of a learned profession subject to professional discipline would largely do away with the antedated acknowledgments and similar frauds which the practitioner occasionally encounters.

The Passing of the Legislature.

Referring to the editorial under the above title in the August issue of Law Notes, a subscriber proffers the following suggestion: "You ascribe the tendency under discussion to a 'more or less unconscious recognition of a transition in our institutions.' Is it not more probable that it represents the lamentable but entirely logical result of the substitution of the system of primaries for the old political convention? Active minorities, such as the Prohibitionists, Suffragists and the like, are compact units, able to enforce their platforms by threats of united action against legislators; the political parties known as Democratic and Republican no longer exist apparently except in name, for there are no party principles proclaimed as in former times by county and state conventions, controlling the candidates named for office; there is no such thing as party discipline; and there is no such thing as punishment by the party, as such, capable of being imposed upon officials selected as candidates at primaries in which often both Republicans and Democrats vote with equal right. The result is that the members of the majority parties in fact are a voiceless mass; the members of minority factions, whose wishes are expressed in and whose punishments are inflicted by their conventions, impress members of legislative bodies with a semblance of power." It is probably true that the decline of the power of party leaders and the weakening of party ties are the immediate cause of the subservience of elective officers to the clamor of compact minorities. But does not the situation go somewhat deeper? The decadence of party government did not come about without a cause, and that cause would seem to be the demand of the people for a more direct control by themselves of the governmental machinery. Pursuant to that demand, direct primary laws were enacted, the election of United States senators passed from the legislatures to the electorate, and the referendum was established in many states. The decline of political party discipline is therefore not a prime cause but merely one of the effects of a tendency which has not yet fully worked itself out. It was in this sense that the present status of the legislative department was referred to as the result of a transition period. The old system of party control has passed; the new system of popular control has not yet established itself. The temporary result is a confusion which the old system would have avoided and which the new will doubtless prevent as completely.

Unicameral Legislatures.

One of the most practical suggestions for legislative reform which has been made recently is that looking to the abolition of the present system of dual legislative bodies, substituting therefor a single house of convenient size. Of course our present system was borrowed from England where the existence of distinct orders, the nobility and the commons, made it logical. In the national Congress there may be reason for the separation between the representatives of the states and those of the people at large. But passing that question, it is hard to find an excuse for the dual system in state legislation. In support of a proposition looking to a unicameral legislature in Arkansas, Mr. C. E. Daggett presented to the Bar Association of that state a forcible argument which he summarized as follows: "(1) The historical reason for the bicameral system has disappeared. (2) The 'check and balance' system is not applicable to present-day conditions. The same kind of men who compose the upper house compose the lower; we have no classes and the membership of both houses is elected by the same electors, at the same election. (3) The bicameral system has grown from bad to worse. (4) The bicameral system diminishes responsibility; the unicameral increases it, locates and fixes it. (5) The economic consideration is deserving of attention. We can save $75,000 annually. (6) The reduction in membership in the one house would increase the ability, intelligence and experience of the personnel. (7) The second house was designed as a check, not to facilitate legislation but to prevent it. We need a body to efficiently enact necessary legislation. (8) The evil of local legislation will be remedied for the reason that such a body as the one proposed will, after due consideration and deliberation, enact general laws that can be made applicable to the state at large. (9) By definitely fixing

the responsibility of a small number of men, in a single chamber, the effect will be that consciousness of such responsibility will sober the body and have its effect on legislation. (10) The most important law under which we live, the constitution of the state, is written by a unicameral body. The 'people' have never yet demanded the bicameral system for the performance of this great task."

The novelty of the proposition naturally repels at the outset the conservative legal mind, but it is difficult to find a convincing answer to the arguments adduced. It really involves nothing more than the application to the state of the commission form of government, and that in a modified form, since the separate executive power is left intact. The analogies of business organization are in line with the proposal. A corporation which adopted a dual board of directors would soon find its way into the hands of a receiver. Every business executive knows that a system of "checks and balances" gets nothing done, and that the way to accomplishment is to give adequate powers and hold the recipients responsible for their exercise. A state is not dissimilar to a large business and the methods of efficient corporate management are worthy of serious consideration by the makers of constitutions.

The Duty of a Legislator.

Our present legislative system presents a question of some difficulty—is it the duty of a legislator to carry out the wishes of his constituents irrespective of his personal convictions, or should he vote according to his own convictions as to the merits of each particular measure? An extreme case either way might easily be put. A patriotic American Congressman who found himself in the early days of 1917 representing a constituency of pro-German or pacifist views certainly would not have been bound to make himself a traitor in order to carry out the wishes of his constituency. On the other hand, on a question like daylight saving or prohibition, which is in effect local, a Congressman would plainly not be justified in aiding to force on his constituency a measure repugnant to them, although he personally might approve of it. Between these extremes lies a zone of debatable questions. There is just ground in many instances for a Congressman to believe that he is more competent to form an opinion than his constituency, and that he is justified in disregarding their views for their own good, just as an attorney may refuse to be governed by the wishes of his client as to the use of a particular witness at the trial. Opposed to this is the view that a representative is elected not for his superior wisdom but merely for convenience, like a business agent, and like such an agent is bound to keep in touch with his principal and carry out his directions. While the latter view is probably the prevailing one at the present time, it will never gain a logical ascendancy without a considerable change from the prevailing public apathy. The election of officers arouses considerable interest and excitement, but a primary or a referendum goes practically by default. Until that condition is removed it seems impossible to lay down any general rule for the conduct of legislators, who must as heretofore strike a balance between their personal convictions and their hopes of reelection.

Docking the Judges.

In 1838 the legislature of Arkansas provided that if any judge should fail to hold court in any county at the time required by law he should forfeit to the state $150. Holding the act to be invalid the court said in Ex p. Tully, 4 Ark. 220, 38 Am. Dec. 33: "To our mind the act is a clear and palpable violation of the constitution. It is a direct and dangerous attack upon the independence of the judiciary, and upon the freedom and happiness of the people." To the mind of any one except a judge this is a little laughable. If an employee in any well-conducted business took a few weeks off without the permission of his employer he would not be surprised to find his salary proportionately curtailed, and would have difficulty in maintaining that the liberty and happiness of any one except himself was endangered. Men in high public station are prone to arrogate to themselves the dignity of their offices. The incumbent of a judicial position is a judge while hearing and deciding a case. In that capacity, as the administrator of justice, he is rightfully hedged about with the dignity which belongs to his lofty function. But with respect to the quantity and quality of the service which he renders in return for his salary he is the servant of the public. If he is ordered by his employer to hold court at a certain time and place and fails to do it, there is no reason why the employer should not dock his salary. We still maintain a little, and a little is too much, of the old notion that the judges are a distinct caste endowed with some measure of infallibility. Most of the unjust attacks on the judiciary are the result of a reaction against that idea, for it needs but scant research to demonstrate that judges are not always infallible. If the public had been brought up to recognize the fact that the judges are merely lawyers raised to official station, usually honest, usually competent, but occasionally neither one nor the other, that mistakes are as inevitable in the decision of cases as in any other department of human activity, the occasional instances of judicial misconduct or incompetence would never have produced the present distrust of our judicial system. Teach that a book is infallible and the man who can prove one mistake can justly claim to have destroyed it; teach that it is good and helpful and the discoverer of a trivial error will speak to unheeding ears. On the same principle the well meant effort to invest the judiciary with a peculiar sanctity checked criticism for a few years, but has now rendered a large share of the public incapable of recognizing the real and substantial merit of our judicial system and its administrators. The efforts which have been made, copying an outgrown day, to invest the judges with an artificial dignity have deprived them of much of the respect to which their own merits justly entitled them.

"The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster."—Per Strong, J., in Aetna Fire Ins. Co. *v.* Boon, 95 U. S. 130.

UNDERMINING THE RIGHT TO JURY TRIAL.

"A principle of law won without toil is on a level with children brought by the stork; what the stork has brought the fox or the vulture can take away again. But from the mother who gave it birth neither the fox nor the vulture can take the child away, and just as little can a people be deprived of the laws or institutions which they have had to labor and to bleed for in order to obtain." Von Ihring, "The Struggle for Law," p. 18. But as time goes on and the memory of the struggle and the sacrifice wanes, the right is less jealously guarded. It becomes "ancient right, unnoticed as the breath we draw" and we forget that

> "Blood and fire and tumult, sword and gray goose wing,
> Wrenched and tore it inch by inch slowly from the King."

Thus it is that peoples win their freedom and hold it till their hands become lax in fancied security, and then another tyrant rises to snatch it from them. To-day, when a new assault is being made on what was once the most prized heritage of the Anglo-Saxon, the right to trial by a jury of his peers, it is not amiss to glance at the manner in which its foundations were laid by an earlier generation. The right did not spring into being full grown from Magna Charta—as a substantial right it was won by years of struggle in the courts after the King had nominally granted it. The instances of the juries who stood out against the King's judges to make the right a real one are the brightest page in the history of common law trials. Seven bishops presented a respectful petition to the King praying for the enforcement of the laws of the realm. For this they were indicted for libel. Charging the jury, the Chief Justice said: "And I must in short give you my opinion: I do take it to be a libel." Justice Allibone said to the jury: "Then I lay down this for my next position: that no private man can take upon him to write concerning the government at all, for what has any private man to do with the government if his interest be not stirred or shaken." After receiving this charge the jury were marched off in care of a bailiff who was sworn not to let them have meat or drink, fire or candle till they were agreed. All night they were shut up, Mr. Arnold the King's brewer standing out for a conviction until six the next morning, when he was thus addressed by a fellow juror: "Look at me, I am the biggest and strongest of the twelve, yet before I find such a petition as this a libel why I will stay until I am no bigger than a tobacco pipe." At ten the verdict of "not guilty" was returned and the King shook with rage and fear in his palace as he heard the shouts of joy which arose from the street and spread with the news of the acquittal. 3 Campbell's Lives of the Chief Justices 121. William Penn, a Quaker preacher, conducted a street meeting with the staid quiet peculiar to his sect. The meeting was dispersed and Penn indicted for "unlawful and tumultuous assembly." His trial was a farce, as witness a few excerpts. Asking to be shown the law under which he was persecuted, Penn was answered thus:

> Rec. Sir, we must not stand to hear you talk all night.
> Penn. I design no affront to the court, but to be heard in my just plea: and I must plainly tell you, that if you will deny me Oyer of that law, which you suggest I have broken, you do at once deny me an acknowledged right, and evidence to the whole world your resolution to sacrifice the privileges of Englishmen to your sinister and arbitrary designs.
> Rec. Take him away. My lord, if you take not some course with this pestilent fellow, to stop his mouth, we shall not be able to do anything to-night.
> Mayor. Take him away, take him away, turn him into the bale-dock.

As the jury were going out, he protested from the distant bale-dock that he had been tried without hearing the evidence.

> Rec. Why, ye are present, you do hear, do you not?
> Penn. No thanks to the court, that commanded me into the bale-dock; and you of the jury, take notice, that I have not been heard, neither can you legally depart the Court before I have been fully heard, having at least ten or twelve material points to offer, in order to invalidate their Indictment.
> Rec. Pull that fellow down, pull him down.
> Mead. Are these according to the rights and privileges of Englishmen, that we should not be heard, but turned into the bale-dock, for making our defence, and the jury to have their charge given them in our absence? I say these are barbarous and unjust proceedings.
> Rec. Take them away into the Hole: To hear them talk all night as they would, that I think doth not become the honour of the court and I think you (i.e., the jury) yourselves would be tired out, and not have patience to hear them.

The jury, though commanded positively to convict, persisted in returning a verdict "guilty of preaching in Grace-church street" and for this were abused and vilified at length, the recorder saying to the foreman, "I'll take a course with you," "I will cut your throat," "I will set a mark upon you," and observing in conclusion: "Till now I never understood the reason of the policy and prudence of the Spaniards, in suffering the Inquisition among them. And certainly it will never be well with us, till something like unto the Spanish Inquisition be in England." Finally, being ordered to return a verdict of guilty or not guilty in form, the jury returned an acquittal, to which the court said: "I am sorry, gentlemen, you have followed your own judgments and opinions, rather than the good and wholesome advice which was given you; God keep my life out of your hands, but for this the Court fines you 40 marks a man, and imprisonment till paid." The jury were promptly ordered into confinement in Newgate for their contumacy, from which confinement they were later released on habeas corpus. 6 How. State Trials 951.

These and many a similar instance constitute the background of struggle out of which grew a deep affection for the right of jury trial, with which no English King has ever dared to trifle. The same feeling, brought to their new home by the American colonists, wrote into the Constitution "The trial of all crimes shall be by jury." To attempt to-day to erase that guaranty would bring swift political destruction on the man who attempted it. Can this right which will never be yielded to force be undermined or subverted? Once it was attempted. The long established practice of issuing injunction against the individual violation of a property right and trying the violator of such an injunction for contempt was gradually adopted as a weapon against the disorders and riots attendant on labor disputes. As a result men charged with assault, arson and the like were tried and sentenced for contempt without a jury trial. The trials were fair and

impartial, the judges wise and honest, the sentences conspicuously moderate and humane, yet the denial of a jury trial for criminal acts aroused protest so widespread that in 1914 it was enacted by Congress (6 Fed. St. Ann. 2d ed. 142) that in all trials for indirect contempt where the acts charged constitute a crime under state or federal law the accused shall have the right to demand a jury trial.

Undeterred by this example another attempt far more bold is being made to substitute injunction and contempt proceedings for trial by jury. It is provided in the (at this writing) proposed federal measure for the enforcement of the 18th Amendment to the Constitution, that injunction may issue against any liquor seller and subsequent sales may be punished as a contempt. To avoid misunderstanding let it be said that the writer does not here question the constitutionality of that provision. He is also well aware that injunctions have long been issued to protect private rights, that the fact that the act threatening such a right is a crime is no defense and that jury trials are not allowed in proceedings for the violation of such an injunction. It is not the intention at this time to discuss the propriety of that procedure. What is here and now asserted is this: that to create such a procedure to enforce a public law, made in the exercise of the police power for the prevention of alleged offenses against the public morals, health and safety, no private interest or property right being thereby protected, is a gross subversion of the right of trial by jury. What excuse can be given for such a measure? The justification offered is so inadequate that lest the writer be accused of misrepresenting it he quotes from a statement of Mr. Wayne B. Wheeler, general counsel of the Anti-Saloon League of America. In the New York *Tribune* for Aug. 5, 1919, he wrote:

> The criticism concerning the injunction clause is not well founded. There is a clear distinction between criminal and equity cases with reference to a jury trial. In all criminal cases where imprisonment is or may be a part of the penalty a jury trial is guaranteed. In an equity case where the court issues a writ it simply orders the defendant not to further violate the law. If he is inclined to be a law-abiding citizen he will obey it, and not be embarrassed by it. If he violates the order of the court he may be fined for contempt of court. There never has been a jury trial provided in the original proceeding for the injunction. If the habitual law violator or speak-easy keeper continues, the court should be authorized to severely punish him. If the court decided the case wrong, it may be reversed on error, or the liquor law violator may be relieved from this proceeding by becoming a law-abiding citizen. Practically every dry state has this kind of law. Congress recently wrote it into the Alaskan and District of Columbia law. See p. 169, serial No. 1, Committee Hearings on the bill. Experience shows that if the law is to be effectively enforced against these habitual liquor criminals, such provision is necessary. To eliminate this provision, which is found in every prohibition law that is effective, would be an invitation to law-breakers to violate law in places where it is difficult to get fair juries in criminal cases. . . .
>
> No one will be injured by this provision of the law unless he is a defiant violator of the law. Even when a case is made and the injunction granted, the liquor dealer will not be injured unless he continues to violate the law in defiance of the order of the court.

"If the law is to be effectively enforced against these habitual liquor criminals such a provision is necessary!" One seems to hear the echo of the words of the Recorder in Penn's case: "It certainly will not be well with us till something like unto the Spanish Inquisition be in England." The tactics of tyranny, like those of war, have gained something in acumen since that day, for, as an eminent judge once said: "With all their astuteness and eager desire to serve the crown, it never occurred to the judges in those days to enjoin the Quakers from meeting, and Penn from preaching to them. This 'shortcut' would have gotten rid of the jury, and placed Penn and his followers completely in the power of the judges; and, instead of becoming the founder of a great city and commonwealth in a free republic, he would have languished in an English prison for contempt of court, incurred by preaching to his congregation, for he avowed in court 'that all the powers upon earth' could not divert or restrain him from that duty." (Caldwell J., in *Hopkins* v. *Oxley Stave Co.*, 83 Fed. 912, 49 U. S. App. 709, 28 C. C. A. 99.)

Mr. Wheeler's second paragraph is if anything more remarkable than his first. The liquor dealer "will not be injured unless he continues to violate the law in defiance of the order of the court." Is this not the very issue on which the right to a jury trial exists, whether he has continued to violate the law? By the same logic a denial of a jury in homicide cases does no harm, for unless the accused commits murder he will not be injured. The guaranties which surround a person accused of crime are for the benefit of the man who is unjustly accused; and it is certainly a strained logic which assumes his guilt at the outset as a reason why the guaranties may be dispensed with.

But let it be assumed that crime cannot be punished with certainty unless injunction and summary trial are substituted for the constitutional procedure. Assume also that the desirability of certainty in punishing crime is sufficient to justify a violation of the spirit of the Constitution so long as its letter is not infringed. Both of these assumptions the writer would most strenuously deny, but granting them as the only basis on which the proposed measure can stand, to what does the argument tend? Inevitably to one of two conclusions—either the same procedure should be adopted in all cases and courts of equity should be charged with the enforcement of the criminal law, or the offense of illegally selling intoxicating liquor is one of such peculiar enormity that while some latitude may be allowed as to minor offenses like treason, murder and rape, a procedure of peculiar stringency is necessary to suppress this one crime of inexpressible turpitude. During the darkest days of the war, when the existence of civilization hung in the balance, we gave a jury trial to seditious agitators and agents of the Hun. The Bolshevist or Anarchist who threatens the life of our government is tried by jury. A jury passed on the guilt of the man who a few years ago shot down the Chief Magistrate of our country. Are we to believe that, while all this is well enough, it is not safe to take such chances with the man who sells a pint of 2.75?

Von Ihring, in the monumental essay quoted at the outset, points out that the character of a civilization is clearly revealed by its selection of offenses for peculiar reprobation. "Let us take the most undoubted case, an attack on one's honor, and the profession in which it is most sensitively developed—the military profession. An officer who has patiently borne an insult which involves his honor, is no longer an officer. . . . With the officer, let us now compare the peasant, who defends his property

with the greatest stubbornness, but evinces a surprising indifference as to his honor. Why? Because he, too, has a correct feeling of the peculiar conditions of his existence. . . . Put them in the jury-box—submit to a jury of officers the case of an injury to property, and to a jury of peasants a question of honor—and see how different their verdicts! It is well known that there are no severer judges, in the matter of injuries to property, than the peasantry. And although I cannot here speak from experience, I have no manner of doubt, that if a peasant were to bring an action for damages for assault and battery, for instance, it would be found much easier to induce him to arbitrate than if his action were for an injury to property. The old Roman peasant was satisfied with twenty-five *as* for a slap on the face; and when a person put out one of his eyes, he was willing to talk the matter over and to arbitrate, instead of putting out one of his opponent's eyes as he was authorized to do. But he demanded that the law should empower him to hold the thief caught in the act, as a slave, and, in case of resistance, to slay him; and the law permitted him to do so. In the former case, only his honor, his body, was at stake; in the latter, his property. As a third illustration, let us take the case of the merchant. His credit is to him what honor is to the officer, and property to the peasant. The maintenance of his credit is, for him, a vital question; and the man who charges him with negligence in meeting his obligations, deals a heavier blow than the one who attacks his person or robs him. It is in keeping with this peculiar position of the merchant that recent laws tend more and more to restrict the crime of negligent and fraudulent bankruptcy, to him and others like him."

Are the people of the United States willing to accept the characterization which, under this test, the proposed measure imposes on them? Are they a people who contemplate with a judicial calm the trial of one accused of offenses against life, chastity or property, but are moved to such fanatic rage by the violation of a sumptuary law that they cannot tolerate the thought that any constitutional guaranty should protect this vilest of all miscreants? If they are not, then this measure does not represent their will.

The merits or demerits of prohibition as a national policy have nothing to do with the present discussion. The fact, if it is a fact, that the public welfare requires the absolute suppression of the liquor traffic no more justifies the invasion of the right to a trial by jury than the fact that white women must be protected from negro ravishers justifies lynch law. At all times laymen have been impatient of the orderly processes of the law. Incensed by wrong or zealous for right, well meaning men are prone to look to the end and ignore the means. Everyone will concede that a fair trial should have been given to Penn and Horne Tooke and anyone else who has been dead long enough to be invested with some measure of respectability. Everyone will concede that our present liberty is due in no small part to the contumacy of the juries that acquitted them. But many persons are unable to see that this has any application to the trial of bootleggers and blind-piggers. Besides, they say, there are no longer any tyrannical kings against whom the citizen must be protected. They forget that Penn was regarded by the "best people" of his day as a common miscreant. They forget that majorities (or minorities) may impose a tyranny as crushing and be served by agents as unscrupulous as any king. It is not impossible that the next century will point to the acquittal of an obscure bartender in a prosecution directed by the Anti-Saloon League as we do to the acquittal of Penn and the seven bishops. If the rights which the heroism of the past won for us are to be retained, it must be written not only on parchment but in the hearts of the people, it must be maintained not only in letter but in spirit, that "the trial of all crimes shall be by jury."

W. A. S.

SUNDAY LAWS AND GOLF.

According to the newspapers the courts of Massachusetts have recently upheld as constitutional a law prohibiting engaging in amusements on Sunday, and declared that the game of golf came under the ban of the statute. This has caused great indignation on the part of the devotees of the ancient and honorable game and not a few smiles on the part of her neighbors at Massachusetts' reversion to its ancient blue laws. It also brings up again the ever recurring question as to how far the state may go in regulating the habits and pursuits of its citizens under the authority given by the police power.

Sunday legislation dates back to the days of the early Christians, being more than fifteen centuries old. The first "Sunday Law" was enacted in the year 321 after Christ, soon after the Emperor Constantine had abjured paganism, and read as follows: "Let all judges and city people and all tradesmen rest upon the venerable day of the Sun. But let those dwelling in the country freely and with full liberty attend to the culture of their fields, since it frequently happens that no other day is so fit for the sowing of grains or the planting of vines; hence the favorable time should not be allowed to pass lest the provisions of Heaven be lost." Codex, Justin., lib. 3, tit. 12, 1, 3. Under Theodosius II, 425 A.D., games and theatrical exhibitions were prohibited, and about a century later all labor was prohibited on Sunday. The Saxon laws of about 700 A.D. forbade working on Sunday, and laws of a similar character were in force under Alfred (700 A.D.) and Athelstan (900 A.D.), since which time Sunday laws of a more or less stringent nature have existed in that country. Although it is said that the common law in England did not forbid the citizen from pursuing his ordinary labor on Sunday, this situation was changed by the statute of 29 Car. II (1678) which seems to have laid the foundation for laws on the subject in England and in many states of this country. It provided that no craftsman, artificer, workman, laborer, or other person whatsoever should do or exercise any worldly labor, business, or work of their ordinary callings on the Lord's Day, or any part thereof (works of necessity and charity excepted), and placed prohibitions on public sales on that day. Subsequent Sunday legislation has differed in different Christian countries and still differs, and the divergence is very great even in the legislation of the states of the Union. The first Sunday law in this country was enacted in Virginia in 1617 (three years before the landing at Plymouth), and provided a punishment of a fine

payable in tobacco for a failure to attend church on Sunday. This statute was re-enacted in 1623 (Henning's Statutes at Large, Va. 1618-60, vol. 1, p. 123). Plymouth Colony not only made it compulsory to attend church, but made it punishable by imprisonment in the stocks to go to sleep in church. (Records, vol. 11, p. 214.) And to think that some of the reverend gentlemen of those days held forth hours upon hours! The same colony in 1650 made it punishable by whipping to do "any servile work or any such like abuse" on the Lord's Day. And in the Records of Massachusetts Bay, vol. 2, p. 93, we find that "any sin committed with a high hand, as the gathering of sticks on the Sabbath day, may be punished with death, when a lesser punishment might serve for gathering sticks privily and in need." The New Haven Colony Records (1653-55, p. 605) contain a similar provision punishing unlawful sports, recreations, etc., by fine, imprisonment or corporally, but if "the sin was proudly, presumptiously and with a high hand committed" the offender "shall be put to death." Similar laws, though not so stringent, have been enacted in practically all of the states.

The earlier statutes providing for the observance of Sunday bore the sanction of religious obligation, deriving their validity from the oft repeated rule that Christianity was a part of the common law. In more modern times, however, the courts have repudiated that doctrine and it is now well settled that the validity of the so-called "Sunday Laws" is based on the police power of the state and does not depend on any religious tenet. For years the judges of England were wont when charging a jury to say that "Christianity is a part of the law." The doctrine was as well established as the numerous declarations of the courts could make it, and Christianity was universally recognized as constituting a part and parcel of the common law. It became a maxim of the English law and was followed and adopted in many of our states adopting the English common law. As was said in an early Pennsylvania case, "the declaration that Christianity is a part of the common law is a summary description of an existing and very obvious condition of our institutions." *Mohney* v. *Cook,* 26 Pa. St. 342, 67 Am. Dec. 419. However, frequently as the proposition in question appears in one form or another, it was always as something taken for granted and handed down from the past rather than as a deliberate and reasoned proposition. Once viewed in the cold light of reason the courts found no difficulty in repudiating it. In England the doctrine was exploded by Lord Sumner, in the case of *Bowman* v. *Secular Soc.* (1917) A. C. 406, Ann. Cas. 1917D 761, decided in 1917, wherein he said: "My Lords, with all respect for the great names of the lawyers who have used it, the phrase 'Christianity is part of the law of England' is really not law; it is rhetoric, as truly so as was Erskine's peroration when prosecuting Williams: 'No man can be expected to be faithful to the authority of man, who revolts against the Government of God.' One asks what part of our law may Christianity be, and what part of Christianity may it be that is part of our law? Best, C. J., once said in *Bird* v. *Holbrook,* (1828) 4 Bing. 628, 641, 15 E. C. L. 91, 95 (a case of injury by setting a springgun): 'There is no act which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England'; but this was rhetoric too. Springguns, indeed, were got rid of, not by Christianity, but by Act of Parliament. 'Thou shalt not steal' is part of our law. 'Thou shalt not commit adultery' is part of our law, but another part, 'Thou shalt love thy neighbor as thyself,' is not part of our law at all. Christianity has tolerated chattel slavery; not so the present law of England. Ours is, and always has been, a Christian State. The English family is built on Christian ideas, and if the national religion is not Christian there is none. English law may well be called a Christian law, but we apply many of its rules and most of its principles with equal justice and equally good government in heathen communities, and its sanctions, even in courts of conscience, are material and not spiritual." Numerous American cases have announced the same doctrine. In *Melvin* v. *Easley,* 52 N. C. 356, the court said: "Ours is a Christian country, but Christianity is not established by law, and the genius of our free institutions requires that 'church' and 'state' should be kept separate." And in *Board of Education* v. *Minor,* 23 Ohio St. 211, 13 Am. Rep. 233, it was said: "The only foundation—rather, the only excuse—for the proposition, that Christianity is a part of the law of this country, is the fact that it is a Christian country, and that its constitution and laws are made by a Christian people."

As we gradually drew away from the doctrine that Christianity was a part of the common law our courts have tended more and more to found the validity of the so-called Sunday laws on the valid exercise of the police power and not on any religious ground. As was said in *Carr* v. *State,* 175 Ind. 241, 93 N. E. 1071, 32 L. R. A. (N. S.) 1190: "The police power is that inherent and plenary power residing, within constitutional limitations, in the legislature to pass wholesome and reasonable laws for the good and welfare of the people of the state. Sunday laws, which are an invasion of natural private right, are enacted under this power. They are upheld as sanitary measures, on the ground of necessity for periodical relaxation and rest from mental and physical toil, for the general good. The influence of the Christian religion we know has been potent in establishing our civil Sunday, and it is probably true that the desire to give free opportunity for religious devotion and observance of the day as a Christian institution was not absent from the mind and intent of the lawmaking power in providing for and requiring fulfilment of the day as a day of pause in the activities of life. And we know also that without the influence of the Christian religion and its followers and believers the enforcement of observance of the day as a civil day of rest and recuperation would be difficult indeed and its integrity hardly preserved. But eminent jurists and courts, with practical unanimity, agree that Sunday laws can only be upheld as a civil regulation of a sanitary nature." And in *Com.* v. *Has,* 122 Mass. 40, it was said: "It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for the purpose; and even if the day thus selected is chosen because a great majority of the people celebrate it as a day of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to

regulate the business of the community and to provide for its moral and physical welfare."

Granted then that the constitutionality of Sunday laws can be sustained only as an exercise of the police power of the state and not by reason of the force of any religious tenet we come to that question of a million answers—what is the police power? It is under the cloak of this all-pervading power that the innumerable sumptuary laws of the present day are passed and every advocate of every fad or ism known to mankind will tell you that the police power is that sovereign cure-all for the particular imagined wrong they wish to right. The courts define police power as that power inherent in the state to enact all laws necessary for the promotion and preservation of the safety, health, morals and general welfare of society. "It is a power co-extensive with self-preservation, and is sometimes termed, and not inaptly, the law of overruling necessity." *Dunne* v. *People,* 94 Ill. 120, 141, 34 Am. Rep. 213. "It is a familiar law that even the privilege of citizenship and the rights inhering in personal liberty are subject, in their enjoyment, to such reasonable restraints as may be required by the general good." Per Harlan, J., in *Halter* v. *Nebraska,* 205 U. S. 34, 27 S. Ct. 419, 51 U. S. (L. ed.) 696, 10 Ann. Cas. 525. The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of practically every state in the Union as well as the United States Supreme Court. It is universally conceded to include everything essential to the public safety, health and morals. Under this power "it has been held that the State may order the destruction of a house falling to decay or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane or those afflicted with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." *Lawton* v. *Steele,* 152 U. S. 133, 14 S. Ct. 499, 38 U. S. (L. ed.) 385.

Now, as applied to Sunday laws it is conceded by all that in the interest of the public welfare the state may declare a day of rest and the fact that it chooses a day set aside by religious doctrines makes no difference, nor does it depend on religious sanctity for its validity. On this day it can prohibit anything that may endanger the health, morals or general welfare of the public. As well established as is this rule, it is equally well settled that the police power of a state extends only to such measures as are reasonable, and the general rule is that all police regulations must be reasonable under all circumstances. In every case it must appear that the means adopted are reasonably necessary and appropriate for the accomplishment of a legitimate object falling within the domain of the police power. So, the validity of any particular statute resting on the exercise of this power depends on whether it is really designed to accomplish a purpose properly falling within the scope of the police power. Keeping this limitation in view it would seem that some of the Sunday laws approach dangerously near the boundary line, if they do not actually overstep it. Particularly is this true of the laws prohibiting innocent private amusement. That public amusements such as baseball games for which an admission fee is charged, prize fights, dance halls, pool and billiard rooms, race tracks, etc., may be prohibited on Sunday is conceded, but can it be said that a law making it a crime for one or two persons to indulge in an innocent game of golf or tennis on Sunday is designed to promote the health, safety, morals, or general welfare of the public? According to the newspapers such a law has been held in Massachusetts to be a valid exercise of the police power. One court, however, limits the application of the law in cases of golf to games where no written score card is kept. Evidently this judge has never played golf, for if there is anything in the contention that Sunday golf endangers the morals of a community, the prohibition of the use of the score card certainly does not tend to encourage the virtue of veracity. It is difficult enough to keep the record straight with the help of the card, and without it well nigh impossible. Examined in the light of all the reasons for the exercise of the police power it is difficult to see how a game of golf comes within the scope of any one of them. Certainly it does not tend to interfere with the public health, and it is of positive benefit to the health of the individual. Nor can the safety or general welfare of the public be in any way endangered by it. Is it then immoral and therefore does it tend to corrupt the morals of the community? It is well settled that the police power is confined to regulating such occupations or acts as are in themselves indecent and immoral, or tend to encourage or promote immorality or indecency in others. By no stretch of the imagination could golf be deemed an immoral sport, though it is said that at times it gives rise to a large variety of lurid language, and on one occasion the writer remembers hearing a lawyer when remonstrated with by his opponent who was a preacher, for his liberal use of strong language, replying: "Well, Doctor, when a man takes a damn little stick and tries to knock a damn little ball into a damn little hole, how in hell is he going to keep from cussing?" However, that was profanity of the man and not of the game. Sunday golf can no more be said to be immoral than Monday golf. If immoral at all it is solely because of religious doctrine, and as we have seen the validity of Sunday laws is in no way dependent on the teachings of Christianity or any other religion. The Supreme Court of Illinois took what to the writer is the proper view of the matter when it said: "The game of golf is a healthful and harmless recreation of the same class as lawn tennis and other like games, which do not attract crowds or tend to disorder or call for police supervision or regulation. It has never been known to affect in any injurious way the public health, order, safety or morals. The fact that the game has attractions which induce players to practice it does not change its character to

an amusement or entertainment provided for the public. It is not a subject for the exercise of the police power." *Condon* v. *Forest Park,* 278 Ill. 218, 115 N. E. 825, L. R. A. 1917, E. 314.

MINOR BRONAUGH.

PURE ACCIDENTS.

THE idea that civil liability for the immediate consequences of the direct application of force is an absolute liability, seems to be fundamentally inherent in the primary stages of legal thought.

"The early law knows no such thing as an accident, but seeks always for something to make answerable, and determines it by a scarcely appreciable causation-nexus from the conditions of the harmful result." Brummer, Deutsche Rechtsgeschichte, vol. II, p. 549.

In Rex *v.* St. Asaph, 21 How. St. Tr. (Eng.) 1022, Erskine is reported as saying:

"If a man rising in his sleep walks into a china shop and breaks everything about him, his being asleep is a complete answer to an indictment for trespass, but he must answer in an action for everything he has broken."

The fact that such a doctrine should be propounded by learned men even in loose speech is suggestive of the fact that it was generally accepted at that time.

It is interesting to observe, that when a plaintiff and a defendant are brought before a jury in an action involving alleged negligence, the mind of the ordinary juryman presumes that one party at least must be at fault. Seemingly, it can never be imagined, even, that the occurrence in question and the resultant damage were occasioned by circumstances beyond the control of either participant. The statement, "For every wrong there is a remedy," has been enlarged and exaggerated to mean, "For every damage there is a recoupment." As was said by Chief Justice Bartlett in Paul *v.* Consolidated Fire Works Co. of America, 212 N. Y. 117, 105 N. E. 795:

"In accidents of employment, especially where the injuries are serious, there is a tendency always to impute blame to some one. The servant blames his master; the master attributes contributory negligence to his servant. We are apt to forget that accidents are not infrequent for which no one is really to blame at all."

The maxim that a man is innocent until proven guilty is only a fiction in civil as well as criminal law. The minute a defendant in a tort action steps into the courtroom the mind of the ordinary juror concludes that if he had not wronged the plaintiff he would not be in court.

A friend of mine once asked a man who had at various times sat on several juries, who influenced the most, the lawyers, the witnesses or the judge. He expected to get some useful and interesting information from so experienced a juryman. This was the man's reply:

"I'll tell yer, sir, how I makes up my mind. I'm a plain man, and a reasonin' man, and I ain't influenced by anything the lawyers say, nor by what the witnesses say, nor by what the judge says. I just looks at the man in the dock and says, 'If he ain't done nothing, why's he there?' and brings 'em all in guilty."

The layman can hardly conceive of any occurrence where someone is not to be blamed. Just because, in the ordinary course of events, two automobiles do not collide, it is assumed that they cannot, without the fault of someone. We are much readier to believe that both parties are at fault, rather than neither. The human mind shies at the unexplainable, refuses to concede the unknowable and has the vanity to attempt to provide an explanation for any and every occurrence.

The word "accident" in its legal signification is difficult to define and has no definite meaning, being used in many senses by the courts. In an etymological sense anything that happens may be said to be an accident. So, the term, pretended to be used in a legal sense, when flung haphazardly at a jury, is naturally understood by the juryman in the general or popular sense. One of the fundamental differences between legal thought and general reasoning is the content or meaning of the terms used. The content of the term is accepted by the layman as he finds it, uncertain, variable, determined only by a consensus of the popular usage of the day. On the other hand, in legal thinking the meaning of the term is fixed and true, established by construction and precedent. Analogous to the confusion over the word "accident" witness the difference between the legal and general concepts of the words "nuisance" and "malice."

"The poverty of language compels the use of words in different meanings, and this is notably true of the word 'accident.' Strictly speaking, an accident is an occurrence to which human fault does not contribute; but this is a restricted meaning, for accidents are recognized as occurrences arising from the carelessness of men." Nave *v.* Flack, 90 Ind. 205; 46 Am. Rep. 205; The Clarita, 23 Wall. 1, 23 U. S. (L. ed.) 146.

"Mere accident" and "pure accident" are terms often used when it is desired to repel the idea of negligence, and are equivalent to the words "not by defendant's negligence."

The main practical difficulty in dealing with the term is often realized in presenting a case to the jury. The question as to what will and will not constitute an accident under given circumstances is dependent upon the facts of each particular case and is usually a question for the jury.

We can even more readily excuse the juries who confuse the meaning of the word when we find that judges themselves are often guilty. In Ullman *v.* Chicago, etc., R. Co., 112 Wis. 150, 88 N. W. 41, 88 Am. St. Rep. 949, 56 L. R. A. 246, the appellate court says in part:

"The trial court most grievously erred in holding that the terms 'accident' and 'mere accident' are synonymous and both exclude human fault called 'negligence.' On the contrary they are well-nigh universally treated in legal opinions as opposites, the former being referable, among other causes, to responsible human agency."

Our aversion for the accidental is the product of our youthful teachings. We are told that the success of a great man is never due to chance, but is attributable always to certain acquired characteristics. The road to fame is mapped with infinite detail by magazine editors whose magazines are failures. Just as though we would not all be statesmen and captains of industry if the secret were so easily obtainable. We are egotistical enough to believe that we have the power of controlling every event, provided we concentrate and labor. Our materialistic atmosphere has convinced us of the foolishness of the Oriental philosophy of Fate. We believe in the immutable law of cause and effect—the injury sustained is the effect, and one of the humans involved *must* be the cause. Witness our difficulty with the doctrine of "vis major" or "Act of God." The courts are everlastingly involved in confusion when defining this defense. As our scientific knowledge increases, we devise means of averting every catastrophe. As our meteorological learning advances, we

shall impute to all persons a duty to prevent the consequential damage of sudden changes of weather, windstorms and floods. Nature is all in favor of certainty in great laws and of uncertainty in small events. So we must proceed to enact ordinances and statutes to govern these "small events." Of the making of laws there is no end and at every step we are bound to be "mala per se" or "mala prohibitum."

The end of all education is humbleness, and this subject admits of much study.

Webster C. Tall.

Cases of Interest

Effect of Expiration of Insurance Policy on Holiday.—An accident insurance policy does not, it seems, cover an accident occurring the day after its expiration, although it expires on a holiday. It was so held in Upton *v.* Travelers' Ins. Co. (Cal.) 178 Pac. 851, reported and annotated in 2 A. L. R. 1597, wherein the court said: "The action was upon a contract to insure the plaintiff against accidents. The policy was issued on April 12, 1912, and bore that date. It contained the provision that 'this policy is issued for a term of six months, beginning at 12 o'clock noon, standard time, on the 12th day of April, 1912, and ending at the same hour, but it may be renewed, subject to all its provisions, from term to term thereafter by payment of the premium in advance.' It was renewed from time to time, the last renewal taking place on April 12, 1914. The accident causing the injury for which plaintiff seeks recovery in this action occurred on October 13, 1914. This was one day after the policy had expired, and consequently the defendant is not liable. The fact that October 12th was a legal holiday does not aid the plaintiff. The policy expired by its terms on the 12th day of October at noon. The accident does not come within the provisions of §§ 10 or 11 of the Civil Code, or the corresponding provisions of the other Codes. Section 10 declares that the time in which any act is provided by law to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded. The accident, of course, was not an act provided to be done by any law, or by the policy. Therefore this section has no application. Section 11 provides that whenever any act of a secular nature is appointed by law or contract to be performed upon a particular day, which falls upon a holiday, it may be performed upon the next business day with the same effect as if it had been performed upon the day appointed. The policy did not appoint the accident as an act to be performed at any time, or at all; consequently that act does not fall within this section. . . . The court below properly directed the jury to return a verdict for the defendant."

Delegation by Legislature to Private Individuals of Power to Formulate Electrical Wiring Rules.—In State *v.* Crawford, 104 Kan. 141, 177 Pac. 360, reported and annotated in 2 A. L. R. 880, the court held to be invalid a statute requiring electrical wiring to be in accordance with a code of rules promulgated by a body or association of private individuals. The court said: "None of the cases has ventured so far afield as to intimate that the legislature might delegate to some unofficial organization of private persons, like the National Fire Protective Association, the power to promulgate rules for the government of the people of this state, or for the management of their property, or that the legislature might prescribe punishment for breaches of these rules. We feel certain that no such judicial doctrine has ever been announced. If assent to such a doctrine could be given, a situation would arise where owners of property with considerable persistence might learn what these code rules were, and incur the expense of making their property conform thereto, only to find that the National Fire Protective Association had reconvened in Chicago, New York, or New Orleans, and had revised the code, and that the work and expense had to be undertaken anew. And there would be no end of such a state of affairs. Furthermore, there is no official way, indeed no practical way, for the average property owner to know what these code rules are. The laws of this state to which our people owe obedience must be officially published. The people may learn what these laws are, and they are privileged to meet legislative committees and petition the legislature for amendment, improvement, and amelioration of the laws. Shall it be intimated that if these fire prevention regulations, these 'national electrical code' rules, are oppressive, or otherwise objectionable, the property owners of this state must be referred to some voluntary and unofficial conference of underwriters and electricians, which occasionally meets here, there, or anywhere in North America, for redress of grievances? But the fallacy of such legislation in a free, enlightened, and constitutionally governed state is so obvious that elaborate illustration or discussion of its infirmities is unnecessary. If the legislature desires to adopt a rule of the national electrical code as a law of this state, it should copy that rule, and give it a title and an enacting clause, and pass it through the senate and house of representatives by a constitutional majority, and give the governor a chance to approve or veto it, and then hand it over to the secretary of state for publication. The clause in § 5 of the Fire Prevention Act (Gen. Stat. 1915, § 4863), requiring that 'all electric wiring shall be in accordance with the national electric code,' is void for uncertainty, and the informations charging offenses thereunder were properly quashed."

Privilege Attending Statements by Counsel in Application for Pardon.—In Andrews *v.* Gardiner, 224 N. Y. 440, 121 N. E. 341, reported and annotated in 2 A. L. R. 1371, it was held that while statements made by an attorney in an application for pardon on behalf of a client are privileged, the privilege is not absolute. The court said: "The question, therefore, is whether absolute privilege ought now to be extended to an application for a pardon. It was so extended by the court of civil appeals of Texas, in Connellee *v.* Blanton (Tex. Civ. App.), 163 S. W. 404, but we think erroneously. Such an application is not a proceeding in court, nor one before an officer having 'attributes similar' to a court's. Royal Aquarium *v.* Parkinson, [1892] 1 Q. B. 431, 61 L. J., Q. B. N. S. 409, 66 L. T. N. S. 513, 40 W. R. 450, 56 J. P. 404. It is a petition for mere grace and mercy. It may be made by anyone, and without the convict's knowledge. It grows out of the action of the courts, but it seeks to reverse their action by an appeal to motives and arguments which are not those of jurisprudence. There are no clearly defined issues. There is often a most informal hearing. Sometimes there is argument by counsel. As often, the plea for mercy is made by wife or kin or friends. Whatever privilege belongs to counsel should belong also to them; the right to plead for clemency is not a monopoly of the bar. Even if counsel speaks, his words are not 'spoken in office.' Rex *v.* Skinner, supra. Nor are they subject to like restraints. At such a time, anything is pertinent that may move the mind to doubt or the heart to charity. It is not necessary that reason be convinced; it is enough that compassion is stirred. The range of possible inquiry should be con-

fined within the limits of good faith. Where the test of the pertinent is so vague, there must be some check upon calumny. While convict and counsel act in good faith, they are immune; the privilege is lost when they defame with malice. There is no license, under cover of such an occasion, to publish charges known to be false, or put forward for revenge. We are not dealing here with statements made by witnesses required to attend a hearing (Prison Law [Consol. Laws, chap. 43], §§ 261, 262, 265); there is a distinction between the testimony of witnesses and voluntary complaints (Wright *v.* Lothrop, 149 Mass. 385, 390, 21 N. E. 963). We do not go beyond the case before us. Our ruling is in harmony with the tendency of courts to restrict the scope of absolute privilege in libel. Blakeslee *v.* Carroll, supra, at page 235 of 64 Conn., 25 L. R. A. 106, 29 Atl. 473; Odgers, Libel & Slander, pp. 230, 231. It is in harmony with rulings made where petitions have been submitted to the governor or the legislature for relief against oppression or the redress of other wrongs (Wright *v.* Lothrop, supra, at page 390 of 149 Mass., 21 N. E. 963; Proctor *v.* Webster, L. R. 16 Q. B. Div. 112, 114, 55 L. J. Q. B. N. S. 150, 53 L. T. N. S. 765; Woods *v.* Wiman, 122 N. Y. 445, 25 N. E. 919; Cook *v.* Hill, 3 Sandf. 341; Maurice *v.* Worden, 54 Md. 233, 39 Am. Rep. 384); the oppression of a harsh or unjust judgment is not to be distinguished in this respect from any other abuse of power. The ruling gives just protection alike to suitor and to counsel, and charges them with liability only when the privilege is abused."

Compulsory Examination for Venereal Disease.—In Wragg *v.* Griffin, (Iowa) 170 N. W. 400, reported and annotated in 2 A. L. R. 1327, it was held that a rule of a board of health directing officers to make such examinations of persons suspected of having venereal disease as may be necessary to carry out the health regulations, and making it the duty of the mayor to have suspected persons investigated, does not authorize the forcible examination of the person of a suspect, or the extraction of blood from his veins for a "Wasserman test." Said the court: "The respondents place special emphasis on that part of the rules of the state board to which we have already referred, where it is made the duty of the mayor to direct the chief of police to cause persons suspected of being diseased, 'to be investigated,' and authorizing health officers in such cases 'to make examinations' of suspected persons, and to detain them as long as it may be necessary to determine whether they are so afflicted. But even here there is an entire absence of any express authority to subject a suspected person to an examination by physical force, or by an extraction of blood from his body by violence for experimental purposes. Men and women were examined and treated by physicians for sexual diseases for generations before the so-called 'Wasserman test' was discovered or invented, and, so far as we are informed, with reasonably reliable results. At least, there is no evidence that, even in the technical phrase of physicians, the word 'examination,' in such cases, is understood as necessarily meaning a blood test by the Wasserman method, or by any other method involving violation of the person, and, in the absence of explicit authority for the subjection of a person to such treatment, upon suspicion alone, it ought not to be approved as a valid exercise of authority. This petitioner may be a bad man, but we have no right to assume such a fact for the purpose of minimizing his claim to protection of the ordinary rights of person, which law and the usages of civilized life regard as sacred until lost or forfeited by due conviction of crime. Even when charged with the gravest of crimes, he cannot be compelled to give evidence against himself, nor can the state compel him to submit to a medical or surgical examination, the result of which may tend to convict him of a public offense (State *v.* Height, 117 Iowa 650, 59 L. R. A. 437, 94 Am. St. Rep. 323, 91 N. W. 935); and, if there be any good reason why the same objections are not available in a proceeding which may subject him to ignominious restraint and public ostracism, it is, at least, a safe and salutary proposition to hold that, before the courts will uphold such an exercise of power, it must be authorized by a clear and definite expression of the legislative will. This we do not have, and, in our judgment, the restraint of the petitioner, not as a diseased person whose detention in a separate house or hospital the statute authorizes, but solely as a suspect and for the avowed purpose of forcing the exposure of his body to visual examination, and compelling the extraction of blood from his veins in search of evidence of a loathsome disease, which may or may not exist, is a deprivation of his liberty without due process of law, and he is entitled to be set free."

Liability of Telephone Company for Injury to Person Using Another's Telephone.—It seems that a telephone company is not, in the absence of wilfulness, wantonness, or malice, liable for injury by electric shock to one who, by permission of a neighbor, is attempting to use the latter's rented 'phone in a private residence. It was so held in Inman *v.* Home Telephone, etc., Co., (Wash.) 177 Pac. 670, wherein the court stated the material facts and its conclusion thereon as follows: "J. W. Fortune had in his residence a telephone installed by the defendant, which owned the wiring, instrument, and equipment, and furnished the ordinary telephone service. The plaintiffs were neighbors, living about a block distant from Fortune, and were not telephone subscribers. The plaintiff wife was injured while using the telephone. . . . The plaintiffs were not subscribers for telephone service and had no contractual relationship with the company. The only obligation owing them came through the use of Fortune's telephone, by his permission, but without the defendant's knowledge; and he was not the owner of the telephone, but only a purchaser of telephone service. His contract with the company gave him no agency for it. The telephone, unlike other electrically operated instruments, is not highly dangerous, in that its wires do not carry a dangerous current, so we have eliminated from our consideration those cases of liability of conveyers of high electric current for injuries to trespassers, licensees, children, etc., and have only to determine the rights under the Fortune contract. . . . That contract gave its protection to all persons who were intended to be benefited by it; it assured a right of recovery for mere negligence to the Fortune family, its servants, guests, persons working about the house for the benefit and at the request of the owner, and all persons who could be said to have been in the contemplation of the company and the subscriber as liable to make use of the telephone in the reasonable, ordinary, and customary conduct of a home such as the one involved. . . . But as to all persons outside the contemplation of the contract, the company, in order to be liable for their injury, must be shown to have been more than merely negligent. The plaintiffs were accustomed to use this telephone; and Fortune had established, in effect, for them a free telephone service. This he could not do, for no such use of this telephone was reasonable or anticipated by the company when it was installed, or sanctioned thereafter. It may be that in public or business places such use is taken into consideration when telephones are placed there, and that the company is liable to such users as to subscribers; but the private residence, in the absence of agreement to that effect, is not supposed to be a public telephone station. Those using

such telephones for purposes of their own, and not in the interest of the owner of the house, and for their own convenience, and not casually, and not as members of the household, either permanently or temporarily, are at best, as far as the company is involved, bare licensees. . . . As between Fortune and the plaintiff wife, she was entitled to the exercise of ordinary care for her safety. Hanson *v.* Spokane Valley Land & Water Co., 58 Wash. 6, 107 Pac. 863. But as between the parties to this suit, she was no more than a mere licensee, and, no proof having been presented of wilful injury, the plaintiffs were not entitled to recovery."

News of the Profession

The Probate Judges' Association of Missouri met in Springfield, Oct. 6. A. B. Duncan of St. Joseph is the president of the association.

North Dakota Judicial Changes.—F. J. Graham of Ellendale, North Dakota, has been appointed a judge of the third district of that state.

The Commercial Law League of America, which held its twenty-fifth convention in Cincinnati a few weeks ago, was presided over by William H. Platt of Kansas City.

Ohio Judicial Appointment.—Charles A. Lowe of Lawrenceburg has received the appointment of judge of the seventh judicial circuit of Ohio. He succeeds the late Warren A. Hauck.

The Southern Minnesota Bar Association held its annual meeting at Red Wing, recently. H. J. Edison, president, opened the meeting. Justice Oscar Hallam was one of the speakers.

Vacancy in County Court of Oklahoma Filled.—J. G. McKelvey of Medford, Oklahoma, has been appointed county judge for the unexpired term of Judge C. V. Stephenson, deceased.

Death of Indiana Jurist.—The death of Ernest R. Keith, a judge of the Marion County Superior Court, Indiana, is announced. He was at one time president of the Indianapolis Bar Association.

Nebraska Judicial Changes.—W. A. Dilworth of Holdrege, Nebraska, has been appointed a district judge succeeding Judge William C. Dorsey of Bloomington who has become a supreme court commissioner.

Austin, Texas, Lawyer Quits Firm.—E. B. Robertson of Austin, for many years a member of the firm of Lightfoot, Purdy & Robertson, has severed his connection with it to become general attorney for the Swenson-Dole Oil Co., of Fort Worth.

The Missouri Bar Association which met Oct. 3 and 4, was addressed by Attorney General A. Mitchell Palmer. A conference of the judges of the state was held on the day preceding the meeting.

The Judges' Association of Michigan met at Lansing, Sept. 4. Judge Burton L. Hart of Adrian was elected president, Judge George S. Hosmer of Detroit vice-president, and Judge Collingwood secretary-treasurer.

Chicago Bar Association Record Resumes Publication.—With the cessation of the World War the resumption of the "Bar Association Record," the official monthly devoted to the activities of the Chicago Bar Association, is announced.

Kansas Judicial Changes.—Judge Robert Garver of the first division of the Shawnee, Kansas, county district court resigned Sept. 15, and has gone to Fort Worth, Tex., as attorney for the Doherty Gas Company interests.

Attorney Refuses Shipping Board Appointment.—D. H. Kemp of Missouri, who was appointed attorney for the United States Shipping Board Emergency Fleet Corporation at Philadelphia, has refused to accept the position, preferring his practice.

Prominent Cleveland Lawyer Dead.—Clifford A. Neff, who practiced law in Cleveland for twenty-five years, is dead. He was born in Savannah, Georgia. From 1900 to 1902 Mr. Neff was a member of the Ohio Supreme Court committee on admission to the bar.

Changes in Alabama Judiciary.—Horace Wilkinson of Birmingham, Alabama, has been appointed to fill the vacant judgeship in the tenth judicial circuit caused by the death of Judge Henry A. Sharp. At the time of his appointment he was assistant attorney general.

The American Institute of Criminal Law and Criminology met in Boston, Sept. 2. The president's address was delivered by Hugo Pam of Illinois. Papers were read by John H. Wigmore of Illinois, and Arthur Woods of New York, a former police commissioner.

Prominent New York Lawyer Killed.—Benno Loewy, a prominent New York attorney, was knocked down by an automobile truck while crossing a street in that city, and died from the injuries resulting. He had a law library estimated to contain more than 53,000 volumes.

Texas Judicial Changes.—M. S. Munson of Angleton becomes Judge of the 23d judicial district in place of Samuel J. Styles of Bay City who resigned. Judge Joseph Burkett of the 88th district court has resigned. He was formerly a judge of the 42d judicial district.

The North Dakota Bar Association has selected Jamestown as the place of meeting for the 1920 Convention. The officers elected at the 1919 Convention were: president, Theodore Koffel of Bismarck; vice-president, C. A. Pollock of Fargo; secretary, John Green of Minot.

American Bar Association.—The new president of the American Bar Association elected at its recent meeting in Boston is Hampton L. Carson of Philadelphia, former attorney general of Pennsylvania. At the annual dinner Chief Justice White was one of the speakers. Edgar A. Bancroft of Chicago also spoke.

Missouri Lawyers Open Office in Washington.—Former Governor Joseph W. Folk of St. Louis has announced that he has formed a law partnership in Washington with Frank P. Walsh of Kansas City, former chairman of the National War Labor Board. Gov. Folk announces that he will maintain his voting residence in St. Louis.

North Carolina Bar Association.—At the recent annual convention of the North Carolina Bar Association, William P. Bynum of Greensboro was elected president, succeeding Edwin F. Aydlett of Elizabeth City. J. J. Parker of Monroe, Michael Schenek of Hendersonville and T. J. James of Greenville were elected vice-presidents. Thomas W. Davis of Wilmington was re-elected secretary and treasurer.

Greetings of Bar of England Extended to American Bar Association.—The greetings of the bench and bar of England

were brought to the American Bar Association at the annual meeting held last month in Boston by Viscount Finlay, former Lord Chancellor of England. He especially praised the Supreme Court of the United States, saying that the recent war had given a signal illustration of what international law owes to that court.

New Assistant United States Attorneys.—Robert L. Minton, formerly of Mound City, Missouri, has been appointed assistant United States attorney for the western district of that state and has assumed his duties in Kansas City. He is a graduate of the University of Michigan law school. Thomas H. Cody of Brownsville, Texas, has been appointed an assistant United States attorney for the southern district of Texas, succeeding E. P. Phelps resigned. He is a son of Professor Cody of Georgetown University. Warren P. Dillon has been appointed assistant United States attorney for the northern district of Ohio with headquarters in Toledo. He succeeds Leland W. Gordon, resigned.

English Notes*

Prisoners of War in the Civil Courts.—There have, during the late hostilities, been remarkably few cases of prisoners of war charged in the ordinary courts of justice with criminal offenses, no doubt because what offenders there have been have, for the most part, been tried by courts martial. Oddly enough, now the war is, even technically, nearly over, one such case has been heard at the Bow street police court. It resulted in a conviction. The accused, it should be explained, was an escaped prisoner who committed larceny while he was at large, probably, as he asserted, because he had no other means of maintenance. He was only discovered to be a prisoner of war after he had been arrested by the civil police and charged before the magistrate. The question how the civil courts get jurisdiction over prisoners of war naturally arises in the mind. Any difficulty there might be is met by article 8 of the regulations annexed to the Hague Convention respecting the laws and customs of war on land, signed in October, 1907, and ratified in November, 1909. The article runs: "Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State in the power of which they are." This brings into operation as regards such prisoners the Army Act, section 41, proviso *b* of which enacts that "A person subject to military law when in His Majesty's dominions may be tried by any competent civil court for any offense for which he would be triable if he were not subject to military law."

A Funeral as an Entire Contract.—The recent case of Vigors *v.* Cooke is one of some practical interest and importance, notwithstanding the distressing nature of the fact disclosed. The case decided that an ordinary contract to undertake a funeral is one entire contract—namely, to carry out a burial in a decent and reverent manner—and that it cannot be split up into separate contracts, for example, one contract to provide a coffin, another to provide a hearse and bearers, and a third to convey the coffin into a church for a service. This contract, as Lord Justice Bankes remarked, "included as an essential term the conveying and providing the necessary number of bearers to convey the coffin into the church or chapel in which it had been arranged, as part of the bargain, that part of the funeral service was to take place." It was in this particular detail that the contract was not performed by the undertaker. It is unnecessary to mention here the causes which led to the impossibility of taking the coffin into the church for the service. It is sufficient to say that the undertaker did not lose his case because negligence was proved against him. It was not necessary for the defendant to go so far as that. The point on which the undertaker, who was suing for the contract price of the funeral, lost his case was that the contract being one indivisible contract, which was not performed in one essential particular, the onus was on him to prove a satisfactory reason why that essential particular had not been performed, and this he failed to do. It was possible that if he had taken certain steps the untoward events which happened might not have occurred; on the other hand, it was possible that nothing he could have done would have prevented the disaster. It was on the plaintiff to prove the latter, and he failed to do so. We venture to concur with the Court of Appeal in feeling sympathy for both sides, and in the regret that it was found necessary to bring this particular case, with its exceptionally distressing circumstances, into court.

Procedure Adopted in Exile of Napoleon.—The determination of the allies to bring the ex-Kaiser to trial before a specially constituted court sitting in London has sent many students to inquire what was the procedure adopted when, Waterloo having given the *coup de grace* to Napoleon, that monarch surrendered to the commander of the *Bellerophon*. In that case there was no semblance of a trial; the ex-Emperor was regarded as *hostis humanis generis* and at once deported to St. Helena. A curious project was indeed entertained of getting him brought on shore from the *Bellerophon* by the issue of a writ of *habeas corpus ad testificandum* on the pretence of some action in which he would be required as a witness, but it appears to be doubtful whether anything was in fact done, although it has been stated that Capel Lofft moved for the issue of the writ. It seems clear, however, that doubts must have been entertained regarding the regularity of the whole proceedings connected with his treatment, and the possibility of awkward questions relating thereto arising, for, in the statute that was passed "for regulating the intercourse with the island of St. Helena during the time Napoleon Buonaparté shall be detained there," a provision was inserted for completely indemnifying all persons connected with the detention of the ex-Emperor in respect of their acts. It has not been overlooked by critics of the British Government's treatment of the fallen foe that both in the Act just referred to and in that which immediately precedes it in the statute-book (56 Geo. 3, c. 22) the ex-Emperor is throughout described as "Napoleon Buonaparté" (except in one of the marginal notes, which in worse taste speaks of "N. Buonaparté") as if to deny, as Lord Rosebery has said, that he had ever been French at all. Most men are extremely sensitive on the subject of their names and titles, and Napoleon did not differ from his fellows in this respect. When, on landing at St. Helena, he received an invitation addressed to "General Bonaparte," he handed it over to one of his attendants with the remark, "Send this card to General Bonaparte; the last I heard of him was at the Pyramids and Mount Tabor." The petty persecution of the captive in this matter continued, and it is said that on his coffin plate no name appeared because Sir Hudson Lowe had refused to allow the simple inscription "Napoleon," insisting that "Bonaparte" must be added, and, as the ex-Emperor's suite refused to agree to this, the plate was left blank. Questions of this kind are, of course, more for the

* With credit to English legal periodicals.

statesman than for the lawyer, whose only further interest in Napoleon when in custody is the fact, mentioned in a note to Forsyth's Cases and Opinions on Constitutional Law, that, arising out of his residence in St. Helena, a curious point was submitted to the law officers of the Crown. It seems that Napoleon was fond of ball practice and fired very carelessly, one day killing a bullock. Supposing he had killed a person, under circumstances which would amount to manslaughter according to English law, what was to be done with him? An opinion was given, but unluckily Forsyth was unable to discover it. What could have been done if he had been tried and convicted of manslaughter?

The Influence of France in Securing American Independence.—President Wilson in his message to the Senate, submitting the Franco-American Treaty, says: "France now desired American assistance to keep her safe against aggression. . . . Another great nation [Great Britain] volunteers the same promise. It is one of the fine reversals of history that the other nation should be the very Power from whom France fought to set us free." To the participation of France in the War of the American Independence the separation of the North American colonies from Great Britain is unquestionably due. It is, however, not the less certain that the North American colonies, if there had not been a participation by France in the War of the American Independence on their behalf, would have secured the very fullest measure of constitutional liberty with a system of responsible government under the British Crown. The surrender of Burgoyne's army at Saratoga on the 12th Oct. 1777 raised America to the rank of a belligerent Power recognized by the world. France, anticipating the course which England pursued of entering into negotiations with America for purposes of reconciliation, made treaties of alliance and commerce with the States which were formally signed in Paris on February 6, 1778; the sole condition exacted was that the Americans should make no peace with England which did not involve a recognition of their independence. The surrender at Saratoga compelled Lord North to recognize the necessity of a compromise with America, and a Bill was hurried through Parliament which six months previously the States would have accepted with gratitude. The pretension to tax the colonies directly or indirectly was immediately abandoned, and Lord Carlisle and Mr. Eden were sent out as commissioners in order to effect a reconciliation. They promised the Americans complete liberty of internal legislation; seats in the English House of Commons if America wished to be represented there; they gave a pledge that no European troops should be again sent out to America without the consent of the local assemblies; and that England should bear part of the debt which the colonists had incurred in maintaining their rights by arms. It was too late. Congress replied, in conformity with the terms of the treaties of alliance and commerce with France, that if Great Britain desired to negotiate with America she must withdraw her fleets and recognize American independence. These terms might conceivably not have been offered by Great Britain if France had not been in alliance with America. It is certain, however, that they were rejected because they did not assent to the separation of the American colonies from Great Britain, which was made by France the sole condition precedent to the making of the treaties of alliance and commerce with the United States. The constitutional history of the British Empire would have been far different if there had been no treaty condition between France and the United States of such a character.—*Law Times.*

Strikes by Scottish Lawyers.—At the moment when strikes and rumors of strikes fill the newspapers and bring about lamentable disorganization of business, when every effort ought to be put forward, steadily and continuously, to reconstruct our national commerce, it is curious to recall that at least on three occasions the Scots Bar had recourse to what would now be called a "strike" as a protest against high-handed action, or what they deemed such, on the part of the authorities. All three "secessions," as they are called in the history of the Faculty of Advocates, occurred during the seventeenth century. The first was in 1654, when all the most eminent advocates, including Stair, afterwards the Lord President, refused the Tender or oath of allegiance to the Commonwealth and withdrew from the Bar. The late Sheriff Mackay, in his valuable Memoir of Lord Stair, mentions the tradition that it was in consequence of this strike that the voluminous written pleadings, which maintained their ground in Scotland down to a comparatively late period, were introduced with the object of instructing the English judges, who were sent to Scotland by Cromwell, in Scots law; but, as he also points out, this tradition is probably ill-founded, as voluminous written papers were in use before this period. However this may be, the secession did not continue very long, the Tender being laid aside. About sixteen years later the second of the three *émeutes* took place, and this is the only one of the three which may be said to have been to some extent actuated by pecuniary grounds—an attempt to limit the amount of advocates' fees. Certain rules had been recommended by a commission for adoption in connection with the administration of justice in Scotland, and one of these dealt with the delicate subject of fees. The Faculty declined to accept the new regulations, and endeavored to carry their point by a strike. For two months they withdrew from the courts, but at the end of that period the opposition collapsed and all returned to practice. The third strike, called the Great Secession, occurred in 1674. As was the case with the first secession, so now again this extreme course was embarked upon on public grounds—as a protest against the refusal of the right of appeal from the court to Parliament. Two of the leaders, Sir George Lockhart and Sir John Cunninghame, having, when called before the court, refused to disown the right of appeal, were debarred from employment, whereupon about fifty of their brethren resolved to share their fate. Lockhart with his immediate friends retired from Edinburgh to Haddington, while Cunninghame with his adherents migrated to Linlithgow. Incensed at this conduct, the Privy Council issued a proclamation prohibiting the return of those advocates within twelve miles of Edinburgh. After a time Sir George Mackenzie, the "bluidy Mackenzie" of anti-Covenanter fame, who had cooperated with the recalcitrant leaders in the early stages of the proceeding, resolved to submit, and it is said he induced the great bulk of his colleagues to follow his example, and thus this, like the previous secessions, collapsed somewhat abruptly. Although the two latter strikes ended not very heroically, the incidents as a whole reflect the independence of the Bar at a troublous period in the history of Scotland, when autocratic methods in high places were becoming more and more pronounced, and the need for a spirited protest was more than ever clamant.

"It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare."—Per Shiras, J., in Baltimore, etc., R. Co. *v.* Voigt, 176 U. S. 505.

Obiter Dicta

Et Tu Piscis!—Fish *v.* Poorman, 85 Kan. 237.

A Long Chance.—Gamble *v.* State, 113 Ga. 701.

Watch Your Step!—Guard *v.* Risk, 11 Ind. 155.

In Collision—Naturally.—The "Tartar" *v.* The "Charmer," 7 West. Law Rep. 417.

Turning the Tables.—In Laughter *v.* Butt, 25 Ga. 177, the laugh was on the plaintiff, for the Butt won out.

Couldn't Cash In!—In Woodham *v.* Cash, 15 Ga. App. 674, the plaintiff Cash "elected to take a money verdict," but the verdict was set aside on writ of error.

Slanderous Per Se.—The term "boche," addressed publicly to any person, has been held by a French court to be the foundation for a suit for defamation. 1916 Dalloz, Part 2, p. 30.

The Race Is Not Always to the Swift.—In each of the cases of Swift *v.* Crow, 17 Ga. 609, Swift *v.* Hare, 1 Rob. (La.) 303, and Swift *v.* Short, 92 Fed. 567, the defendant won.

A Combination Hard to Beat.—The case of Goldman *v.* Goodrum, 77 Ark. 580, was an action to recover the price of liquor sold in violation of law. Goodrum was right on his job. He hired Trimble to defend him and won out.

Has the United States a Jove?—"Speculative theories may be invoked to demonstrate that it was part of a thunderbolt such as the ancients supposed Jove to employ and particularly to threaten when worsted in argument."—Per Brady, J., in Maher *v.* Manhattan R. Co., 53 Hun 508.

Glass Houses.—In Robinson *v.* Wiese, (Mo.) 210 S. W. 889, the court speaks of "the narrow and technical vision that sees a fly on the house without seeing the house." We trust it will not be considered impertinent if we remind the learned court not only that there are sometimes glass houses, but that people who live in them are not supposed to throw stones.

Easy Picking.—In People *v.* Knapp, 187 N. Y. App. Div. 89, the Appellate Division of the New York Supreme Court, speaking of a statute providing for a franchise tax for corporations, said: "It was a move looking to the simplification of the tax system, of plucking the maximum of feathers with the minimum of noise from the goose." We have always known that taxpayers, especially corporations, were easy picking, but we never expected to find judicial confirmation of the fact.

Escaped Notice?—"A flower garden at passenger stations of any importance is usually provided by up-to-date railroads, and in this esthetic age cannot be deemed foreign to the purposes of such corporations."—Per Land, J., in John T. Moore Planting Co. *v.* Morgan's Louisiana, etc., Co., 126 La. 840. Which leads us just naturally to inquire why the Director General during the recent unpleasantness failed to cut out flower gardens along with all other instrumentalities designed for the pleasure or comfort of railroad patrons.

What the Courts Really Know.—"The appeal to the postulant for membership is the concept of the gracious and neighborly conduct of the Samaritan recited in the Gospel according to St. Luke, chapter 10, beginning with the thirty-third verse, of which the court is judicially informed and personally cognizant."—Per McAvoy, J., in Right Worshipful, etc., Grand Lodge *v.* Jounson, 177 N. Y. Supp. 500. Judicial candor is always refreshing, especially where actual as distinguished from judicial knowledge is concerned. But we wonder whether the court would have been equally ready to acclaim actual knowledge of certain other matters, e.g., the intoxicating qualities of various beverages.

A Judicial Litany.—"This case is nothing but an unseemly and a disgraceful wrangle between two ladies of 'easy virtue' for the possession of a diamond ring, bestowed upon each of them, on different occasions (and no doubt for value (?) received), by their common and generous admirer—a Federal convict. And a curious coincidence is that this ring (as described in the record) has upon it 'the figures of two women.' It is not disclosed whether or not these figures are nude, but considering their environment, we do not imagine that their charms are concealed by excessive drapery. No doubt our gallant convict-lover and his two fair lady-friends agreed in thinking that 'beauty when unadorned's adorned the most.' From having to wade through such another nauseating mess, may the good Lord deliver us."—See Newborn *v.* Weitzer, 15 Ga. App. 670.

The "Prevailing Morality" of the People.—In State *v.* Phillips, 109 Miss. 22, the court said: "We quote the words of an unknown writer as fairly representative of the present 'prevailing morality' of the people of this state: 'Whiskey is a good thing in its place. There is nothing like it for preserving a man when he is dead. If you want to keep a dead man put him in whiskey; if you want a kill a live man put whiskey in him.' Is the writer a wag or a philosopher? This question will be answered by 'dyed in the wool "individualists" ' but one way, but we apprehend that their answer would not be approved in a statewide primary." This may or may not be true as to the state of Mississippi. But it suggests the thought that a constant harping on the "prevailing morality" of the people is scarcely consistent with the strenuous objections invariably raised to the referendum of the liquor question.

"Out of the Mouths of Babes," etc.—In his learned but at the same time extremely entertaining article on "The Decline and Fall of the Serjeants-at-Law" in the new number of the *Law Quarterly Review*, Mr. Theobald Mathew mentions in connection with the coif the incident of a prisoner puzzled as to the black patch on the top of the judge's wig, inquiring the name of the "sore-'eaded bloke." This is one of the comparatively few recorded opinions, says the *Law Times*, expressed by an accused regarding the judge who is trying him. They are rarely flattering, as may well be imagined. One prisoner, having received a much more lenient sentence than he expected or deserved, asked the warder, as he was descending from the dock, "if the old devil was drunk or didn't know his job." Lord Cockburn, of the Scots Bench, who has recorded a multitude of quaint and curious stories in his Memorials, Journal, and Circuit Journeys, records having overheard a woman, who with four others had been sentenced to transportation for a ferocious robbery, remark of her judges as she was leaving the dock, "Twa d——d auld gray-headed blackguards! They gie us plenty o' their law, but deevilish little joostice!" But perhaps the most amusing story in this connection is that which preserves the conversation between an Irish prisoner and the interpreter. Gazing about him when brought into the dock, the prisoner, addressing the interpreter, asked who "the ould woman wi' the red bedgown round her" sitting up there was. To this the interpreter made some reply. The judge hearing, but not understanding, the conversation, asked the interpreter what it was. Not unnaturally this official was shy about disclosing the nature of the prisoner's question, but under pressure he did so, adding that he had informed the prisoner that his Lordship was "the ould bhoy that's going to hang ye."

Correspondence

THE TRIAL OF THE EX-KAISER.

To the Editor of LAW NOTES.

SIR: There seems so much doubt and so many difficulties suggested as to the trial of the Kaiser by some international tribunal, I beg to suggest why not try him for piracy?

The sinking of the Lusitania, as well as many other similar crimes, constituted clearly piracy on the high seas. Everyone connected with the submarine that sank the Lusitania could be tried for piracy in the Admiralty Courts of Great Britain, against whose flag the crime was committed. All the statutes on piracy both in this country and abroad provide further that everyone who "combines, confederates, or corresponds" with a pirate is guilty as an accessory.

Can it be doubted that Wilhelm, Von Tirpitz, Cappell and all the rest of the gang confederated, combined and corresponded with those who committed this act of piracy? Not only that, they were the principals, and the commander of the submarine was purely an agent acting under the authority of the principals, directed and paid by them.

It seems to me quite clear that everyone connected with the German Admiralty can be tried in the Admiralty Courts of Great Britain or America for piracy on the high seas, and if adjudged guilty, hanged by the neck until they are "dead, dead, dead."

Hutchinson, Kan. F. DUMONT SMITH.

DECISIONS ON APPEAL BY DIVIDED COURTS.

To the Editor of LAW NOTES.

SIR: I agree absolutely with the views of F. Dumont Smith of Hutchinson, Kan., expressed in a recent issue of LAW NOTES, to the effect that in cases involving contributory negligence, where the rule undoubtedly is that if men of ordinary intelligence might reasonably differ upon the question of the contributory negligence of the plaintiff, the question should be submitted to the jury, that in the event the supreme court, upon appeal, should be divided upon the question, whether the trial court acted properly in submitting the question of contributory negligence to the jury, or non-suiting the plaintiff, the action should be affirmed, if this is the only question involved in the case upon appeal, if the trial judge submitted the case to the jury and reversed it he non-suited the plaintiff. A statute to this effect would obviate the necessity of the majority of the judges of the Supreme Court branding their fellow jurists—the dissenting minority—as men not of ordinary intelligence.

Also in passing upon the constitutionality of a statute, the rule is universally recognized that unless the Judge can say that he is convinced beyond a reasonable doubt that the statute in question is unconstitutional, it should be upheld. In case the trial court should hold a legislative enactment unconstitutional, and the supreme court upon appeal should be divided upon the question, the law should provide that in such a case the trial court's rulings should be reversed.

I believe that the law should also provide that the supreme court, either upon appeal or proceedings commenced directly in the supreme court, should not have a right to declare a law unconstitutional unless all of the Justices of the supreme court concur.

La Grande, Ore. J. W. KNOWLES.

THE "LIE BILL," AND CROPPED EARS.

To the Editor of LAW NOTES.

SIR: In your issue for the present month (July, 1919), you have an article headed "The Founder of the Ananias Club," quoting an old court record of Cumberland county, North Carolina, from which it appears that in 1822 one William Jones had an entry made that "I do hereby acknowledge myself a Public Liar, and that I have told unnecessary lies on Jesse Northington, and his family," etc. It may interest some of your readers to know that a paper of this character is still in use in some rural communities of the South and is known as a "Lie Bill." When a man slanders his neighbor, and wishes to avoid legal proceedings or personal violence from the aggrieved party, he saves himself by signing such a paper; but to have signed a "Lie Bill" is quite naturally considered a great disgrace.

In the North Carolina county in which I live (Wake) will be found some curious entries of another nature, and a person unacquainted with the criminal laws and customs of the old days might be puzzled to know why they were put on the court records. One of these we find on the records of the Inferior Court of Pleas and Quarter Sessions of Wake County for the September Term, 1771: "Averington McKelroy came into court, and by the oath of Mr. Isaac Hunter proved that he unluckily lost a piece from the top of his right ear by Jacob Odem's biting it off in a battle." Again, on the records of the same tribunal, September Term, 1772, we find it entered: "James Murr came into court and produced John Patterson, a witness to prove how and in what manner he lost his ear, who made oath that after a battle between said Murr and one Wagstaff Cannady, he (the said Patterson) found a piece of his (Murr's) ear on the ground—to wit, the right ear." On reading these entries one might naturally ask the cause of the solicitude of Mr. McKelroy and Mr. Murr to have a permanent record made of the wounds they had received in "battles" with their neighbors. The reason is quite simple. In those days, the punishment for perjury, and some other crimes, was for the convicted party to have his ears cropped off by the common hangman. Hence when a citizen lost his ears by some other means than the shears of the hangman, he went into court, had witnesses to prove why he was lacking in ears, got the clerk of the court to give him a certified copy of the entry, and this copy he could carry with him, if away from home, to show that he was not a convicted perjurer.

Raleigh, N. C. MARSHALL DELANCEY HAYWOOD.

"PROHIBITION AND BOLSHEVISM."

To the Editor of LAW NOTES.

SIR: In LAW NOTES of August, 1919, appears an editorial on "Prohibition and Bolshevism," in which the writer defines civil liberty to be the right of every man to do as he pleases except so far as his acts interfere with the like liberty of others, and sets out in opposition to this definition the theory that any person or class of persons who may seize the power so to do may rightfully impose on their fellows such restrictions as whim or self-interest may dictate. He then refers to a "rule by the Kaiser and his junkers," etc., etc., and speaks of a "distinction in principle," but is not a "distinction in degree" nearer the facts? As the writer knows, civilization is founded on each member of society giving up some part or portion of his civil liberty, and society has progressed very rapidly of late years in restrictions which touch each member and interfere with his doing as he pleases, and the reason is that the things prohibited affect the enjoyment of liberty of others.

I would be pleased to know what the writer has to say about the seizing by the Government of hoarded food and the arresting of merchants for selling at prices which the public term "profiteering." If prohibition is "rule by the pharisaical prohibitionists," what kind of a rule is the Anti-Profiteering Crusade, and what kind of a rule is it to prohibit a child from going to school unless he has been vaccinated, and what kind of a

rule is it that says that I cannot erect on my lot in a city a frame building, or that I cannot maintain a slaughter house or a soap-making plant in a built up community?

To me these are degrees of giving up of civil liberty, and the question is how far will society, in order to protect certain of its rights, be willing to give up certain other rights. The topic is one of growing importance because we are traveling pretty fast at present, and the end no one can see, and consequently seasonable and temperate discussions are to be desired.

Chester, Pa. A. A. Cochran.

RIGHT OF PROSECUTION TO APPEAL IN CRIMINAL CASE.

To the Editor of Law Notes.

Sir: I have just read with a great deal of interest your editorial on the right of appeal on the part of the prosecution in a criminal case. The undersigned has had experience both in the prosecution of criminal cases and in the defense and also as trial judge in such cases. While there is great force in what you say as a matter of abstract right, yet as a matter of public policy the following suggestions present themselves on the other side:

1. The criminal law is simple and easily understood and there are very few cases of reversible error on the part of the trial court. To allow appeals on the part of the state would add very much to the burdens of our already overworked Appellate Courts. It would necessitate a new set of judges.

2. The extra cost of these appeals and retrials would add to the already heavy burden of the taxpayers.

3. It is very likely that where an acquittal had been once registered, the second jury would merely follow in the track of the first jury.

4. The extra time taken up in retrials would make it less possible to reach other cases not yet up for trial.

5. In many cases, men who are persecuted by strong interests could never reach the end. It would give unscrupulous men who had it in for some poor devil a leverage too great to be allowed.

6. The State—the real party at interest—selects the judge, the prosecuting attorney, all the officials, makes the law under which a man is to be tried, has the last speech to the jury and in fact regulates all the proceedings, and with all this powerful machinery, if a jury fails to convict that ought to end it. In our state, all twelve must agree to a verdict of Not Guilty.

7. Long usage and custom have proven the advantage of the present system, and all things considered, the present system of not allowing appeals is in my judgment the best as a matter of public policy and practice. The Bench and Bar in our state favor the present rule.

I may add that I enjoy what you say and usually agree with you, but these suggestions arise in my mind on the above question and I send them to you for what they are worth. Of course I am not presumptuous enough to put my opinion up against yours.

Saluda, S. C. C. J. Ramage.

CONCURRENT "POWER" OR "JURISDICTION."

To the Editor of Law Notes.

Sir: Mr. Wayne B. Wheeler, the general counsel for the Anti-Saloon League, in an article appearing in the September issue of Law Notes, takes exception to the conclusions reached by the writer in an article in the August issue discussing the concurrent jurisdiction of Congress and the states to enact laws for the enforcement of the 18th amendment. His criticism is based on a quotation from the amendment wherein the term "concurrent jurisdiction" is used instead of "concurrent power." The writer admits the error in the quotation but must take issue with Mr. Wheeler's statement as to its effect, which in his zeal as an advocate he sadly misinterprets. He says that "concurrent power" and "concurrent jurisdiction" do not mean the same thing, and therefore the article discussing the meaning of the term concurrent jurisdiction with reference to the construction of the 2d section of the 18th amendment is not in point. Is it conceivable that Congress and the states have been given the "power" to enact laws to enforce the 18th amendment and yet have not the "jurisdiction" to do so? or to reverse the proposition, can a legislative body be given the "jurisdiction" to enact laws and yet not have the "power" to do so? His statement that "concurrent power" and "concurrent jurisdiction" do not mean the same thing is dependent for support solely on his bare assertion of the fact. He cites no authorities to sustain it, for the very good reason that there are none. On the other hand there is authority of the highest degree to sustain the contention that "concurrent jurisdiction" and "concurrent power" are in effect one and the same. No less an authority than Chief Justice Marshall used the terms "jurisdiction" and "power" as synonymous. See Postmaster General *v.* Early, 12 Wheat. 136, 148, wherein the chief justice in construing a statute conferring "concurrent jurisdiction" said: "The phrase may imply that *power* was previously given to that other; but if in fact it had not been given the words are capable of imparting it." The Supreme Court of Wisconsin says: "Jurisdiction, in its strict sense, means power, as distinguished from mere judicial rules as to when it may be exercised." State *v.* Houser, 122 Wis. 534, 100 N. W. 964, 968. A similar definition is given by the Kentucky court in Meyer *v.* Wedding, 107 Ky. 685, 60 S. W. 20, wherein it was said: "Jurisdiction is the sovereign authority to make, decide on, and execute laws." And the United States Supreme Court, followed by a host of judges in the lower federal courts, has said that "jurisdiction" when applied to courts means "the power to hear and determine." Rhode Island *v.* Massachusetts, 12 Pet. 718; McNitt *v.* Turner, 16 Wall. 336; Davis *v.* Cleveland, etc., R. Co., 217 U. S. 157; Rexford *v.* Brunswick-Balke Collender Co., 181 Fed. 462, 470, 104 C. C. A. 210. The foregoing definitions present the view of the judiciary. Now what say the experts among the laity on the subject? The Standard Dictionary defines "jurisdiction" as the "lawful power or right to exercise official authority, whether executive, legislative or judicial." Webster says that "jurisdiction" is the "authority of a sovereign power to govern or legislate; right to make or enforce laws"; also, "jurisdiction and authority are often interchangeable." The Century Dictionary defines "jurisdiction" as "the right of making and enforcing laws."

Mr. Wheeler says that power is simply the right, ability or authority to do something. With this definition no one will quarrel. He does not attempt to define jurisdiction, though he asserts that "concurrent power" and "concurrent jurisdiction" do not mean the same thing. The judiciary and the lexicographers say that "jurisdiction" means the right, *power,* or authority to make and enforce laws. So there you are. "You pays your money and you takes your choice." As a matter of fact would it have made any difference if Congress had used any one of the words, "right," "power," "authority," or "jurisdiction"? The meaning sought to be conveyed was that of authority legally conferred, and the use of any one of those words would have had the same effect. It were idle to pursue this phase of the subject further, or discuss it at all except for the striking example it presents of the slender reeds to which the attorney is sometimes forced to cling in his efforts to sustain his client's cause. And while due allowance is to be made because of the position he occupies, a statement so contrary to accepted authority cannot be allowed to pass unchallenged.

While Mr. Wheeler is conveniently blind to the similarity in the meaning of the words "jurisdiction" and "power," he seems to find no difficulty in viewing the terms "equal power" and "superior power" as synonymous. We agree with his definition of "concurrent power" as used in the 18th amendment. He says it "simply means equal power or authority on the part of the state and federal governments." In the exercise of this equal power, however, he contends that the states must give way to the superior power of Congress. This line of argument is confusing to say the least. If Congress and the states have equal power under the terms of the Constitution, by what authority does Congress exercise a superior power? He takes the position, that whenever Congress legislates concerning a matter within its jurisdiction, or perhaps I had better say within its power, state laws must give way although they were enacted under a specific constitutional provision giving them equal power with Congress over the subject matter. To sustain his contention he quotes the recent case of United States *v.* Hill, 39 S. Ct. Rep. 143, as follows: "When Congress exerts its authority in a matter within its control, state laws must give way in view of the regulation of the subject matter by the superior power conferred by the Constitution." In that case Congress was exercising its "superior" power over interstate commerce, conferred by the Constitution. In the case of the 18th amendment it is exercising an "equal" power conferred by the Constitution on it and the states. Under its superior power it may assume exclusive control of the subject matter, but under the terms of the 18th amendment equal power is reserved to the states, and Congress cannot assume exclusive control, for its power is equal and not superior to that of the states. Mr. Wheeler conveniently ignores the distinction between superior and equal and contends that when Congress exercises a power shared equally with the states, the state laws are superseded if in conflict therewith, because the Supreme Court has said that when Congress exercises a superior power state laws must give way.

His attitude toward words and their meanings seems to be a negative one. He tells us what they do not mean but fails to tell us what they do mean. His statement that "concurrent" does not mean "joint," like his statement that "power" and "jurisdiction" do not mean the same thing, lacks authority, aside from his own assertion, to support it. However, there is authority on the subject, but unfortunately for his contention it is diametrically opposed to his views. The same noted jurist who found no difficulty in using the words "power" and "jurisdiction" as synonymous terms, has said: "For one body to do a thing concurrently with another, is to act in conjunction with that other; it is equivalent to saying, the one may act together with the other. The phrase may imply that power was previously given to that other; but if, in fact, it had not been given, the words are capable of imparting it." Postmaster-General *v.* Early, 12 Wheat. (U. S.) 136. It would seem that this definition from such a source would satisfy the most captious, but for the benefit of those who must be convinced against their will, reference is made to the following later cases: In re Mattson, 69 Fed. 535; Ex p. Desjeiro, 152 Fed. 1004; Oregon *v.* Neilson, 212 U. S. 315.

New York. Minor Bronaugh.

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German Opera.

WHILE, in the legal discussion which is at the time of writing in progress in New York as to the validity of the prohibition by a Mayor of the rendition of opera in the German language, the prohibition is justified by its advocates on the ground that a state of war still exists, it may be justified on a ground equally applicable in time of peace, viz., that such a performance is an act proximately tending to produce conflict and public disorder. Thus in *Com.* v. *Karvonen,* 219 Mass. 30, Ann. Cas. 1916D 846, the court sustained a statute forbidding the carrying of a red flag in any parade. Per se a red flag is as innocent as a white, green or pink one. But that flag has acquired such a significance in the popular mind that, as the court said, the legislature could rightfully decide that "its carrying in parades would be likely to provoke turbulence." In *People* v. *Burman,* 154 Mich. 150, the court went yet further and held that the carrying of a red flag in public amounted to disorderly conduct, saying: "The question here is not whether the defendants have in general a right to parade with a red flag. It is this: Had they such a right when they knew that the natural and inevitable consequence was to create riot and disorder? Defendants knew this red flag was hated by those to whom it was displayed, because it was believed to represent sentiments detestable to every lover of our form of government. They knew that it would excite fears and apprehension, and that by displaying it they would provoke violence and disorder. Their right to display a red flag was subordinate to the right of the public. They had no right to display it when the natural and inevitable consequence was to destroy the public peace and tranquillity. It is idle to say that the public peace and tranquillity was disturbed by the noise and violence, not of defendants, but of those whose sentiments they offended. When defendants deliberately and knowingly offended that sentiment, they were responsible for the consequences which followed, and which they knew would follow." In like manner the fact that opera in German may be of itself as innocent as opera in Chinese is quite beside the question. The German tongue is now and for many years to come will be associated with all that is vile and bestial. To every American there sounds above the strains of German music the wail of the drowning passengers on the *Lusitania,* the shrieks of the ravished women and murdered babes of Belgium. A man who can hear it without being moved to rage is unfit to live on American soil. And quite apart from the emotional aspect, there is another consideration which demands and justifies the permanent prohibition of German opera. The preservation of the German language and German institutions in other lands has been shown to be the prime factor in the evil policy which the Hun has so studiously pursued for years—a policy which is directly and perpetually at war with our efforts toward Americanization. For that reason the language should be barred from the stage, the public prints, and the public schools and colleges. The Hun has not failed of course to provide a deal of high sounding talk about the "universality of art." Granting that German music is art, the German language is not. If German opera will not stand translation into the English language, that opera is proved thereby to contain nothing of universality. Yet again, art and literature are supposed to have an influence in the formation of human character. If German art and literature have had such an influence, we know them by their fruits and should exclude them as we exclude obscenity. To the foreign propagandist, whether he be Bolshevist or German opera singer, America should have but one answer: "If you don't like the language, the government, the art, the institutions of this country, go back to your own. If you have no country go to—Berlin."

Disability of the President.

THE Constitution of the United States (Art. II, § 1) provides that "in case of the removal of the President from office, or of his death, resignation or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President." It is somewhat remarkable that no judicial decision has ever been demanded by the clause relating to the inability of the President to discharge the duties of his office. The clause is ambiguous in several particulars. Obviously it does not ordinarily include a disability of a few hours. Yet an emergency might be imagined in which a very brief inability of the President to act would warrant action by the Vice-President. Perhaps the most sensible interpretation would be that a Presidential inability to act does not warrant the assumption of power by the Vice-President if the matter can be deferred without injury to the public interest, but the application of that rule is not free from difficulty. Again, must the inability to act be absolute or may it consist in such a condition of health that the President cannot without danger to himself give his attention to public business? Does absence from the United States constitute inability to act as President, and if so is the rule absolute or does it depend on the possi-

bility of easy communication with the seat of government? Yet more difficult is the question who is to pass on the existence of a condition warranting the Vice-President in taking over the chief magistracy and on the termination of that condition. Probably the decision in the first instance belongs to the Vice-President, on the theory that, since the duty of acting under certain conditions of fact is imposed on him, his official discretion extends to the determination whether the conditions calling for action are present. But that theory does not preclude the possibility of an unseemly conflict with a President, returning to deny that he had ever been unable to act. A reading of the opinions in *Henry* v. *State,* 10 Okla. Crim. 369, will show the possibilities of acrimonious dispute which inhere in the situation.

An Amendment Needed.

THE questions suggested in the preceding paragraph are of more or less frequent recurrence. Three Presidents have languished for a considerable time before succumbing to an assassin's bullet. The past year has seen the President twice absent from the United States for protracted periods, and he has but recently been ill and debarred by his physician's orders if not by his own condition from attending to the duties of his office. Probably no man will ever hold the office of Vice-President who has not tact and good sense sufficient to avoid the unseemly contests which have taken place over lesser offices, but the question goes somewhat deeper. A condition may well exist where the public interest sorely requires executive action, yet the Vice-President will be deterred by considerations of good taste from taking the step which his judgment dictates. It is not fair to the official or to the country that such a situation should arise. The Constitution should be so amended as to prescribe precisely when the Vice-President shall assume the functions of Chief Executive and how the existence of the duty so to do shall be determined. The formulation of a definite rule will be a matter of some difficulty, but it is just as easy to formulate it beforehand as after the emergency has arisen. The same considerations support a provision that in case the President leaves the United States his powers shall automatically devolve on the Vice-President. It may be necessary, advisable or convenient for the incumbent of the Presidency to go abroad. That may perhaps be left to his discretion. But the duties of the Presidency are so complex and exacting that it is impossible that the public interest should not suffer in his absence. The expedient of delegating powers to be exercised in subordination to the absentee, to which a business executive would naturally resort, is out of the question, for Presidential powers cannot be exercised in that manner. The question is a practical one, not to be clouded by fine scholastic theories as to the exercise of sovereignty. The President of the United States is the head of the largest business in the world. When he is absent from his office because of illness, or for reasons of business or pleasure, measures should be taken for the management of the business, as prompt and adequate as those employed in other business establishments.

The Spirit of Lawlessness.

HOW far has the exercise of the judicial power to nullify legislation contributed to the prevailing spirit of disregard of law? It was said (and in a spirit of eulogy) of Mr. Justice Miller of the United States Supreme Court that he regarded a state statute with no more deference than the by-law of a corporation, and the epigram but little exaggerates the attitude of that school which advocates the rigid application of constitutional limitations. Whatever may be the merits of that viewpoint in the abstract, in actual practice the public absorbs its contempt for legislation much more rapidly than its reverence for the Constitution. When a law generally deemed to be salutary is invalidated by a judicial decree, the lawyer or publicist may see merely the working out of a wholesome system of checks and balances, and count the temporary loss well repaid by the vindication of a principle of permanent value. But the "man in the street" does not react to the decision in just that way. He may avoid the folly of attributing the decision to corruption or judicial favoritism, but he cannot escape the steady growth of a feeling that an act of the legislature is a thing of little importance, which will make it easy for him to ignore or evade some law which bears inconveniently on him. Between the evasion of a law and a direct attack on its constitutionality there is a distinction obvious enough to a lawyer but by no means so plain to a layman, particularly if his own interest is involved. The daily press serves more and more to present the facts as to legislative and judicial acts to a public which is without the training necessary to understand them. It is impossible to take a step backward, to revert to the idea of the divine right of rulers and the meek popular acceptance of their edicts. The other extreme of individual self-determination is already bearing fruit in the spirit of Bolshevism. The public at the present time knows too much to be docile and too little to be intelligently law abiding. Out of that situation grows naturally the spirit of lawlessness and the cure must go as deep as the cause. "Can we expect that free men will take an attitude of reverence towards the law which they know to be no matter of divine inspiration, but only the resultant of contending social forces in which very possibly their own opinions and desires have been overborne and supplanted by the wishes of others? That depends, I take it, upon the ability of men to adequately conceive the meaning and value of free government." (Mr. Justice Stafford before Colorado Bar Association.) No instruction worthy of the name is given in our common schools on American institutions and government. A few emotional exercises of the flag-waving and poem-reciting order represent the average course on a subject much more important to the average child than geography or grammar. An intelligently designed course on civil government, given a full period daily for at least five of the eight years of the average grade school course, and followed by a more advanced high school course, would give us a citizenry quite impervious to any attempt to overthrow our national institutions.

The Defense of the Kaiser.

A SUBSCRIBER whose letter is published in this issue presents an argument of some cogency against the contention recently made in LAW NOTES that it would be unworthy of the traditions of the bar for an American lawyer to accept employment to assist in the defense of William Hohenzollern. It is true that since a trial is to be accorded to this arch criminal it should be in every respect a fair trial. The requirements of scrupulous jus-

tice may well be deemed to be the equivalent of the provision in our Constitution that every accused person shall have the assistance of counsel for his defense. But even in the realm of domestic crime there are cases where no reputable counsel will defend voluntarily. Such a case, for example, was that of Czolgosz, who was defended by counsel appointed by the court. The appointment, fixing an imperative duty on these gentlemen, freed them from the odium which would otherwise have attached to the service. In like manner during the German occupation of Brussels, a German firm sued in the Belgian courts could find no lawyer willing to represent it and appealed to the Batonnier who as head of "L'Ordre des Avocats" assigned counsel for the defense. It is hard to see why the assistance of American counsel should be deemed essential to a fair trial of this case. The employment of counsel solely because of their political or religious agreement with the judge, though not unknown, is not highly regarded, and the introduction of American lawyers in the trial of the late Kaiser would be open to suspicion of a like motive. But if it is deemed desirable that American lawyers should participate in the defense they should be designated by the International Commission and paid from the public treasury, that it may never be said in reproach of the American bar that one of its members served as a mercenary under the black flag of Hohenzollern.

Professional Self-Government.

THE American lawyer must feel some abatement of pride in his professional status when he reads that when the appointment of a defender of a German interest in Belgium was desired the application was made not to a judge but to the chosen representative of a self-governing bar. The status of the Belgian bar was stated by its Batonnier in a communication to the German authorities, quoted in the recent work of Mr. Brand Whitlock, as follows: "The bar is not an administrative body. It is an autonomous and a free organization. Placed by law at the side of the magistracy to accomplish with it the joint task of justice, protected by its secular traditions, it knows neither the guardianship nor the control of any political power. It receives orders or injunctions from no one. It exercises this liberty without restraint, not in the interest of its members but in the interest of its mission. It has developed in its heart more discipline than pride; it has created a code of severe rules of honor and of conduct which only the chosen can endure." In this free and progressive land these proud words cannot be repeated by the lawyer. He is placed not beside but in subordination to a magistracy above whose personnel he ofttimes towers in mental and moral stature. His qualifications, admission and discipline are prescribed by political power. The fact that there is a lower fringe of the bar whose conduct sometimes brings the entire profession into disrepute is due in no small part to this fact. There is a deal of truth in the aphorism that the best way to keep a man out of the mud is to blacken his boots.

Jury Trial in Civil Cases.

MR. PERCY WERNER, writing in "The Public" for September, 1919, criticises the jury system as applied in civil actions, maintaining at some length that the average jury pays little attention to the instructions and "will ordinarily decide a civil case according to the law as they conceive the law ought to be unless their feelings are too much aroused in favor of the underdog in the fight to consider the law at all in their decision of the case." Professional opinion is far from being in accord as to this proposition. An experienced trial lawyer recently wrote: "Now in regard to juries: My understanding is that juries, some way or other, hit it off accurately pretty nearly every time. Judges whom I have spoken to on the subject tell me that nearly all juries decide correctly. How they do it nobody knows. It seems strange that men like carpenters, mechanics, and men like that should decide complicated cases correctly, but they tell me that, as a general rule, they do do it." (Henry Wollman in "Bench and Bar," May, 1918.) But accepting Mr. Werner's contention as embodying a considerable measure of truth, is there not room for a contention of considerable force that therein lies the greatest value of the jury system? Law by reason of its generality must in some instances result in injustice. Law must, however, be general and certain, and provision for exceptional cases cannot ordinarily be inserted therein. In this situation does not the jury system provide the very corrective that is necessary, furnishing a kind of "shock absorber" between inflexible law and ever varying equities? Moreover, law is conservative and its progress though sure is slow. After the injustice of an existing system is recognized, considerable time usually elapses before reform is put into effect. In such a situation is not the action of juries often a forerunner of reform, doing justice while the legislators wrangle? For instance, the workmen's compensation laws are generally recognized to-day as representing a just principle. Before they were passed, that same justice was done for years by jurors who decided personal injury cases in favor of the plaintiff in the teeth of the instructions. The heart of man has always been wiser than his head. The heart desires justice and fair play, and the progress of law is marked by the extent to which that desire has broken through and remolded the subtle intricacies of form and system in which the intellect delights. Granted a perfect law, and its inflexible administration would be most desirable. But while it remains imperfect, it is sometimes a saving grace and not a defect that it is not applied where its application would shock the conscience of common men.

Arbitration as a Substitute.

IN the article referred to Mr. Werner confines himself to criticism and suggests no substitute. But in the "Central Law Journal" of Oct. 10, 1919, he sets forth his constructive program, which is voluntary private arbitration, to be effectuated by a judgment entered on the award. The arbitrations, he contends, "should be professionalized by selecting lawyers as statutory arbitrators and adding, if the parties so desire, one or more expert laymen." Voluntary arbitration before expert arbitrators is undoubtedly the ideal method of determining some questions. It is cheaper than litigation, less apt to leave bitterness in its train, and gives the maximum of that flexibility which has already been referred to as requisite to justice in individual cases. But however much may be said in favor of voluntary arbitration it will probably never come into any considerable vogue.

Two thousand years ago it was said, "Agree with thine adversary quickly, whiles thou art in the way with him," and it is not probable that modern repetitions of the injunction will be more effective than its original pronouncement. On the other hand, general compulsory arbitration will inevitably tend to lose the informality which is its chief virtue and grow to something indistinguishable from a trial by a judge. Thus in a recent case in the English House of Lords (*Produce Brokers Co.* v. *Olympia Oil & Coke Co.* [1916], 1 A. C. 314), it was said: "It is in one aspect of it a deplorable case. These men of business made contracts and therein agreed to arbitrate upon all disputes arising out of their contracts. Yet there have already been seven distinct stages of argument and decision, four of them in courts of law, upon a dispute arising on those contracts, and the end is not yet. I do not know how many more stages there will be." But though voluntary arbitration is futile, and general compulsory arbitration is not feasible, it does not follow that the advantages of that system are wholly beyond reach. At the present time the workmen's compensation laws are administered by a procedure amounting to compulsory arbitration. The procedure of juvenile courts and the domestic relations courts is not different in principle. The next step probably will be, following the British example, along the line of arbitration of trade disputes. Following this, industrial arbitration seems logical and necessary. If the principle of arbitration is to be introduced into our governmental system, it will probably have to be along the line of compulsory arbitrament of controversies of certain classes rather than by any general attack on our present methods of trial.

Constitutional Law in Canada.

HOWEVER attached one may be to the principles of the American constitution, it is impossible to avoid a feeling of impatience when some piece of legislation believed to be sorely needed is nullified because of its conflict with a constitution adopted more than a century ago. Accordingly many American lawyers have on occasion expressed something of envy of the lack of restraint enjoyed by the legislatures of Canada. It seems, however, that their immunity from judicial nullification is not as great as has been supposed. A recent decision of the Privy Council (W. W. Rep. [1919], vol. 3, p. 1) holds that an initiative and referendum act adopted by the legislature of Manitoba is void because it impairs the powers conferred on the Lieutenant-Governor by the British North America Act of 1867. Viscount Haldane said: "Their Lordships are of opinion that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the Lieutenant-Governor as an integral part of the legislature, and to detract from rights which are important in the legal theory of that position. For if the act is valid it compels him to submit a proposed law to a body of voters totally distinct from the legislature of which he is the constitutional head, and renders him powerless to prevent its becoming an actual law if approved by a majority of these voters. . . . Sec. 11 of the Initiative and Referendum Act is not less difficult to reconcile with the rights of the Lieutenant-Governor. It provides that when a proposal for repeal of some law has been approved by the majority of the electors voting, that law is automatically to be deemed repealed at the end of thirty days after the clerk of the executive council shall have published in 'The Manitoba Gazette' a statement of the result of the vote. Thus the Lieutenant-Governor appears to be wholly excluded from the new legislative authority. These considerations are sufficient to establish the ultra vires character of the Act. The offending provisions are in their Lordships' view so interwoven into the scheme that they are not severable." It seems, however, that this holding represents the only limitation on the powers of the provincial legislatures, it being said in a recent encyclopædia of Canadian law: "By section 92 [of the British North America Act] the provincial legislatures may exclusively make laws in relation to the amendment from time to time of the constitution of the province with but one exception, namely as regards the office of Lieutenant-Governor" (2 C. E. D. pt. V., p. 42). The reason for that particular limitation is found of course in the fact that the Lieutenant-Governor is the representative of the Crown, his prerogatives being about the only indicia of the status of the Dominion as a colony. The general freedom of the provincial legislatures from imperial control is interestingly shown by a recent case in the Manitoba Court of Appeal (*Rex* v. *Hildebrand* [1919], 3 W. W. R. 286). In that case it appeared that, in order to secure the settlement in Canada of a colony of Russian Mennonites, an Order in Council was passed giving to them certain privileges demanded by their peculiar religious belief. These privileges coming in conflict with a school law passed by the Manitoba legislature, it was held that the Order in Council was ineffective to bind the Dominion legislature in respect to a local question.

An Assault on Civil Service.

QUITE apart from the merits of the particular measure which they may advocate, political reformers who are obsessed by an "idée fixe" not infrequently try to burn the house in order to rid it of rats. The latest illustration of this tendency is to be found in the fact that the federal bill for the enforcement of prohibition excepts from the civil service law the "agents and inspectors in the field service" thereby authorized. The bill appropriates $3,500,000, enough to provide quite a number of jobs, and there will be no dearth of Congressmen willing to enlarge so promising a "pork barrel." The civil service law is far from being a perfect or complete means of securing competency and efficiency in governmental employment. It represents, however, the farthest advance which has been made in that direction. The "spoils system" has produced so many and so gross abuses and has become so thoroughly discredited that no political party would dare put out a platform which did not asseverate an intention strictly to enforce the civil service law. That law has been and still is subjected to covert attack by the forces which represent all that is worst in our political system. In this situation it is nothing less than a public misfortune that so large a breach has been opened for the return of the spoils system. Prohibition, granting it all the virtues which its devotees claim, may well be thought dearly purchased at that price. And of all the occasions where positions outside the civil service might be created, it is hard to imagine one more unfortunate. If a few thousand political appointees were put into offices in Washington, the public money would be

wasted and the public service would suffer, but individuals would sustain comparatively little inconvenience. But these "agents and inspectors in the field service" come into contact with every community. If they are ignorant, incompetent or corrupt, the scandal of it will come into every hamlet. Their position involves peculiar temptations to spying and blackmail. Not only should these inspectors and agents be placed under the civil service and subjected to rigid examination as to their qualifications, but each of them should, like a sheriff, be required to give a substantial bond on which any citizen subjected to illegal treatment may recover. The idea of turning loose on the people of the United States thousands of federal constables, appointed under the spoils system, exempt by reason of their federal employment from the local magistracy, and immune by reason of their financial irresponsibility from civil liability, must be viewed with considerable alarm by any man whose sense of comparative values is not wholly lost.

Handwriting Experts.

In the discussion of the testimony of handwriting experts, there is a tendency to regard it as a mere matter of opinion. In some instances the testimony is of that character, but as was pointed out in the recent case of *Boyd* v. *Gosser* (Fla.), 82 So. 758, it may rise to a much higher level of probative value. In that case the court reversed the finding of a chancellor in favor of the genuineness of an instrument, despite the testimony of eyewitnesses to its genuineness and testimony of admissions of the alleged signer, because it was contradicted by the testimony of a handwriting expert that the disputed signature and an admittedly genuine signature were so identical that when superimposed they showed no divergence in a line or the direction of a line. Of this testimony the court said: "It was something more than a mere opinion of the witness. It was a detailed statement of facts relating to the questioned signature of W. T. Boyd which was appended to the two documents; facts which were revealed by the use of mechanical instruments and scientifically established to the degree of demonstration." Further in the same connection it was said: "In the case at bar we have the uncontradicted evidence of the expert on handwriting. The questioned signatures and photographs of them are before the court, as well as signatures admittedly genuine and photographs of them, some enlarged for convenience of comparison; and the means were at hand for measurements and other comparisons embracing the whole field of examination. So that the facts to which the expert witness testified concerning the characteristics and construction of the signatures are matters within the field of demonstrative evidence. These facts being established by evidence of the first rank, are strongly presumptive of the further fact that the signatures in question are tracings or drawings by a hand other than the person whose signatures they purport to be, and this presumption is supported by the mathematical law of probabilities as well as the common experience and knowledge of man." The distinction made in that case is one which members of the profession will do well to remember. There are a great number of cases in which the testimony of handwriting experts is referred to slightingly, and the impression is more or less general that such testimony is of but little weight. This may be true as to mere opinions, but testimony based on reasons which may, by the resources of chemistry, microscopy and photography, be exhibited to the triers of the fact is, as was said by the Florida court, demonstrative evidence.

The Deceased Wife's Sister Law.

Some devious twist of ancient ecclesiastical polity left the rule that a man could not lawfully marry his deceased wife's sister embedded in the law of England, as the fossil remains of a silurian mammoth survive in a bed of lava. So great is the inertia of traditional law and so strong the persistence of superstition that it required generations of argument and ridicule to secure the relegation of the prehistoric monster to a museum of antiquities. Even after the Act of Parliament of 1907 legalizing such marriages one well-meaning ecclesiast refused to administer communion to a couple who had married by permission of the act, on the ground that they were "notorious evil livers" (see *Thomson* v. *Dibdin* [1912], A. C. 533). It is now reported that, giving the statute a strict construction, it has been held by a trial judge that a marriage between a woman and her deceased husband's brother is unlawful. The whole controversy is laughable enough from the vantage ground of the American bar. But after we have had our laugh it will not be unprofitable to spend a few moments in search for rules of law still obtaining in our own land which rest on no foundation other than an outgrown condition or an ancient superstition. And having thus reflected, is it not the duty of the American lawyer to do what is in his power to wipe out at least one of these anachronisms? Having done this, he can with better grace take a second laugh at our British cousins.

THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

It was not until we had been at war for nearly a year that Congress passed an act (Act March 8, 1918, Fed. St. Ann., 1918 Supp., p. 811) for the protection of soldiers and sailors from litigation, mortgage foreclosure and the like during their absence in the service. It is due chiefly to the patriotism of the much maligned creditor class that great and serious injustice was not visited on the nation's defenders and their dependents during this period of legislative delay. It is doubtless due to the same cause that but a very few cases under the act have been passed on by the courts of last resort since its enactment.

The act ceases to apply to any soldier or sailor within a short period after he leaves the service, so with demobilization now practically complete it is in one sense more or less academic. But its provisions affect the validity of many acts done during the war, and it is inevitable that in some instances its provisions have been misconstrued or overlooked. Titles based on a judgment rendered or a judicial sale had during the war will continue to be open to question as to a possible violation of the act. The pressure of war and its urge to patriotic self-sacrifice have passed, and the disposition to enforce strict rights is returning. We are therefore entering on a secondary legal phase of the relief act which may be

more productive of litigation than the first. It is not, therefore, untimely to suggest some points of inquiry with reference to this secondary phase.

While the Soldiers' and Sailors' Civil Relief Act has not been passed on by the federal supreme court, its validity would seem to be indubitable. In *Hoffman* v. *Charlestown Five Cent Sav. Bank,* 121 N. E. 15, the Massachusetts court said: "There can be no question of the constitutionality of the act. It is a war measure within the power of Congress, therefore the supreme law of the land. For this reason it governs the foreclosure of mortgages on real estate within the territorial limits of the commonwealth." So the Supreme Court of Wisconsin said in *Konkel* v. *State,* 170 N. W. 715: "There can be no doubt that Congress, in the exercise of the powers conferred upon it, may prescribe the conditions under which persons in the military service of the United States shall be subject to the process of courts, whether state or federal. Such provision seems necessarily implied from the provisions expressly granted to maintain an army and navy. No question as to the validity of the Soldiers' and Sailors' Civil Relief Act is raised, and we see no ground upon which its validity could be successfully assailed."

The act is in terms permissive, providing that the court "'may" stay certain proceedings. These provisions are held to commit the question of granting a stay wholly to the discretion of the court to which the application is made. *State* v. *Klene* (Mo.), 212 S. W. 55; *Dietz* v. *Trempel,* 170 N. Y. S. 108; *Gilluly* v. *Hawkins* (Wash.), 182 Pac. 958. Congress certainly must have been very busy just then or it never would have thought of anything so revolutionary as committing the ascertainment of the equities of each particular case to a court of justice. The experiment seems, to judge from the few cases coming up on appeal, to have worked so well that it may encourage a little further legislation along the same line. In each of the three reported cases in which a stay was denied there seems to be little room to question the equity of the decision. In *State* v. *Klene* (Mo.), 212 S. W. 55, it appeared that a husband had procured a divorce. The wife's application to vacate the decree because of fraud was sought to be stayed because the husband was absent in the military service. Denying the application the court said: "Here we have a case wherein relator, as plaintiff below, when already in the service of the United States army, voluntarily filed his suit for divorce against his wife, and, upon affidavit that she was a nonresident of the state, obtained an order of publication, and in due course thereafter, having filed proof of publication, was permitted to take a default as against the alleged nonresident defendant, and then upon ex parte hearing was granted an absolute decree of divorce; the effect of such judgment being that the former wife is deprived of any possible relief under the Articles of War governing courts-martial, article 95 (9 Fed. Stat. Ann. [2d ed.], p. 1288; U. S. Comp. St., § 2308a) of which requires that married officers in the service of the United States army support their wives." In *Gilluly* v. *Hawkins* (Wash.), 182 Pac. 958, it was held not to be an abuse of discretion for a court which had stayed proceedings for three months in a suit to recover leased premises from the dependent father of a soldier to refuse a further stay. The facts in that case do not appear in the opinion. In *Dietz* v. *Trempel,* 170 N. Y. S. 108, the court questioned the propriety of staying proceedings against a naval reserve yeoman who was devoting a part of his time to the conduct of a real estate business.

Post v. *Thomas,* 170 N. Y. S. 227, is apparently the only case reviewing the grant of a stay, the facts in that case being of no general interest.

Coming then to the presently important features of the act, the provisions which will affect the rights of parties after demobilization, the principal provisions of this kind appear to be: (*a*) The provision against entry of a default judgment without an affidavit that the defendant is not in the military service or the appointment of an attorney to protect his interest if he is (§ 200 [1]). (*b*) The provision that the period spent in military service shall not be computed in any period now or hereafter limited for bringing action by or against a person in the service or his heirs or representatives (§ 205). (*c*) The provision for stay of mortgage foreclosures and warrants of attorney to confess judgment (§ 302 [1-3]). (*d*) The provision allowing any man in military service six months after the expiration of his term of service to redeem from tax sales (§ 500 [2]).

The provisions noted as (*b*) and (*d*) have thus far received no judicial construction, and are so plain in their terms as to suggest no question of interpretation. The provision respecting default judgments is limited by a further provision (§ 200 [4]) as follows: "Such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment." Rights arising under this section will therefore not remain long to vex the unwary. A federal decision (*Howie Min. Co.* v. *McGary,* 256 Fed. 38) precludes any purely vexatious question as to the failure to file an affidavit that the defendant was not in the service, the court holding that a default judgment will not be set aside for failure to make the required affidavit where it appears that the defendant was not in fact in the service. Compare, however, *Bobcoff* v. *Chesticoff,* 24 Hawaii 447.

There remains the provision which is perhaps most provocative of future litigation, that relating to mortgage foreclosures. That provision was construed in *Hoffman* v. *Charlestown Five Cent Sav. Bank,* 121 N. E. 15, the court holding that the provision applied though the person in the service who claimed an interest was not the owner of record and the mortgagee had no notice or reason to suppose he was interested. Answering the contention that this would require an order of court for the foreclosure of every mortgage, the court says that such is the true construction of the act, "for in that way alone can a mortgagee be certain that the foreclosure of his mortgage will not be made in violation of the act." If this construction of the act is correct, it is certain that some foreclosures made since its passage are invalid. But it is not these which produce the chief difficulty. A far more serious situation confronts the holder of a title acquired at a foreclosure sale who seeks to compel a pur-

chaser to accept it. On him rests the burden to prove not merely that a specific person was not in the military service but that no person in the service was interested in the title at the time of the foreclosure. This was squarely held by the Massachusetts court in *Morse* v. *Strober,* 123 N. E. 780, the court saying: "The meaning of the decision in *Hoffman* v. *Charlestown Five Cents Savings Bank* is that the safe course for the mortgagee is to foreclose his mortgage under the order of a court of equity. It is only by pursuing that course that he gets a record title not open to successful attack under the said act of Congress, and therefore in that way alone can he be certain that the foreclosure of his mortgage will not be made in violation of that act of Congress. But it is not a proposition unprovable in the nature of things or practically impossible to show beyond doubt in a court of equity that no person in the military service of the United States had an interest in the premises described in a mortgage foreclosed without order of court. A mortgagee who forecloses his mortgage under the power of sale therein contained, without an order of court during the time specified in said chapter 20 of the act of Congress, known as the Soldiers' and Sailors' Relief Act, assumes a heavy burden of proof when he undertakes to enforce specific performance of his agreement to convey by good title the land so foreclosed. But it is not a burden of proof incapable of being sustained as matter of law. Circumstances attendant upon the history of a particular title and its record owners may be such as to exclude every rational hypothesis compatible with the notion that a person in the military service of the United States has an interest in it likely to be affected by the foreclosure. Evidence may make it clear beyond a reasonable doubt that no such person has any interest in specified real estate. The allegations of the present bill, to the effect that no person in the military service of the United States has an interest in the premises, in the nature of things, is or may be susceptible of legal proof. The question whether in truth a person in the military service of the United States had any interest in the premises which are the subject of the present suit, was one of fact and not of law. *Shanahan* v. *Chandler,* 218 Mass. 441, 443, 444, 105 N. E. 1002. Its decision depends upon the hearing and weighing of evidence. No evidence has been presented. The case is reserved merely upon the bill and answer. It follows that the case must stand for hearing. If the plaintiffs succeed in maintaining the burden of proof and demonstrating to the satisfaction of the court that no person in the military service had any interest in the property according to the principles heretofore stated, then they will be entitled to a decree. Otherwise, the bill must be dismissed."

The relief act contains specific provisions limiting the time within which a person within the protection of the act must apply for relief against a violation. But in respect to foreclosures there seems to be no such limitation, and on familiar principles of statutory construction none can be implied. The right to attack a foreclosure would seem therefore to continue until it is barred by laches under the local law. The situation is one which may result in clouding many titles, and should be kept in mind by every attorney who has occasion to pass on a title. It may be noted in this connection that it has been held that it is not necessary to stay a foreclosure because a person in the military service is secondarily liable on a deficiency judgment, where he has no interest in the property. *Dietz* v. *Trempel,* 170 N. Y. S. 108.

It is worthy of consideration whether the rights of bona fide purchasers at a foreclosure sale are not saved by the provisions of section 200 (4) heretofore quoted. The language of the clause in question, "Vacating, setting aside or reversing any judgment because of any of the provisions of this act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment," is certainly broad enough to cover a judgment of foreclosure. But that clause is found in a subsection whose earlier provisions relate wholly to the vacation, etc., of default judgments, and in a section all of whose subsections relate wholly to such judgments. It would seem therefore to be a strained construction to extend it to the provisions of other sections relating to the stay of actions and proceedings, merely because the language of this single sentence is broad enough to admit of such an extension. The view that the clause is not so to be extended finds further support in the fact that the section relating to the enforcement of secured obligations (§ 302) provides in its third subsection that no sale "shall be valid" unless made on an order of court previously granted, with no saving of the rights of bona fide purchasers.

Another question which is still unsettled and which may cause future litigation is the status of state laws for the protection of men in the service. The delay of Congress resulted in the passage of a number of these, some being far more sweeping than the federal act. If these acts were not superseded by the federal statute, attorneys who proceeded on the assumption that they were so superseded have involved some rights and titles in serious doubt. In one case it was held by a divided court that the federal act superseded all state legislation on the subject. *Konkel* v. *State* (Wis.), 170 N. W. 715. The argument of the majority in that case was stated as follows: "It is argued that, because chapter 409 grants a more generous immunity or greater exemption than that granted by the Soldiers' and Sailors' Civil Relief Act, there is no conflict, within the principles laid down in *Savage* v. *Jones,* 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182, and in *McDermott* v. *Wisconsin,* 228 U. S. 115, 33 S. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A 39. Viewed from the standpoint of the person in the military service of the United States, there may be some force to this argument; but he is not the only person concerned. In this case the defendant soldier is the father of a child which he is legally and morally bound to support. The United States prescribed the conditions under which the delinquent father may be proceeded against. Chapter 409 provides that he may not be so proceeded against. Upon what theory can it be said that there is no conflict between the two acts?" The theory of the dissent was thus stated: "Plainly it was the purpose of Congress to secure certain immunity for soldiers and sailors. The securement of such immunity is not hindered by the voluntary action of the state in granting further immunity. Congress simply demanded such immunity as was required by its military exigencies, and, in my opinion, had no power to demand any more. The granting of further relief on the part of the states was of no concern to Congress. Its power was to demand the immunity necessary for its military purposes. It had no power to forbid further immunity on the part of the states."

On the other hand in *Pierrard* v. *Hoch* (Ore.), 184 Pac. 494, it was held that the Oregon act forbidding mortgage foreclosures against men in the service was not superseded by the federal act.

In *Gearin* v. *Fleckenstein* (Ore.), 173 Pac. 569, the court construed and applied a state act without reference to the federal statute. The same action was taken by the North Dakota court in *Thress* v. *Zemple,* 174 N. W. 85. A dissenting judge contended that the state act was void as impairing the obligation of contracts, and referred to the federal act as valid and controlling.

The solution of the difficult questions thus presented must be left to future decisions. The purpose of the present discussion is to warn the profession against the dangers of an assumption that with demobilization the relief act ceases to be of practical importance.

W. A. S.

THE TREATY-MAKING POWER AND CONGRESS

Article 6, clause 2, of the Constitution provides that "This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." From the earliest days of the country this clause has received consideration from statesmen and jurists, different interpretations have been given its various phases, and a number of cases have been decided which leave little doubt as to what the law has been and is in some of the circumstances arising thereunder.

The power of the United States to make a treaty, whereby the rights reserved to the states under the Tenth Amendment may be infringed, has arisen in discussion time and again, and has been before the courts in a long line of cases from *Ware* v. *Hylton* (1796), 3 Dall. (U. S.) 199, 1 L. ed. 568, to *United States* v. *Thompson* (1919), 258 Fed. 257.

This article, however, does not concern itself with the treaty-making power as in conflict with the Constitution or laws of any state, but considers solely the ability of a treaty to encroach on the powers delegated by the Constitution to Congress. Can a treaty bind the United States to the performance of certain acts which under the Constitution are left to the decision of Congress? This question is of particular interest to-day in view of the treaties before the country at the present time, the League of Nations with its now famous Article X, and the treaty whereby, jointly with Great Britain, we pledge our power to the protection of France. Article X of the Covenant of the League of Nations surely calls for the delegation to the League of the power to declare war on behalf of its members.

The question of the constitutionality of a treaty which assumes and delegates a power granted to Congress has never, apparently, been the subject of a judicial decision, but there have been numerous expressions of opinion thereon by those who assisted in the framing of the Constitution, and by statesmen of a later day. The position which was assumed by Washington is disclosed in a conversation with Jefferson as early as 1792, where it was evident that he considered that the House was called on by the Constitution to appropriate the money necessary to carry into effect a treaty properly made and ratified. The question also arose for consideration on the ratification of the Jay treaty in 1796, which provided for an appropriation of money. It was the belief of Washington and Hamilton that Congress was bound to appropriate the money called for in the treaty, and yet if such were the case what became of the discretion vested in Congress by the Constitution as regards the powers specifically delegated to it? It was at this time that the House, in reply to Washington's refusal to furnish them with the documents and particulars of the negotiations, passed the following resolution: "Resolved: It being declared by the second section of the second article of the Constitution that the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur, the House of Representatives do not claim any agency in making treaties; but when a treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution as to such stipulations on a law or laws to be passed by Congress, and it is the constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon as in their judgment may be most conducive to the public good." This resolution was passed by a vote of fifty-seven to thirty-five, and it is the assertion of Mr. Henry St. George Tucker that thereby the House at the very outset established its position as the equal of the treaty-making power in the field of its delegated powers.

Mr. Tucker in his book "Limitations on the Treaty-Making Power" has pointed out the course of procedure followed by various Presidents in carrying into effect treaties concluded by them and requiring the action of the House for giving force to certain of their provisions. So Jefferson, in asking for an additional appropriation for the purpose of the Louisiana Purchase, said in his communication to both the Senate and the House: "You will observe that some important conditions cannot be carried into execution but with the aid of the Legislature, and that time presses a decision on them without delay." (Richardson's "Messages and Papers of the Presidents," vol. 1, p. 362.) And in a later treaty requiring the appropriation of money he said: "As the stipulations in this treaty also involve matters within the competence of both houses only, it will be laid before Congress as soon as the Senate shall have advised its ratification" (Id., p. 359). Mr. Tucker calls attention to the contest which arose over the bill which was before the House as a result of President Madison's message regarding the treaty of Ghent. As a result of a Committee of Conference between the House and the Senate the committee of the House of Representatives declared that they were "satisfied that it is by no means the intention of the Senate to assert the treaty-making power to be in all cases independent of the legislative authority. So far from it that they are believed to acknowledge the necessity of legislative enactment to carry into execution all treaties which contain stipulations requiring appropriations, or which bind the nation to lay taxes, to raise armies, to support navies, to grant subsidies, to create

states, or to cede territory; if indeed this power exists in the government at all" (Annals of Congress, 1815-16, pp. 1018-1023).

When President Johnson "invited" the attention of Congress to the subject of an appropriation to cover the payment for the cession of Alaska, the House retorted with an amendment to the bill as follows: "Whereas the subjects thus embraced in the stipulations of said treaties are among the subjects which by the Constitution of the United States are submitted to the power of Congress, and over which Congress has jurisdiction, and it being for such reasons necessary that the consent of Congress shall be given to said stipulations before the same can have full force and effect—be it enacted that the consent of Congress is hereby given to the stipulations of said treaty" (House Journal, 40th Congress, 2d Sess., p. 1064). But the bill as passed was not as strongly worded, due to the action of the Senate. And it is the contention of Mr. Henry St. George Tucker that in the matter of treaties requiring the legislation of Congress the Presidents have uniformly acted contrary to the practice of President Washington in the case of the Jay Treaty.

It has been stated frequently that the treaty-making power is supreme when its "regulations are not inconsistent with the Constitution"; but this of course is begging the question, for the very thing which we are seeking is to discover what is and what is not consistent with the Constitution in such matters.

As remarked before, it is not believed that this subject has ever been passed on by the courts, but there are a few dicta which may be taken for what they are worth in the absence of any decisions directly on the question. So in *Siemssen* v. *Bofer,* 6 Cal. 250, Mr. Chief Justice Murray in discussing the treaty-making power said: "The true rule of interpretation, in my opinion, is, that whenever the treaty embraces matters which are the subject of legislation by Congress it will require an act of legislation to carry the treaty into effect, otherwise the House of Representatives is a useless appendage to the political machinery of our government, and powers which are expressly prohibited to Congress or reserved to the states may be exercised through the instrumentality or omnipotence of the treaty-making power." And in *Turner* v. *American Baptist Missionary Union,* Fed. Cas. No. 14,251, 5 McLean 344, Mr. Justice McLean said: "A treaty under the Federal Constitution is declared to be the supreme law of the land. This unquestionably applies to all treaties, where the treaty-making power without the aid of Congress can carry it into effect. It is not, however, and cannot be the supreme law of the land, where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative in the sense of the Constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of the government can be regarded as a law until it shall have all the sanctions required by the Constitution to make it such. As well might it be contended that an ordinary act of Congress without the signature of the President was a law, as that a treaty which engages to pay a sum of money is in itself a law. And in such a case the representatives of the people and the states exercise their own judgments in granting or withholding the money. They act upon their own responsibility, and not upon the responsibility of the treaty-making power. It cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know that so far as a treaty stipulates to pay money, the legislative sanction is required." This case, decided in 1852, surely does not follow the principles of Washington and Hamilton as regards the part to be played by Congress in carrying into effect the provisions of a treaty. Until the necessary concurrent power of Congress is exercised the treaty is not perfect; and if this is to be true of treaties requiring the appropriation of money it must equally obtain in a treaty involving the power to take us into war, or indeed to accomplish any of the acts the power over which has been delegated to Congress. If Congress is to act on its own responsibility in appropriating money for the purposes of a treaty, is it not at least as important that the same responsibility should be exercised in a declaration of war imposed upon us by a treaty? and if so what validity is possessed by such a treaty—what is its binding power on Congress?

Let us see what has been the opinion of the statesmen on this matter; what the authorities on constitutional law have said on the subject. Cooley says that under the treaty-making power nothing can be done which "robs a department of the government or any of the states of its constitutional authority." ("Principles of Constitutional Law," p. 117.) And John Randolph Tucker makes the same limitation from another point of view when he says: "A treaty cannot compel any department of the government to do what the Constitution submits to its exclusive and absolute will. On these questions the true canon is, that the treaty-making power in its seeming absoluteness and conditional extent is confronted with equally absolute and unconditional authority vested in the judiciary." It is clear then that neither Cooley nor Tucker would have accepted the doctrine that the power of Congress might be usurped by a treaty.

Judge St. George Tucker, in Tucker's Blackstone, vol. I, Appendix 338, writes as follows: "Let it be supposed, for example, that the President and Senate should stipulate by treaty with any foreign nation, that in case of war between that nation and any other the United States should immediately declare war against that nation. Can it be supposed that such a treaty would be so far the law of the land as to take from the House of Representatives their constitutional right to deliberate on the expediency of such a declaration of war and to determine and act thereon according to their own judgment?"

Henry Clay, in speaking of the limitations of the treaty-making power, said in the House of Representatives: "I think also that wherever there are specified grants of power to Congress they limit and control, or, I would rather say, modify the exercise of the general grant of the treaty-making power upon a principle which is familiar to everyone. But if the concurrence of this House be not necessary in the cases asserted, if there be no restrictions upon the power I am considering, it may draw to itself and absorb the whole of the power of the Government. To contract alliances, to stipulate for raising troops to be employed in a common war about to be waged, to grant subsidies, even to introduce foreign troops within the bosom of the country, are not infre-

quent instances of the exercise of this power: and if in all such cases the honor and faith of the nation are committed by the exclusive act of the President and Senate, the melancholy duty alone might be left to Congress of recording the ruin of the Republic."

Mr. Calhoun said in a speech before the House: "The treaty-making power has many and powerful limits, and it will be found, when I come to discuss what those limits are, that it cannot destroy our Constitution or our personal liberty, or involve us, without the assent of this House, in war or grant away our money." (Works of Calhoun, vol. II, pp. 131-133, and Annals of Congress, 14th Congress, 1st Sess., 1815-16, pp. 530, 531.) And later in the same speech, repeating the doctrine that that cannot be done by a treaty differently which is directed by the Constitution to be done in a certain manner, he said: "And a treaty of alliance could not involve the country in war without the consent of this House."

Mr. Jefferson, in drawing the limits of the treaty-making power, included in his list of exceptions to that power those subjects of legislation in which a participation had been given to the House of Representatives, but admitted that this exception was not granted by everyone. (Manual of Parliamentary Practice, p. 186.) And Mr. Henry St. George Tucker has expressed his opinion that since the Constitution has granted to Congress the power to declare war, the President and Senate could not make a treaty with a foreign power to enter into war under certain circumstances. To do so, he holds, would be to consider the treaty-making power superior to the Constitution itself.

It would be hard, in these opinions, to find any support for the doctrine of the unlimited treaty-making power, of which Justice Daniel said in the Passenger Cases, 7 Howard 516, 12 L. ed. 702: "It must be viewed as the exercise of a power transcending that which called it into existence: a power single, universal, engrossing, absolute. Everything in the nature of civil or property right is thus engulfed in federal legislation and in the power of making treaties."

The exponents of this theory have their authorities of course. Alexander Hamilton said: "A treaty cannot be made which alters the constitution of the country, or which infringes any express exceptions to the power of the Constitution of the United States. But it is difficult to assign any other bounds to the power." (Hamilton's Works, vol. IV, p. 342.) The supporters of this view base their opinion on the theory that the Government possesses all the attributes of sovereignty, and that the treaty-making power as such an attribute is vested in the Federal Government thereby in addition to the delegation of such power by the Constitution.

But, Mr. Henry St. George Tucker points out, if such power were not dependent on the Constitution for its existence but was indeed an "inherent power" of the federal government, why should a grant of the power have been made in the Constitution? And it has been repeatedly remarked that to put into practice the theory of the unlimited treaty-making power would result in the overthrow of that nice balance and adjustment of powers which were the aim and effort of the framers of the Constitution; would make it possible for the President and the Senate to accomplish by way of a treaty what could not otherwise be done or done only by Congress.

It is argued that without the exercise of an unlimited treaty power the United States lacks an attribute of sovereignty which is most important. But the United States is a government of enumerated powers, and if an unlimited treaty-making power is not among those granted by the Constitution it is not possessed by the federal government. Moreover, as Mr. Henry St. George Tucker again makes clear, the treaty-making power in other governments is subject to many of the restrictions imposed thereon by our own Constitution.

It must be admitted that treaties have been made by the United States which are similar in a degree, as regards the questions involved, to the provisions of the League of Nations. By one such treaty we have guaranteed to maintain the independence of the Republic of Panama, and the validity of this treaty seems not to have been questioned. But it is submitted that the reasonable and logical view of the matter is set forth in Tucker's Blackstone, vol. I, appendix 338, where it is said: "It may not be improper here to add something on the subject of that part of the Constitution which declares that treaties made by the President and Senate shall be a part of the supreme law of the land; acts of Congress made pursuant to the powers delegated by the Constitution are to be regarded in the same light. What then is the effect of a treaty made by the President and Senate, some of the articles of which may contain stipulations on legislative objects or such as are expressly vested in Congress by the Constitution, until Congress shall make a law carrying them into effect? Is Congress bound to carry such stipulations into effect whether they approve or disapprove of them? Have they no negative, no discretion upon the subject? The answer seems to be that it is, in some respects, an inchoate act. It is the law of the land, and binding in all its parts, except so far as relates to those stipulations. Its final fate, in case of refusal on the part of Congress to carry those stipulations into effect, would depend on the will of the other nation. If they were satisfied that the treaty should subsist, although some of the original conditions should not be fulfilled on our part, the whole except those stipulations embracing legislative objects might remain a treaty. But if the other nation chose not to be bound, they would be at liberty to say so, and the treaty would be defeated."

R. S.

MISTAKES IN WILLS

A MISTAKE in a will is a serious thing and not always rectifiable. In addressing a jury Lord Hannen on one occasion said (Morrell *v.* Morrell, 46 L. T. Rep. 485; 7 Prob. Div. 68): "There can be no graver question brought into a court of law than the question what is a man's last will when he is dead and no longer able to speak for himself, and his property has to be distributed according to the particular words that have been used in a particular instrument." Among such questions perhaps the gravest are those that relate to cases where a court is entirely satisfied as to a mistake having been made, and as to what the testator's real intention was, and yet finds itself constrained to hold that the mistake cannot be put right and the testator's intention cannot be carried out. This is one of

the inevitable results of the policy introduced by the Wills Act 1837—that a will must be in writing and must be attested in a certain manner. But the limits within which the general equitable jurisdiction to correct mistakes can be exercised with respect to wills is even now far from being settled. In particular, it is still a matter of doubt how far a rule laid down in very definite terms by Lord Penzance in 1866 can be regarded as sound—a rule making inviolable, in the absence of fraud, any will once formally read over to and approved by the testator.

The rule referred to was laid down in set terms upon more than one occasion by Lord Penzance, and a typical case is Guardhouse *v.* Blackburn (14 L. T. Rep. 69; L. Rep. 1 P. & D. 109). In that case the whole subject of parol evidence in relation to wills was gone into very fully, and certain propositions were stated as embodying rules which, since the Wills Act 1837, ought to be followed by the court. Among these propositions were the following: That, subject to exceptions for cases of fraud, "the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof." It was sought to have certain words expunged from a codicil before probate of the will and codicil was granted. The effect of the words was to discharge realty from pecuniary legacies, and the ground on which the court was asked to expunge them was that they were inserted by the solicitor who drew the will by mistake and without instructions. The codicil, however, had been read over to the testator before execution, and Lord Penzance applied the principle above stated and refused to expunge the words from the codicil, notwithstanding "the oath of the attorney who prepared it, fortified by his notes of the testator's instructions."

One of the cases in which Lord Penzance laid down and acted on the rule above quoted at length came before the House of Lords in 1875 (Fulton *v.* Andrew, 32 L. T. Rep. 209; L. Rep. 7, H. L. 448). In the course of the judgment delivered on this appeal it was observed that there was no hard-and-fast rule of law to the effect above stated, as laid down in Guardhouse *v.* Blackburn (sup.) and other cases. Lord Cairns said: "I should . . . greatly deprecate the introduction or creation of fixed and unyielding rules of law which are not imposed by Act of Parliament. I think it would be greatly to be deprecated that any positive rule as to dealing with a question of fact should be laid down." Lord Hatherley referred to "the supposed existence of a rigid rule, by which, when you are once satisfied that a testator of a competent mind has had his will read over to him, and has thereupon executed it, all further inquiry is shut out," and went on to express the opinion that the supposed rule only amounted to this, that "if a man signs any instrument, he being competent to understand that instrument, and having had it read over to him, there is a very strong presumption that it has been duly executed."

The precise extent, however, to which these observations in Fulton *v.* Andrew are to be taken as qualifying the effect of Guardhouse *v.* Blackburn and similar cases has been left in great doubt by subsequent cases on the subject, and, pending further decision by competent authority, it is impossible to affirm positively—what the observations in Fulton *v.* Andrew certainly point to—that the fact of a will being read over to a testator is merely a circumstance to be taken into account in deciding whether any part of it has been inserted by mistake.

In 1892 Sir Francis Jeune did "not think any serious difference with" Guardhouse *v.* Blackburn had been expressed by the Lords in Fulton *v.* Andrew (Collins *v.* Elstone, 67 L. T. Rep. 624; (1893) P. 1). In that case the question at issue was whether the words "I hereby revoke all wills by me at any time heretofore made," contained in a printed form of will, could be omitted as having been left standing in the executed document by mistake. The testatrix had already made a will and codicil, and did not desire to revoke them. The person employed to prepare the will (intended to be merely a codicil) was a layman, and did not understand the effect of the revocation clause. The testatrix actually objected to the revocation clause when read to her, but was persuaded (through her friend's mistake) to leave it in. Sir Francis Jeune refused to strike out the revocation clause, though "regretting that I am compelled to come to a conclusion in which I am conscious that the result will be that the real intention of the testatrix is not carried out." "The words were inserted," so the President held, "because the testatrix misunderstood their meaning, and I have no doubt as to how she came to misunderstand their meaning." But the correction of this mistake could not be allowed "consistently with the authorities"—namely, Guardhouse *v.* Blackburn, etc. No effect, therefore, was given to the observations made in Fulton *v.* Andrew (sup.). Sir Francis Jeune also put the matter in another way, though this does not seem to carry it any further. He cited the view of Lord Hannen in Morrell *v.* Morrell (46 L. T. Rep. 485; 7 Prob. Div. 68) as to a testator adopting the words of his legal adviser "just as though they were his own"—"if a person employs another to convey his meaning in technical language, and that other person makes a mistake in doing it, the mistake is the same as if the person had employed the technical language himself. . . . This lady thought it right to employ this gentleman to make her will for her . . . his mistake is her mistake."

In 1917 the question again came up, though it was not necessary to decide it, as to how far Guardhouse *v.* Blackburn was qualified by Fulton *v.* Andrew. Mr. Justice Hill in Gregson *v.* Taylor (117 L. T. Rep. 318; (1917) p. 256) had to determine whether the name of a legatee, as to whose legacy it was uncertain what the testatrix had intended, was to be expunged from a codicil. In the result it was held that there was not sufficient evidence to show that the testatrix intended no benefit at all to be given to the legatee, and the gift was therefore left standing in the codicil as executed. The codicil had been read over to the testatrix. It was observed that only in two cases since the decision of Fulton *v.* Andrew have words been directed by the court to be omitted from a will definitely proved to have been properly read over to a capable testator. These cases are In the Goods of Walkley (69 L. T. Rep. 419) and Jane *v.* Jane ("Times," March 30, 1917). In the first the number of a house had been incorrectly stated, in the latter the number of a particular year. Mr. Justice Hill also said that, assuming no such binding rule as laid down by Lord Penzance to exist, the reading over of a will to a capable testator and his deliberate execution of it "afford a very grave and strong presumption that he knew and approved all the contents, a presumption which can be rebutted only by the clearest evidence."

The tendency of the English courts to minimize the effect of Fulton *v.* Andrew upon Guardhouse *v.* Blackburn is accurately reflected in the oversea courts. The question was raised in Australia recently (In the Will of Cartledge, 1919, Vict. L. R. 82). In that case the court was asked to transpose words in a will, on the ground that the will and codicil as executed did not express the real intention of the testator. Satisfactory evidence was adduced to show that two devises of land had been by the testator's own mistake transposed, each beneficiary getting by the will land which the testator really intended for the

other. The judge before whom the case was heard expressed himself as quite satisfied that the mistake had been made—"the evidence being to my mind conclusive"—but held that he could not strike out some words and insert others. The decision, if sound, is at all events near the line. The cases must relied on were Collins *v.* Elstone (sup.) and Morrell *v.* Morrell (sup.)—*Law Times.*

Cases of Interest

Liability of Directors for Embezzlement by Officer of Corporation.—In Besselieu *v.* Brown, (N. Car.) 97 S. E. 743, reported and annotated in 2 A. L. R. 862, it was held that directors of a corporation who neglect to attend directors' meetings, and leave the corporate business largely to the control and management of an officer without control, direction, or restraint, may be liable at the suit of its receiver to make good money embezzled by such officer. The court said inter alia: "It is fully established, in this jurisdiction and elsewhere, that the directors and managing officers of a corporation are to be properly considered and dealt with as trustees or quasi trustees in respect to their corporate management, and may, in proper instances, be held liable for loss or depletion of the company's assets, due to their wilful or negligent failure to perform their official duties. They are not, as a rule, responsible for mere errors of judgment (Fisher *v.* Fisher, 170 N. C. 378, 87 S. E. 113, and authorities cited), nor for slight omissions, from which the loss complained of could have reasonably been expected; but, where they accept these positions of trust, they are expected and required to give them the care and attention that a prudent man should exercise in like circumstances and charged with a like duty; usually the care that he shows in the conduct of his own affairs of a similar kind; and if there is a breach of legal duty in this respect, causing a loss of the company's assets, the corporation may sue, and, in case of insolvency, the action can be maintained by the receiver."

Duty of Husband to Use Force Against Wife to Prevent Separation.—In Nunn *v.* Nunn (Oregon), 178 Pac. 500, reported and annotated in 3 A. L. R. 500, it was held that a man is not compelled to use physical force to prevent his wife leaving him in order that the separation may not be deemed collusive and he thereby be debarred of his right to a divorce. Said the court: "It is evident that plaintiff is an ignorant man, who is unable to express himself clearly; but the testimony indicates that he had on his hands a dissatisfied, self-willed wife, who was determined to go away and never return, and that after using reasonable remonstrance, and endeavoring, without avail, to persuade her not to go, he succumbed to the inevitable and allowed her to go without creating a useless scene. So far as persuasion went, plaintiff did his part, and it was but good manners to help her with her trunks to the station when he found she was determined to go, and this act should not be construed to imply a consent to the separation. The law does not require that a man shall use physical force to detain his wife, or to protest to the iron heavens against her going, in order that the separation shall not be deemed collusive. It seems reasonably certain that no persuasion or objection on plaintiff's part would have prevented her going, and that he never consented to it, but, on the contrary, remonstrated against it. We think defendant's conduct falls fairly within the definition of desertion given by Mr. Commissioner Slater in Luper *v.* Luper, 61 Or. 418, 96 Pac. 1099: 'Desertion or abandonment consists in the voluntary separation of one spouse from the other for the prescribed time, without the latter's consent, without justification, and with the intention of not returning.' The defendant went after she was honestly asked to remain; she went without the intention of returning, and it is evident that she will not return. Under these circumstances, plaintiff ought not to be hampered in the transaction of his business or the transfer of his real property for the balance of his life, simply because he submitted to the inevitable like a gentleman."

Power of Court to Read "Not" Into Criminal Statute.—The case of State *v.* Claiborne (Iowa), 170 N. W. 417, involved a statute intended to provide for safety in the use of automobile lights but actually reading that no automobile should be operated with a light "unless the same shall be so designed that the directly reflected and unsuffused beams, when measured 75 feet or more ahead of the light, shall rise above 42 inches from the level surface." On the trial of the case, the lower court read the word "not" in the statute so as to make it read "shall not rise above 42 inches," etc. Holding that this was improper and that there was a failure of legislation, the appellate court said: "Under the authorities, it is proper for us to take into consideration the object which the legislature sought to obtain and the evil which it endeavored to remedy, and the surrounding circumstances and the ends intended to be accomplished, as well as the context, and that statutes should be so construed as to give effect to the evident legislative intent. We may take into consideration the fact that automobiles are in common use, and that certain lights used on automobiles oftentimes blind the driver of a vehicle approaching in the opposite direction, and that the purpose of the legislature in passing the act in question was to correct this condition. We are satisfied from all these circumstances and the record that it was not the intention of the legislature to pass the act as it reads. Conceding this to be so, the question is: May we, under the circumstances and record, read into the statute a word which gives it exactly the opposite effect. We are not disposed to go that far. It seems to us, to do so we would be compelled to take into consideration matters not proper for us to consider, such as the evidence or opinions of witnesses testifying in the case, and the like. We could construe it as written, but, as said, we are satisfied such was not the intention. In this case the word 'not' was read into the statute in order to work the acquittal of the accused. Nevertheless, it is a criminal statute. Might this be done in order to secure a conviction, if it were necessary to do so? We reach the conclusion that, rather than to construe the statute as written, or to read into it the word 'not' as was done by the trial court, we ought to and do hold that as to this particular point there was a failure of legislation, and that the defendant was properly discharged on that ground; there being no statute under which he could be convicted of the charge against him. The legislature is about to meet, and if the matter is brought to their attention they can readily make the matter plain."

Validity of Statute Forbidding Location of Oil or Gas Well Near Railroad.—A state statute making it unlawful to drill or operate oil or gas wells within 100 feet of the right of way of any steam or electric line of railway does not contravene the provisions of the Federal Constitution and is a proper exercise of the police power of the state. It was so held in Winkler *v.* Anderson, 104 Kan. 1, 177 Pac. 521, reported and annotated in 3 A. L. R. 268, wherein the court said: "The action was one to enjoin enforcement of the penal pro-

vision of the statute (Gen. Stat. 1915, § 4979), making it unlawful to drill or operate oil or gas wells within 100 feet of the right of way of any steam or electric line of railway. An injunction was denied, and the plaintiffs appeal. The plaintiffs have an oil and gas lease of a strip of ground from 37 to 50½ feet wide, adjoining the right of way of the Atchison, Topeka & Santa Fe Railroad on the south. The right of way is 100 feet wide. The track is in the center of the right of way, and the plaintiffs have two producing wells within the limits denounced by the statute. The owners of a lease adjoining the plaintiffs' property on the south are operating a producing well 83 feet from the plaintiffs' south line. The plaintiffs' lease is entirely valueless, if the statute be valid. The claim is that the statute was not the product of a proper exercise of the police power of the state, that it deprives the plaintiffs of property without compensation, and without due process of law, that it denies the plaintiffs the equal protection of the law, and that it abridges the privileges and immunities of the plaintiffs, contrary to the provisions of the Constitution of the state of Kansas, and of the Constitution of the United States. The question is a very narrow one. The police power extends not only to the protection of the public safety, health, and morals, but also to the promotion of the common convenience, prosperity and welfare. State *v.* Wilson, 101 Kan. 789, 794, L. R. A. 1918B, 374, 168 Pac. 679. While oil and gas wells are not nuisances per se, and the business of drilling and operating them is ordinarily legitimate and harmless, it is conceivable that they may become detrimental in a high degree. The greed for mineral in a rich field becomes insatiate. Steam and electric railway rights of way may be exploited, and unless the works, structures, establishments, activities, and products of mining operations be kept at a safe distance from railway tracks, life and property might be endangered, commerce impeded, and the general welfare seriously affected. If the legislature acted from some such considerations as these, it possessed power to fix a limit within which drilling and operating should not intrude, and the court is unable to say that a free space of 100 feet is unreasonable."

VOTE NECESSARY TO PASS BILL OVER PRESIDENTIAL VETO.—In Missouri Pacific R. Co. *v.* Kansas, 248 U. S. 276, 39 Sup. Ct. Rep. 93, it was held that a two-thirds vote in each house of Congress of the members present, there being a quorum, is all that is required to pass a bill over the President's veto. The case involved the legality of certain penalties imposed on the Railway Company by virtue of power conferred on the state by the Webb-Kenyon Act, and it was contended that that Act was never enacted into law because after its veto by the President it received in the Senate only a two-thirds vote of the senators present (a quorum), which was less than two-thirds of all the members elected to and entitled to sit in that body. Mr. Chief Justice White said: "The proposition concerns clause 2 of § 7 of article 1 of the Constitution, providing that, in case a bill passed by Congress is disapproved by the President, '. . . he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. . . .' The extent of the vote exacted being certain, the question depends upon the significance of the words, 'that house'; that is, whether those words relate to the two houses by which the bill was passed and upon which full legislative power is conferred by the Constitution in case of the presence of a quorum (a majority of the members of each house; § 5, art. 1), or whether they refer to a body which must be assumed to embrace, not a majority, but all its members, for the purpose of estimating the two-thirds vote required. As the context leaves no doubt that the provision was dealing with the two houses as organized and entitled to exert legislative power, it follows that to state the contention is to adversely dispose of it. But, in addition, the erroneous assumption upon which the contention proceeds is plainly demonstrated by a consideration of the course of proceedings in the convention which framed the Constitution, since, as pointed out by Curtis (History of the Constitution, vol. 2, p. 267, note), it appears from those proceedings that the veto provision as originally offered was changed into the form in which it now stands after the adoption of the article fixing the quorum of the two houses for the purpose of exerting legislative power, and with the object of giving the power to override a veto to the bodies as thus organized. A further confirmation of this view is afforded by the fact that there is no indication in the constitutions and laws of the several states existing before the Constitution of the United States was framed that it was deemed that the legislative body which had power to pass a bill over a veto was any other than the legislative body organized conformably to law for the purpose of enacting legislation, and hence that the majority fixed as necessary to override a veto was the required majority of the body in whom the power to legislate was lodged. . . . While there is no decision of this court covering the subject, in the state courts of last resort the question has arisen and been passed upon, resulting in every case in the recognition of the principle that, in the absence of an express command to the contrary, the two-thirds vote of the house required to pass a bill over a veto is the two-thirds of a quorum of the body as empowered to perform other legislative duties."

News of the Profession

NEW ORLEANS JURIST TO QUIT.—Associate Justice O. O. Provosty of the Louisiana Supreme Court refuses to be a candidate to succeed himself.

CHICAGO COUNTY COURT APPOINTMENT.—James T. Burns, county judge of Kankakee county, Illinois, succeeds the late Thomas F. Scully on the Cook county bench.

DEMISE OF NEBRASKA ATTORNEY.—Hon. John J. Burke, for many years one of the leaders of the bar in southeastern Nebraska, died at his home in Geneva after a long illness.

ALABAMA COUNTY COURT APPOINTMENT.—W. T. Lowe, a Decatur, Alabama, attorney and former state senator, has been appointed a judge of the newly created Morgan County Court.

WELL-KNOWN PHILADELPHIA LAWYER DEAD.—Reuben O. Moon, a Philadelphia lawyer and former member of Congress, is dead at the age of 72. He was born in Burlington, New Jersey.

PROMINENT ST. LOUIS LAWYER DEAD.—Frederick N. Judson of St. Louis died October 18. He was one of the leading authorities on taxation and was the author of the Missouri income tax law.

Death of Buffalo Lawyer.—Sidney W. Petrie of the federal court for the western district of New York and instructor of federal practice at the Buffalo Law School, died Nov. 1, at the age of 63.

South Dakota Judicial Vacancy Filled.—Governor Norbeck of South Dakota has appointed L. W. Mead of Alcester county judge of Union county to fill a vacancy caused by the death of Judge Stickney.

Former Indiana Jurist Succumbs to Disease.—The death of George H. Koons of Muncie, Indiana, occurred in October. He was formerly judge of the Delaware circuit court, and one of the best known attorneys of eastern Indiana.

Demise of Illinois Judges.—The death of Judge Duane J. Carnes, 71 years old, a former judge of the appellate court of the second Illinois district, occurred recently, as did that of Judge Henry M. Guerin of the superior court of Chicago.

Changes in Nebraska Courts.—E. J. Clements of Lincoln, Nebraska, has been appointed district judge of Lancaster county to fill a vacancy caused by the appointment of Judge Leonard C. Flansburg to the supreme court commission.

Former United States Assistant Attorney General Commits Suicide.—Winfred T. Denison, a former assistant attorney general of the United States, committed suicide recently in New York city by throwing himself in front of a moving subway train.

Deaths Among New York Lawyers.—Ralph J. Preston, a lawyer of New York city, who was deputy Red Cross Commissioner for the whole of Europe, died October 25. James W. Osborne, widely known as a criminal lawyer, and former assistant district attorney of New York county, died suddenly at the age of 61.

The Probate Judges' Association of Missouri was held at Springfield the early part of October, Judge Thomas H. Gideon of Green county was elected president, Judge Sam A. Hogden of St. Louis vice-president, and Judge Jules E. Guinotte of Kansas City secretary and treasurer.

Deaths Among Texas Jurists.—Judge J. H. Calhoun of Cisco is dead. He was formerly judge of the forty-second judicial district. Judge D. B. Tarlton, 65 years old, former chief justice of the Court of Criminal Appeals, is also dead. He had been a professor of law at Texas University for twelve years.

Missouri Bar Association.—The Bar Association of Missouri held its annual meeting in Kansas City, October 3 and 4. Judge David H. Harris of Fulton was elected president, succeeding James C. Jones of St. Louis. United States Attorney General A. Mitchell Palmer and David R. Francis, ambassador to Russia, were among the speakers heard.

Texas Judicial Changes.—Governor Hobby has appointed Judge J. Adams district judge of the first judicial district, succeeding Judge W. T. Davis of San Augustine who resigned. Judge J. T. Nolan, county judge of Kenney county, has tendered his resignation. E. A. Hill of Cisco has been appointed judge of the eighty-eighth district court.

The Ohio Bar Association will hold its midwinter meeting at Dayton, January 23, 24. Hampton L. Carson of Philadelphia, and Sir James Aiken, K. C., of Winnipeg, Canada, have accepted invitations to address the meeting. It is the intention of the committee having the meeting in charge to bring together at the same time other members of the American Bar Association.

Missouri Supreme Court Appointments.—John I. Williamson of Kansas City, Missouri, has been made a judge of the Missouri Supreme Court to fill a vacancy caused by the resignation of Judge C. B. Faris recently appointed a federal judge. Another vacancy caused by the death of Chief Justice Henry W. Bond has been filled by the appointment of Richard L. Goode.

Dean of Kansas University Law School Dead.—James Woods Green, Dean of the law school of Kansas University since its foundation forty years ago, died Nov. 4, at Lawrence, Kansas, aged 77 years. He was an active member of the American Bar Association and was its general counsel in 1896. He was born in New York state and was graduated from Williams College.

Appointment of New Assistant United States Attorney General.—Frank L. Nebeker of Salt Lake City has been appointed Assistant United States Attorney General in charge of the Public Lands Division of the Department of Justice. Mr. Nebeker was a member of the Democratic National Committee from 1906 to 1913, and was special assistant to the Attorney General in charge of the prosecution of the I. W. W.

Vacancies in Michigan Courts Filled.—Circuit Judge Nelson Sharpe of West Branch, Michigan, has been appointed a justice of the Michigan Supreme Court to succeed Judge Russell C. Ostrander deceased. The new supreme court justice was a judge of the thirty-fourth judicial circuit for twenty-six years. Judge Guy E. Smith of the probate court of Gladwin county succeeds Judge Sharpe on the circuit bench.

Changes Among Assistant United States Attorneys.—John E. Dougherty of Peoria, Illinois, assistant United States attorney, has resigned, giving ill health as the reason. Leo Brewer of San Antonio has been appointed assistant United States attorney for the Western District of Texas in place of Claude Carter. Francis B. Kavanagh of Cleveland, Ohio, a special assistant to the United States attorney, has quit to resume the practice of the law, as has William E. Allen, assistant United States attorney for the Northern District of Texas.

Oklahoma Judicial Changes.—Frank M. Barley of Chickasha has been appointed a member of the Oklahoma Supreme Court to succeed Justice J. F. Sharp who resigned. The Governor has also announced the appointment of H. R. Christopher, his private secretary, to be superior court judge of Okmulgee county in place of Judge E. R. Simpson, resigned. He has also appointed John L. Coffman, formerly a county judge, as judge of the ninth judicial district, to succeed George C. Crump, resigned. Judge J. M. Crook of the district court composed of Bryan and Marshall counties has resigned.

Deaths Among Illinois Lawyers.—Attorney James H. Ward of Chicago died October 13. James H. Hammill, one of the prominent attorneys of southern Illinois, died October 4. For many years, and at the time of his death, he was an attorney for the Louisville and Nashville railroad. Axel Chytrane of Chicago, former judge of the superior court, also died the first of October. He was once a law partner of Charles S. Deneen and was born in Sweden. Arthur M. Otman of Peoria

died October 18. He was widely known in Masonic circles and had had conferred on him recently the 33rd degree.

Women of Ontario Plan Bar Association.—Plans to form a Women's Ontario Bar Association, which are already well under way, are causing considerable criticism from members of the Ontario Bar Association, who believe that women lawyers would benefit by mingling in their association and enjoying its broadening influence. Toronto has at present four women lawyers and 19 students at Osgoode Hall, while Hamilton has three women lawyers. Any woman who has graduated from Osgoode Hall is eligible for membership in the Ontario Bar Association.

Changes in Federal Courts.—Judge Maurice H. Donohue of New Lexington, Ohio, and a judge of the Ohio Supreme Court, has been appointed to the United States Circuit Court of Appeals for the sixth circuit to fill the vacancy created by the resignation of Judge John W. Warrington who resigned. Judge Charles B. Faris of the Missouri Supreme Court has been appointed a United States district judge for the federal district which includes St. Louis, succeeding Judge David P. Dyer. Judge Don Albert Pardee, senior judge of the Circuit Court of Appeals for the fifth circuit, died at his home in Atlanta in his 83rd year. He was appointed to the federal bench in 1881. Judge Howard C. Hollister of the United States District Court for the southern district of Ohio, died in October. His home was in Cincinnati. Judge Gordon Russell of the United States District Court for the eastern district of Texas died in September. He was a member of Congress from 1902 to 1910.

English Notes*

Field courts-martial are a necessity, but it is doubtful, says the *Law Times,* if any form of administration of justice is more unsatisfactory. There is at the present moment a demand by the former soldiers who fought at the Loire for the revision of a judgment of the *conseil de guerre* of the 65th Division. In October, 1914, the 298th Infantry held the trenches before Vingré Coursécourt. They were surprised by the Germans and nine French soldiers were captured, including the Marquis de Vogüé. The same evening the *conseil de guerre* tried six soldiers who were not taken—the party consisted of sixteen—and condemned them to death, a similar sentence being passed in absentia on the nine taken prisoners. On the following morning the six unfortunate men were shot, *pour encourager les autres,* as Voltaire observed in a similar case. The Marquis de Vogüé has recently returned to France with other prisoners of war, and his case has been before another *conseil de guerre,* which acquitted him of all blame, and he has since been appointed to a position in the Ministry of War. The marquis having been rehabilitated, the *Federation des anciens combattants de la Loire* have decided to call for the quashing of the sentence carried out on the six men who found themselves with the marquis, but, unfortunately, rehabilitation will not bring them back to life, although it will remove the stigma attaching to them.

Canadian Legislation Against Sedition.—The new legislation in Canada respecting sedition and seditious propaganda, in the form of an amendment to the Criminal Code, introduced by the Hon. Hugh Guthrie, Solicitor-General, declares that any society or organization the purpose of which is to bring about any Governmental, industrial, or economic change in Canada by use of force, or physical injury to person or property or by threats of such, or which teaches or advocates the use of force, or threats of injury, in order to accomplish such change, shall be an unlawful association; any property belonging or suspected of belonging to any such organization or held on its behalf may without warrant be seized by the Chief Commissioner of Dominion Police. Any person who acts or professes to act as an officer of such association, and who shall sell, speak, write, or publish anything as the representative of such body, or wear anything suggesting that he is a member of or associated with it in any way, shall be liable to imprisonment for not less than one year and not more than twenty years. The letting knowingly of quarters or premises to persons advocating the purposes of such unlawful association is an offense, and carries with it liability to heavy penalties; and if a judge, a magistrate, or any two justices of the peace are satisfied that there is reasonable ground for suspecting that quarters are about to be used for these purposes they may enter the premises, search all persons in attendance, and carry off all literature found therein. The Criminal Code is further amended by declaring that any person who prints, publishes, circulates, sells, or distributes, or attempts to circulate through the mails any piece of literature which advocates or defends without the authority of the law the use of force as a means of accomplishing any Governmental, industrial, or economic change shall be guilty of an offense. There is also a heavy penalty for importing such literature into Canada by freight, express, motor truck, or otherwise.

Money Paid Under Mistake of Law.—One of the principles of English law which the layman finds it hard to square with fair dealing is that which refuses relief in the case of money paid under a mistake of law. If the law were, as in the ideal State it perhaps ought to be, always clear and unmistakable, there might, he thinks, be some solid basis for the doctrine; but with legal principles so often ill-defined it is difficult for him to appreciate the virtue of this particular rule of law. Its hardship is again being brought home to that large number of persons who, having paid income tax on the Union Pacific "special dividend," think that, since the special commissioners' decision that the tax was not legally exigible, they have good ground for claiming repayment from the Inland Revenue authorities. The City correspondent of the *London Times,* writing on the subject recently, appears to be under the impression that a refusal to refund the tax must "be based on some rule governing income tax matters, but it is obviously an inequitable one and contrary to common sense." We may willingly agree that the rule is inequitable, but every law student knows that it is not based on anything peculiar to income tax matters; it is our old doctrine about money paid under a mistake of law being in general irrecoverable—a doctrine which is much easier to state than to give rational grounds in its support. An attempt was made some years ago in Whiteley Limited *v.* The King (101 L. T. Rep. 741), by persons much in the same position as those who have paid income tax in the Union Pacific case, to recover a tax which, after having been paid, was judicially declared to have been exacted on an erroneous view of the law. The case had reference to the duties on male servants. Whiteleys employed a number of men to prepare and serve meals to their shop assistants. For some years the Inland Revenue authorities contended that licenses must be taken out

* With credit to English legal periodicals.

in respect of those waiters. Whiteleys protested, but paid in face of the statement by the Revenue officials that the tax was legally exigible. In 1906, however, they were more courageous and refused to pay, and the matter came up for decision in Whiteley Limited *v.* Burns (98 L. T. Rep. 836; (1908) 1 K. B. 705), when the point was settled in favor of Whiteleys, who thereupon presented a petition of right asking for repayment of the sums they had paid while protesting they were not liable. Mr. Justice Walton dismissed the petition, holding that the payments were voluntary, and were therefore not recoverable. Such a decision, as we have said, puzzles the lay mind, but "the law allows it, and the court awards it."

THE DUTY OF COUNSEL FOR THE DEFENSE.—The concluding words of Maître Darmon, in his defense of Quien for the betrayal of Nurse Cavell, at the last sitting of the court-martial in Paris, on September 5, which terminated in the conviction of Quien, followed by a pronouncement of sentence of death, are out of consonance with the strictly impersonal character of advocacy in England. "I;" said Maître Darmon, "await your verdict with painful anxiety, because I am convinced I am defending an innocent man, but I await with confidence because I know you are incapable of condemning a man without proof." The attitude of counsel in England has been clearly defined as one of scrupulous abstention from the expression of any personal opinion on the matter which is the subject of the proceedings. The late Mr. Forsyth, Q. C., M. P., in his Life of Cicero, explains the distinction between the doctrine of the duty of an advocate in Rome and in England. "How," he asks, "could Cicero think of appearing in defense of such a man as Catiline whom he soon afterwards bitterly attacked? If the profession of an advocate in ancient Rome had been the same as it is in England there would be no difficulty in the matter, for the modern advocate does not concern himself with the guilt or innocence or moral character of his client. His duty is merely to deal with the legal evidence, and to show, if possible, that it fails to bring the charge home to the accused. And, except in some very rare cases, he is by the very fact of his profession understood to be under an implied obligation to undertake the defense of the accused, if his assistance is required. But at Rome it was different." At the trial of Courvoisier in 1840, Mr. Charles Phillips was informed by the prisoner that he was guilty of the murder, but he was at the same time directed by the prisoner to continue to defend him to the last extremity. An eminent judge, Mr. Baron Parke (Lord Wensleydale) was sitting on the Bench with the judge (Chief Justice Tindal), who was trying the prisoner. Phillips took Baron Parke into his confidence, stated privately the facts that had arisen, and asked for his advice. Baron Parke declared that Phillips was bound to continue to defend the prisoner, and that in defending him he was bound to use all fair arguments arising out of the evidence. Phillips acted on this advice, abstaining from giving any personal opinion on the matter, and thus maintained the impersonal character of counsel which was abandoned by Dr. Kenealy at the trial of the claimant to the Tichborne title and estates, who pledged his belief in the innocence of his client, and thus violated the etiquette of the Bar of England. Sir Fitzjames Stephen thus tersely enumerates the etiquette in relation to counsel for the defense in criminal cases: "The barrister's province is singularly well defined. It is to say for his client whatever upon the evidence it is by law open to him to say, and which he thinks likely to be advantageous." The expression of personal opinion is contrary to the rules and sentiments which determine the duties of counsel in Great Britain.

UNENFORCEABILITY OF PROMISES BETWEEN HUSBAND AND WIFE.—The circumstances divulged in the recent case of Balfour *v.* Balfour were, perhaps, somewhat peculiar, but many a close analogy thereto could doubtless be furnished by daily events occurring in the relationship of husband and wife. The decision of the Court of Appeal in that case will, therefore, have an application which is far wider spread than at first sight might be imagined. And especially is it important to consider the lucid judgments on the subject of domestic arrangements that are made between married couples and of a husband's promises to his wife which were delivered by the learned Lords Justices, Warrington, Duke, and Atkin. Agreements between parties which do not constitute contracts in a legal sense are of perennial frequency. Particularly so are arrangements between spouses which must necessarily be constantly entered into. In the present case, the question that called for determination by their Lordships on appeal from Mr. Justice Sargant sitting without a jury as an additional judge of the King's Bench Division was as follows: Whether the promise of the husband to the wife that while she was living apart from him—he having to reside abroad on account of his professional duties and she having to reside in this country on account of the state of her health—he would make her a periodical allowance, was a promise which involved in law considerations on the part of the wife sufficient to convert the promise into a contract within the meaning of that term in the eye of the law. Spouses, it was not denied, might enter into agreements which give either party a cause of action. Lord Justice Duke was disposed to think that the promise of a wife in respect of her separate estate would found an action on contract within the principles of the Married Women's Property Act 1882 (45 and 46 Vict. c. 75). But in the present case the view entertained by the Court of Appeal, differing entirely from the opinion that was expressed by Mr. Justice Sargant, was that there was no evidence of any such exchange of promises as would render the promise of the husband the basis of an enforceable contract. If there had been an agreement for separation at the time that the promises were made, which agreement would have involved mutual considerations, as Lord Justice Duke went on to point out, citing Eastland *v.* Burchell (38 L. T. Rep. 568; 3 Q. B. Div. 432), a totally different aspect would have been put on the present case. But the period of absence was as between husband and wife living in amity. The conclusion arrived at by the Court of Appeal was that it is impossible to hold that while the relationship of husband and wife exists, and mutual promises are exchanged between the parties, such promises are to be deemed to be of a contractual nature. It is the natural and inevitable result of the relationship of husband and wife, said Lord Justice Atkin, that the two spouses should make agreements between themselves of the kind that was made in the present case. Here it was for an allowance of money to the wife. But his Lordship proceeded to state that, in his opinion, those agreements do not result in legal contracts at all, even though there may be what, as between other parties, would constitute consideration for the agreement.

"Experience has disclosed, that for the security of rights, and the preservation of the repose of society, a limit must be imposed upon the faculties for litigation. For this purpose, the presumption has been adopted, that the thing adjudged by a court of competent jurisdiction, under definite conditions, shall be received in evidence as irrefragable truth."—Per Campbell, J., in Washington, etc., Steam Packet Co. *v.* Sickles, 24 How. 343.

Obiter Dicta

BOTH FULL.—Schwolen *v.* Fuller, 182 Pac. 592.

A REGULAR LAWSUIT.—Law *v.* Law, 83 Ala. 434.

ALWAYS IN OPPOSITION.—Kidney *v.* Persons, 41 Vt. 386.

LAUNDRYMEN ON STRIKE.—Starcher Bros. *v.* Duty, 61 W. Va. 371.

WELL NAMED.—In Johnston *v.* Johnston, 173 Mo. 91, the name of a mother-in-law who figured quite prominently in the case was Ann Fury.

A FIFTY TO ONE SHOT.—Despite the handicap of a presumption in favor of the defendant, the plaintiff in Fancourt *v.* Heaven, 18 Ont. L. Rep. 492, won his suit.

SOMETHING FROM NOTHING?—In Bouvier-Iaeger Coal Land Co. *v.* Sypher, 186 Fed. 644, the complainant had judgment. It would be interesting to know whether the judgment was ever collected.

NOT ON ALL FOURS.—In Gordon Dry Gin Co. *v.* Righeimer, 258 Fed. 925, the court said: "Coca-Cola Co. *v.* Bennett, 258 Fed. 513, has no bearing in our judgment on such a situation as is here presented."

A GOOD PLACE TO LIVE.—In the 6th edition of Perry on Trusts the running head on page 1397 is as follows: "Three Bars in Equity." Most bars have towels appurtenant thereto, so there should be no difficulty in the matter of clean hands.

UNCIVILIZED NEW YORK.—"The whole question before me, however, is whether there has been a sufficient compliance with the New York statute of wills, which statute differs from the law of most other civilized countries."—Per Fowler, S., in Paez's Estate, 176 N. Y. Supp. 751.

EQUALLY PERTINENT TO THE 18TH AMENDMENT!—"While the statute remains it must be given effect by the court. It is too definite and substantial to be blown away by mere indignation or to be reduced to ashes by heat of denunciation."—Per Evans, J., in Hamilton *v.* McNeill, 150 Ia. 470.

"AN EYE FOR AN EYE," ETC.—In the London *Law Times* of September 13, the following ad. appears: "Messrs. Tooth and Tooth (late Oxenhams), 187 and 189 Oxford street, W., undertake valuations of furniture and other effects on moderate terms, and, if desired, will purchase for cash at the sum awarded by them."

WITH THE PUBLIC AS THE ORCHESTRA?—In Blue Funnel Motor Line *v.* Vancouver, 26 Brit. Col. 142, Morrison, J., remarked gratuitously and incidentally: "The said British Columbia Electric Railway Company and the Vancouver City Council put their corporate and corporeal heads together and their respective hands in each other's pockets, the vinculum thus created eventually developing into a concerto."

CERTAIN EXIGENCIES.—"The plaintiff in error boldly takes the ground that, being a corporation, it has a right, by contract, to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community requiring such manufacture to cease. We do not so understand the rights of the plaintiff."—Per Mr. Justice Bradley in Boston Beer Co. *v.* Massachusetts, 97 U. S. 25. The foregoing remarks, penned in 1877, clearly demonstrate the prophetic vision of our great judges. Who else could have foreseen the World War and the Anti-Saloon League?

CHARGING THE JURY.—Mr. Justice Riddell of the Supreme Court of Ontario is reported in a recent issue of the New York *Sun* to have made the shortest known charge to a jury, to wit: "Gentlemen, how much?" The witty all-sufficiency of the charge, if it was ever made, recalls to mind by way of contrast the ludicrous proceedings in Touchard *v.* Crow, 20 Cal. 150. In that case, which was tried by the court without the intervention of a jury, counsel requested the court to charge itself as a jury, and handed in certain instructions for that purpose. The court thereupon formally charged that part of itself which was thus supposed to be separated and converted into a jury, commencing the charge with the usual address, "Gentlemen of the jury," and instructing that imaginary body, that if they found certain facts they should find for the plaintiff, and otherwise for the defendants, and that they were not concluded by the statements of the court, but were at liberty to judge of the facts for themselves. The appellate court, commenting on the proceedings, said: "The record does not inform us whether the jury thus addressed differed in their conclusions from those of the court."

A MALICIOUS PRECEDENT.—Some one has said that a certain famous Missouri judge of modern times was prone to "(Lamm)-bast" the English language. Well, if he did, he merely sat at the feet of his fathers. As witness the following extract from the opinion in Stubbs *v.* Mulholland, 168 Mo. 75, written thirty years ago: "Malice, like its congener, fraud, poses in such a multitude of attitudes, assumes such a variety of shapes, manifests itself in such 'Protean transformations,' that were direct proof of its presence required at a certain time and place, it could always establish the favorite defense of the elder Weller, an alibi. For this cause it is that courts permit an infinite variety of circumstantial evidence to be adduced to show the cloven foot of malice. This thought will more fully be developed later on; but before reaching that point, it is well to quote, en passant, a description of malice as found in the familiar lines:

> 'Damn with faint praise, assent with civil leer,
> And without sneering teach the rest to sneer.'

Or, as the Book of Common Prayer hath it:

> 'Envy, malice and all uncharitableness.'"

A CAT IN A STRANGE GARRET.—Who would ever dream of poetry emanating from a grand jury room? Nevertheless, we are indebted to His Honor therein named, for the following grand jury report:

> Friday evening:
> To the Honorable J. W. Knowles,
> Who as presiding Judge controls
> The District Court of Number Ten,
> In the good old State of Oregon.
>
> Your Jury, designated Grand,
> For Union County's happy land,
> Once more appears before the Court
> To make the following report:
>
> We have examined well and true
> The work that we were called to do,
> All cases wherein at this time
> Had the appearance of a crime.

Indictment bills returned as true,
Are twelve, with nothing else in view
We wish to thank Attorney Hodgin,
The State for paying board and lodgin'.

Your Honor for your courtesy,
On whose good judgment, all agree.
And now our business is through,
The next move, Judge, is up to you.

M. L. CARTER,
Foreman of the Grand Jury.

Correspondence

DEFENDING THE KAISER.

To the Editor of LAW NOTES.

SIR: Your article in the current September issue of LAW NOTES, "Defending the Kaiser," takes rather a strong ground in the criticism of the American lawyer who might consent to a retainer as counsel for the Kaiser in his defense before the international tribunal to try him for his part in bringing on the great war. While my judgment as to the degree of his guilt accords with yours as expressed in your article, yet is it not true the Kaiser is entitled to his day in court, and to the services of the most competent counsel in the presentation of his defenses? That there are two sides to the question is implied in the very fact that a tribunal for his trial is provided for. Can a lawyer decline a cause for reasons such as underlie those expressed by you as affording justification to the American lawyer for declining to have a part in presenting the defense of the Kaiser? You will grant that as a general proposition the lawyer cannot do so. History and posterity are entitled to a verdict at the hands of this tribunal that reflects truth fairly ascertained, and all hands will agree that the highest legal talent representing opposite sides of any controversy is the best assurance of a just and rightful termination of the issue; and so for the sake of the generations to come let the defense of the Kaiser be put forth by the most capable legal talent of the world as a guarantee that the judgment of the tribunal trying him is beyond all cavil.

Elba, Ala. W. W. SANDERS.

JUDICIAL ROBES.

To the Editor of LAW NOTES.

SIR: I note with interest the short article entitled "Judicial Robes," under the heading "English Notes" in the September number of LAW NOTES. I think that I have had the most unique experience of any American judge regarding that subject. In 1906 President Roosevelt appointed me Federal Judge of Porto Rico, which position I held for four years. On going there I ascertained that the judges of all the Insular courts, including their supreme court, robed themselves elaborately on the bench. I found also that my predecessor had done the same, and the court officials when I arrived showed me an elaborate and ornate "gown," with lace collar, cuffs, and surcingle cords, which they said I was to wear when on the bench. I had always been against the custom, considering it wholly undemocratic, and a relic of ancient ecclesiasticism which was not either becoming or at all proper under a government such as ours, and especially so in a place lately acquired from Spain. So, much to the satisfaction of the American portion of the Bar in the Island, I went on the bench without any gown. Later when our court janitor died, I donated the robe as a shroud to bury him in. It seems that my example was at once followed by the district courts of the Island, and they also discarded their robes. The matter of my refusing to wear the robe and of the mode of its disposition was much commented on at the time, and some New York newspapers elaborated the incident into rather long and sometimes more or less amusing articles. I have never been of the opinion that wearing a robe on the bench in this democratic country adds anything to the dignity of a judge, for I feel that if a judge (at least in a nisi prius court) cannot command the respect of the people and the Bar without robing himself like a church dignitary, he should resign, and seek some calling he is fitted for.

Albuquerque, N. Mex. BERNARD S. RODEY.

DIFFERENCE OF OPINION AMONG REASONABLE MINDS.

To the Editor of LAW NOTES.

SIR: I have observed in recent communications and articles appearing in the LAW NOTES, regarding the test of whether reasonable minds can differ on a proposition as determining whether it is one of law or fact, and in this connection I have noted one or two interesting cases in Texas recently in which this rule has been up for discussion and application.

In the case of Marshall & East Texas Railway Company *v.* J. M. Petty, 107 Tex. 387, 180 S. W. 105, our Supreme Court held that reasonable minds could not differ to the effect that the plaintiff, riding on horseback, at a walk and in daylight, on a highway, going underneath a railway bridge too low to permit his clear passage, seeing it only in a general way, but thinking he could pass under without striking it, though his attention was not distracted and the contrary was obvious, was guilty of contributory negligence as a matter of law in permitting his head to strike against a beam of the overhead bridge.

Our Supreme Court is composed of three judges, and one of them, Mr. Justice Hawkins, dissented, and with regard to the numerical test as to the number of those who had decided the question adversely to the Supreme Court's decision, Mr. Justice Hawkins used this language:

"The views of the two district judges and of twenty-four jurors, and of the three members of the Court of Civil Appeals, and of this writer are, of course, not of controlling effect as against the views of a majority of this court; but I venture to respectfully suggest that, when contrasted therewith, said views at least indicate the existence of a difference of opinion among reasonable minds upon the question of plaintiff's alleged contributory negligence."

The case had previously been appealed and reversed on some other question, which accounts for it having been passed on by two sets of jurors and by two different district judges.

It thus appears that two district judges, three judges of the Court of Civil Appeals, and one judge of the Supreme Court, aggregating six judges, and also twenty-four jurors, were opposed to two judges of the Supreme Court constituting a majority of one, on the ultimate decision of the case.

In one of our recent decisions by our Commission of Appeals, approved by the Supreme Court, an interesting explanation of the test is given by our court. It is in the case of Gulf C. S. & F. Co. *v.* Gaddis et al., 208 S. W. 895, where it was held that where a deceased, though warned by a flagman maintained at a highway crossing, attempted to cross in front of a train running at a speed in excess of that fixed by ordinance, he was guilty of contributory negligence, and no recovery could be had on the theory that he could assume the railroad was

not violating the ordinance, and, if not, he could pass ahead in safety. In so holding our Supreme Court reversed the finding of the jury in the lower court and reversed the district court judge, and three judges of the Court of Civil Appeals, holding that whether the deceased was guilty of contributory negligence was a question of fact, and in passing on the test of whether reasonable minds could differ, Mr. Justice McClendon used this language:

"We are met with the suggestion that a contrary opinion has been reached by twelve jurors, a trial judge, and three judges of the Court of Civil Appeals, from which it is urged that such conclusion must be reasonable. We are not unmindful of the force of this suggestion. However, the reasonableness of a conclusion to be drawn from undisputed facts *is not to be tested by the reasonableness of the individuals who arrive at it, but by the inherent soundness or reasonableness of the conclusion itself;* and, when such question is presented to an appellate court for decision, such court must decide the question for itself, untrammeled by what other minds may have concluded, and with the consciousness that its own conclusion may not in every instance meet the full approval of others equally capable but not charged with the ultimate duty of decision. A different conclusion by other minds is, of course, persuasive. Which fact makes valuable the opinions of other jurisdictions not binding, as a matter of law, upon this jurisdiction. But in the last analysis each court is charged with the duty and must for itself determine the question of reasonableness of a particular conclusion from a given undisputed state of facts; and, with all deference to those with whom we here differ, we have been unable to reach any other reasonable conclusion but that contributory negligence as a matter of law is shown in this case." (Italics ours.)

I thought the above decisions might be of interest to the profession in connection with the discussion of the question recently appearing in your journal.

Houston, Tex. ROBERT L. COLE.

CONCURRENT "POWER" OR "JURISDICTION."

To the Editor of LAW NOTES.

SIR: I have read with much interest the articles in your August and September issues by Mr. Bronaugh and Mr. Wheeler about the 18th amendment to the Federal Constitution.

Mr. Wheeler criticises the article by Mr. Bronaugh principally because the latter by mistake quoted the second section of the amendment as providing for "concurrent jurisdiction" instead of "concurrent power" in the Congress and in the states to enforce the article by appropriate legislation, but I am unable to see that this error in any way affects the soundness of Mr. Bronaugh's arguments. Mr. Wheeler asserts that "concurrent power" and "concurrent jurisdiction" do not mean the same thing.

But within the meaning of the 18th amendment it is difficult to see any difference. What is meant by "concurrent jurisdiction" is quite familiar and it has usually been applied to courts, and it is well settled that where two courts have equal and concurrent jurisdiction of a subject, the one that first assumes jurisdiction in a given case retains that jurisdiction without interference by the other court, until the matter is finally disposed of. I am unable to see why the same meaning should not be attached to the phrase "concurrent power." The practical difficulty would be that we might have many different kinds of legislation in force if we took the view that the sovereignty which first legislated would have control of the subject. If Congress acted first, its legislation would be the effective one everywhere, but if some of the states acted first and we should hold that their legislation would be superior, we cannot foresee how many different methods might be adopted for the enforcement of the amendment.

The Oregon case which is cited by Mr. Bronaugh in effect decides only "that a man may not be punished under the law of a state for an act performed in another state where the act was authorized by law." That is, one state cannot punish an act done within the territorial limits of another state where the act is authorized by law. An examination of the opinion will show that the question really was as to the exercise of power by legislation concerning the Columbia river, as to which, upon the admission of Oregon into the Union, "concurrent jurisdiction" was given to Oregon as to all boundary waters with other states of which such waters formed a boundary in common with Oregon. Each state attempted to exercise its power over the Columbia river, and, as already stated, the court merely decided that Oregon by virtue of the "concurrent jurisdiction" could not punish a man for doing within the limits of the state of Washington an act which that state had authorized him to do, and that one state could not enforce its opinion against that of the other as to an act done within the limits of that other state. The case is, however, a strong one as to the meaning of the word "concurrent" when applied either to jurisdiction or power of two independent sovereignties.

If I understand Mr. Wheeler's argument it is that if there should be a conflict between federal and state laws as to the enforcement of this amendment, the federal legislation would necessarily over-ride the state law on account of the provision in Article VI of the Constitution that the laws of the United States made in pursuance of the Constitution shall be the supreme law of the land, anything in the laws of any state to the contrary notwithstanding; but this argument is violative of a cardinal rule of construction that we must never impute folly to the legislature, and Mr. Wheeler's conclusion would take all meaning out of the phrase "concurrent power" and would lodge the sole power of legislating for the enforcement of this amendment in the Congress of the United States. He says that the state is given equal power within its jurisdiction to enact laws prohibiting the liquor traffic, but if it does not use that power to the full extent the federal government may carry out the full purposes of the 18th amendment; and obviously the only authority to pass upon the question whether the state had legislated to the full extent necessary would be the Congress itself, if that legislation is to over-ride that of the state. Mr. Wheeler quotes from the Supreme Court of the United States an assertion of the well-known doctrine that when Congress exerts its authority in a matter within its control, state laws must give way, but this does not help any in the consideration of the question now under discussion, which is, in the light of that doctrine, whether the 18th amendment has put its enforcement under the control of the Congress. But the application of such a holding to the 18th amendment is subject to the objection already stated, that it would deprive the word "concurrent" of all meaning in the amendment. After all what we need to get at is the meaning of the word "concurrent" and it may be well to resort to the meanings given by lexicographers:

In the American Universities Dictionary, appears the following:

"Concurrent. 1. Meeting; united; accompanying; acting in conjunction; agreeing in the same act; contributing to the same event or effect; operating with. 2. Conjoint; associate; concomitant; joint and equal; existing together and operating on the same objects; as the federal and state courts have, in some cases, concurrent jurisdiction."

In the Standard Dictionary we find:

"Concurrent. 1. Agreeing or acting together, as concurrent signs, concurrent forces. 2. Meeting or joining at the same point; running together, as concurrent lines. 3. United in action or application; co-ordinate; concomitant, as concurrent remedies or jurisdiction. 4. Contemporary and co-equal action or right concerning the same matters; common privilege or authority, as concurrence of jurisdiction."'

In the latest Webster:

"Concurrent. 1. Running together; conjoint; associate; concomitant; existing or happening at the same time. 2. Meeting in, or directed to, the same point, as concurrent lines. 3. Acting in conjunction; agreeing in the same act or opinion; contributing to the same event or effect; co-operating. 4. Joint and equal in authority; taking cognizance of, or authority over, the same subject-matters; operating on the same objects, as concurrent jurisdiction of courts."

Of the foregoing, the most satisfactory is "running together," that is, considering the derivation of the word.

An interesting case in this connection, heard by three federal judges, is In Re Mattson, 69 Fed. 535. In that case Mattson was imprisoned upon a conviction in a court of Oregon of Sunday fishing in the Columbia river, within the territorial limits of the state of Washington. Near the end of the opinion on page 542, the court uses the following language:

"In the case under consideration, Oregon has established a weekly close season for the Columbia river, and has made fishing in the river during such season a crime; and it undertakes to punish a citizen of Washington for fishing in violation of this restriction in that part of the river within his own state, although by the laws of such state he is permitted to fish on the day interdicted by Oregon. It is no reason for this assumption of legislative control by Oregon within the boundaries of Washington that the latter state has the right to legislate similarly with reference to the river. Washington is precluded, by the legislation of Oregon over the river, from legislating otherwise. What is thus accorded to Washington is not a right but the necessity of acquiescence to avoid a conflict of jurisdiction. How can this state more than Washington determine the right of the citizens of Washington to fish in the waters of that state, or prescribe the days of such fishing? Washington is wholly foreclosed in the premises by the action of Oregon in determining the question for both states. How can this be called the exercise of concurrent jurisdiction? The word 'concurrent' in its legal and generally accepted definition means acting in conjunction, and when applied to the jurisdiction of Oregon to enact penal laws for the Columbia river it can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the state of Washington, or as are already in force within its jurisdiction."

Mattson sought release from the imprisonment by a writ of habeas corpus and it was ordered that the writ be issued.

Santa Fe, N. Mex. FRANK W. CLANCY.

"Jurors are disposed to regard as proper any argument which the court permits the attorneys to address to them, and this impression is made stronger when he refuses to sustain an objection by the opposing party."—Per Hodges, J., in S. A. Pace Grocery Co. v. Guynes, (Tex.) 204 S. W. 797.

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Justice Holmes on Freedom of Speech.

DISSENTING in the recent case of *Abrams* v. *U. S.*, 40 Sup. Ct. 17, Mr. Justice Holmes said: "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe, even more than they believe the very foundations of their own conduct, that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." In the same case the learned Justice expressed his approval of the decision in *Schenck* v. *U. S.*, 39 Sup. Ct. 247, wherein speaking for the court he said: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic." To this approval he adds: "I do not doubt for a moment that by the same reasoning that would justify persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent." As thus limited, the words of Justice Holmes afford no comfort to the seditious, the point of disagreement with the majority of the court being as to the construction of the particular pamphlet under consideration.

A Difficult Problem.

No more delicate problem confronts the United States to-day than that of the extent to which it is wise and permissible to go in controlling the radical economic propaganda now rife. At the beginning of the war more than one wise and patriotic lawyer expressed apprehension of the time when, at its close, selfish interests would seek to retain the benefit of the arbitrary powers of government and the relaxed sense of personal liberty which the conflict brought into existence. On the other hand no more crushing tyranny was ever devised than that which Bolshevism and its kindred movements seek to impose. Two fundamentals are clear beyond dispute. All agitation which seeks to incite violence, resistance to law or disobedience of law is and must be illegal, and must be suppressed with vigor and, what is even more important, with promptness. On the other hand there must be retained the most absolute freedom to advocate changes in our laws. No matter how radical the change, no matter how disastrous many may believe it would be, so long as it is attempted to bring it about in the manner prescribed by the Constitution, its public advocacy should not be restrained. The difficulty is not in the rule but in its application; the judges of the federal supreme court could not in *Abrams* v. *U. S.* agree as to its application to a single pamphlet. A few applications are plain enough. Any propaganda which starts from the assumption that all government is wrong is per se illegal. Its exponents may call themselves "philosophical" anarchists and deny that they advocate the use of violence, but the bald fact remains that only by violence can government be abolished. Any propaganda which sets up extra constitutional bodies, "soviets," or the like, and seeks to arrogate to them governmental powers is pure revolution and as such subject to suppression. Any propaganda which looks to economic action for political ends—general strikes, sabotage, or the like—is beyond the pale of toleration, for the reason that it seeks to subvert the one constitutional method of political action, viz., by vote. From these premises, the lawfulness of a particular speech or pamphlet rests on a single test. What is it that the speaker or writer is trying to get the people to do? The question is not whether his views are good or bad, wise or foolish. Is he trying to educate the people to cast their votes to make those views into law? If so he is within his rights. Is he trying to get them to disobey the law, to commit violence, to coerce public officials? If so he is beyond his rights, and liberty is secured and not endangered by his prosecution. The danger is, as pointed out by Justice Holmes, that those in power are easily convinced that views in opposition to

their own are dangerous to the public welfare. There have been few reforms which were not at their inception considered chimerical if not wicked by the administration at the time. As to the wisdom of any measure, however radical, which contemplates only constitutional methods for its adoption, there is but one just rule—full and free discussion unhampered by any government control. The most utter atheist is he who does not believe that truth will prevail over falsehood in fair field.

A Campaign of Education.

THE statement that truth will prevail over error in a fair contest by no means implies that truth has any such inherent power as will automatically and without effort on the part of its adherents bring to naught the propagation of falsehood. The triumph of truth is assured only when it is maintained with a zeal and ability equal to that which is exerted on behalf of the error sought to be combated. To-day the doctrines of revolution are being urged through hundreds of newspapers, through countless pamphlets, through speeches delivered wherever workingmen congregate. They are urged by men some of whom at least believe what they teach, who starve themselves to feed the printing press and risk imprisonment to distribute its product. What is being done to counteract this propaganda? Many "ringing editorials," many carefully considered speeches in Congress, many well-intentioned sermons, none of which reach a tenth of one per cent of the people whom the revolutionary propaganda is likely to affect, none of which require from their authors the slightest risk or the slightest sacrifice. This unequal struggle can have but one outcome; the ignorant hearing but one side will accept it, and the government will have to call out troops to make corpses of men who might have been made into good citizens. If it is true, as every good American believes, that with all the faults of our system it is still the best in the world, that our laws give equal justice and our economic system gives equal opportunity, or may by constitutional methods be made to do so, the facts can be convincingly maintained in the face of those who deny them. What is needed is an organized, sincere and unselfish propaganda of Americanism. We were able during the war to organize a propaganda to get money out of the pockets of all classes; we should be able to organize one as effective for getting ideas into their heads. Adopting the methods and the phrase of commercialism, the war was "sold" to the American people in the teeth of the Hun's propaganda. By the same sincere and non-partisan zeal American institutions can be "sold" to them, despite the utmost efforts of Bolshevist and I. W. W.

Class Consciousness.

THE average lawyer is usually somewhat surprised to find respectable and personally law abiding men who are so far imbued with class consciousness as frankly to defend riot, intimidation and arson, when used as a means to further the interests of the laborer in a dispute with his employer. That view, that the member of your own class is always right, finds its culmination in the existence of American apologists for the Russian Bolsheviki. Business and professional men are prone to look on this as a dangerous vagary peculiar to the ignorant workingman. Nothing could be further from the fact. The manual laboring class has in the past been singularly devoid of class consciousness, or with its superior numbers it would long since have ruled the world. It is but now beginning to imitate an example long set for it. It is obviously wrong for a workman to conceal, out of sympathy, the fact that another workman has "slugged a scab" or derailed a car manned by strike breakers. But when a doctor finds that a fellow practitioner has sewed up a pair of scissors and a ball of twine inside a patient he "observes the dictates of professional ethics." When a lawyer is called on to bring suit against a fellow member of the bar who is evading the payment of a just debt, he too develops ethical scruples. The spirit of class consciousness, the spirit which judges an act not by its own quality but by the occupation of the actor, must be abated or it will destroy our institutions. The manual laborers adopted that spirit in imitation of their more favorably placed fellow citizens; they will not abandon it till they are moved thereunto by example as well as by precept.

Federal Protection of Birds.

IN LAW NOTES for November, 1918, the validity of the act of Congress of July 3, 1918, passed to give effect to the migratory bird treaty with Great Britain, was discussed at some length. In line with the views then expressed, four recent decisions of the federal district court have upheld the act. *U. S.* v. *Thompson,* 258 Fed. 257, *U. S.* v. *Samples,* 258 Fed. 479, *U. S.* v. *Selkirk,* 258 Fed. 775, *U. S.* v. *Rockefeller,* 260 Fed. 346. The correctness of the conclusion reached by these courts would seem to be beyond dispute. As was said in the Rockefeller case the purpose of the treaty was to share peacefully those natural resources of bird life which are alternately found in the territory of two nations and which are the property of none till reduced to possession. So in the Samples case it was said: "The controlling consideration is the effect upon the mutual interests of the two nations concerned. By this treaty the United States profits by the protection which is accorded such wild fowl in Canada during the nesting and feeding seasons before the migration sets in to the south. Canada gains by the same protection which is thrown about the same birds during their stay within the United States. The people of both countries, of our entire Union and of all the states, benefit by the mutual and reciprocal advantages which accrue from this arrangement. If this be so, then the subject-matter comes properly within the treaty making power. If it curtails any right which would otherwise be lodged in an individual state, it does so only through the full and untrammeled exercise of a federal power to negotiate with a foreign government."

Treaties and State Rights.

IT is to be hoped that if the validity of the migratory bird act comes before the federal supreme court the resulting decision will clarify the power of Congress to legislate in respect to matters which have become the subject of a treaty. The bare rule that a treaty is the supreme law of the land leaves a considerable field uncovered. For example, when, as in the case of the New Orleans Mafia, aliens become the subject of mob violence, demand for redress is made on the federal government, which has always repudiated all responsibility on the ground that

the offense was one wholly of state cognizance. If, as in the instance cited, the foreign power swallows its grievance in the interest of international amity, there is no particular harm done, though such incidents are not the source of very much national pride. But suppose the offense to be more serious or the aggrieved nation less complaisant—must the United States go to war for an undoubted wrong which it is without power to repair or punish? Certainly nothing of the kind is contemplated by the Constitution. The power to make treaties involves of necessity the power to require their observance by every person within the jurisdiction of the United States. Whatever may be the fate of the presently pending treaty of Versailles, the international relations of the United States will be more complex in the future than in the past. The establishment and exercise of the power to legislate for the enforcement of treaties will do more than to promote international good will. It will tend to bring a recognition of that which is often forgotten, that the agreement of the United States is the agreement of all its people, a thing to be entered into with caution and when made to be observed with scrupulous fidelity. If the people are made to realize that a treaty is a law, binding on every individual, secret diplomacy and partisan ratification will speedily become things of the past.

The Liability of the Railroads.

WHILE the authorities are conflicting, it has been held by a number of federal cases that a railroad company may not be joined as a party to an action to enforce a liability arising under the railroad administration. See, for example, *Hatcher* v. *Atchison, etc., R. Co.,* 258 Fed. 952. The decisions so holding proceed either expressly or impliedly on the theory that the federal act permitting such suits against the railroads is invalid as imposing on the corporation a liability for the acts of persons who are wholly beyond its control. These rulings present a question of considerable importance to the profession, viz., when the railroads are returned to private ownership what provision is to be made for the payment of liabilities accruing under the federal administration? The same considerations which have led courts to pronounce against the validity of the act permitting suits against the carriers would undoubtedly dictate a decision against a statute seeking to impose liability on the carriers. If the government assumes the payment, there is grave danger that past instances where claims against the government were paid to the remote descendants of the original creditor will be repeated. A great number of these claims are for personal injuries, and the claimants are men without means and more or less crippled by their injuries. As to them a long delay of justice is equivalent to its denial. The necessity of collecting their damage claims from a government agency has already imposed on this class of persons a very serious wrong. The government does not set a very helpful example to its citizens in standing behind its immunity from process and delaying for years the payment of its debts, and the crippled railroad workman on whom the injustice is inflicted is not going to inspire very much patriotic sentiment in his immediate locality. When the railroads are given back to private ownership the members of the legal profession should see to it that a provision of undoubted validity is made as to the payment of all claims, and that the most stringent provisions for the prompt liquidation of all liabilities assumed by the government to small claimants is inserted. The railroads and the holders of railroad securities will be fully represented at the conference wherein the congressional solution of the present entanglement is reached, but the injured workmen and the small shippers will have no representation and must look to the sense of justice of the legal profession for their protection.

A Flaw in the Patent Laws.

THE patent laws of the United States form an exception to our policy which as was said by Judge Lurton in *Park* v. *Hartman,* 153 Fed. 24, "is founded upon the theory that competition is desirable." For the monopoly thus granted there is of course a sound and sufficient reason, for only by that means can the investment of capital to commercialize an invention be secured. But *cessat ratione lex,* etc. It is well known that there are hundreds of valuable inventions which have not been and probably never will be put on the market. Granted an invention which works an economy in a manufacturing process or improves the product, and a pre-existing monopoly of the business to which it relates, and the trust will buy the invention to suppress it, simply because its advent would scrap the expensive equipment already in use. This is all very good for the trust and equally bad for the public. It perverts the monopoly given to encourage improvement into a means for suppressing improvement. The remedy of course is obvious—a statute invalidating all patents not put into use within a limited time. The monopoly conferred by a patent is given for the benefit of the public and if it is not used for that purpose it should be revoked. The difficulty is not to find the solution but to secure its enactment, in view of the fact that no one person has an active interest in promoting it while powerful combinations of capital are interested to oppose it.

A Code of Legal Ethics in Canada.

AT a recent meeting of the Canadian Bar Association the committee on legal ethics recommended the appointment of a committee to formulate a code of legal ethics "using amongst other data the code of the American Bar Association." (See Canada *Law Journal,* Oct., 1919, p. 295.) The American practitioner will find cause for pride in the fact that the report is based largely on the experience of the United States; Mr. Roosevelt, Mr. Henry St. George Tucker and Mr. Elihu Root being quoted. The argument against a codification of ethics has never been more strongly stated than in a "dissenting opinion" by Mr. Justice Riddell presented with the report of the committee. He said among other things: "Any Code which entered into particulars would in my view do more harm than good—and for two reasons: First, when a Code of Rules has been formulated it is most natural, almost inevitable indeed, for its provisions to be considered exhaustive; whatever is forbidden is wrong, and in most minds the old logical fallacy of the 'undistributed middle' is not avoided, but it is considered that what is not forbidden is not wrong. When one is charged with wrongdoing, and told that he must act in a particular way, his defiance is, "On what compulsion must I? It is not so written in the Code.' It is the natural and inevitable

consequence of any written Code to divide sharply what is forbidden from what is not—and what is not forbidden too often is considered to be allowed. Anyone who is accustomed to refer to a written Code for the rule to direct his conduct will be apt to believe that it is complete, and will generally give himself the benefit of any doubt or omission." If the matter were res integra, it would be difficult to answer the argument of Justice Riddell, or escape the force of his observation that the whole project is like making a gentleman by means of a code of etiquette. But most observers will agree that in the United States the code has worked, not perfectly, but well, and has in the main been observed and administered with such good sense that the evils predicted have not made their appearance up to date.

The Successful Lawyer.

AT a recent meeting of the Illinois Bar Association a contest was held for the best definition of a "successful lawyer." First and second prizes respectively were awarded for the following answers: "One who masters his case, who gives a fair share of his surplus time to the advancement of jurisprudence, who performs his full duty of citizenship, and who is honest with court, client, opposing counsel and himself." "One thoroughly qualified, diligently and ethically practicing law as an honorable profession, not to acquire wealth; standing for the highest ideals of humanity and government." Most of the other answers submitted were in the same vein, the winners being distinguished chiefly by their aptness of formulation. It would be interesting to know how much of this is idealism and how much humbug; how far the answers represent the ambitions to which the judges and contestants direct their own professional efforts. It is a safe bet that a man going into an average Illinois city and asking for the most successful lawyer would be directed, not to an individual approximating the prize winning definition, but to the man who won the most cases and collected the largest fees. Too much cannot be said in favor of high professional ideals, but they carry this danger, that the man who professes them may become so pleased with their loftiness that he will arrogate to himself the credit due to a man who practices them. By all means let us have professional ideals of the highest, but let us never forget that with the acceptance of such ideals only the most unceasing effort will save us from hypocrisy.

Military Training in Schools.

THE Attorney General of Ohio has recently rendered an opinion to the Cleveland school board to the effect that the establishment of compulsory military training in high schools was unauthorized. The statutes of Ohio prescribe with somewhat unusual particularity the curriculum in high schools. Also it may be noted that the regulations sought to be established by the Cleveland board went unusually far, prescribing among other things a cadet uniform for pupils. The Attorney General said, inter alia:

> Much can be said in favor of military training in public schools, but its merits or demerits is not the question before us; the question is whether, under *existing Ohio law*, a board of education can inaugurate any military training under the head of "physical training," mentioned in section 7721, G. C. While a board of education has broad powers in its management of the public schools under its control, it cannot go beyond the things contemplated by the legislature, and until further legislation is had on the subject, a board of education has no authority to establish military training in the public schools (sec. 7649 G. C.) or compel its student body to dress in a certain manner during school hours, with the attendant expense on the parent.

This opinion discloses no constitutional objection to military training in the schools, and it would be difficult to imagine one. While in many states it is probable that a different conclusion would be reached, the matter is one which should be handled by legislative action, as was done in New York, where a statute which might well be taken as a model requires three hours per week of military training for all boys over the age of sixteen in the public schools, supplemented by an optional field training camp in the summer, the whole being under the supervision of the state military training commission. While military training in the schools is not a substitute for the universal training which should be a national institution, it is a valuable preliminary, and moreover has an educational value quite apart from the question of national preparedness. To whatever heights we may as a people rise under the stress of an emergency, we are normally weak in national spirit, and are very far from a general realization that citizenship involves duties as well as privileges. Such institutions as the Boy Scouts are doing much to avert future crime by recognizing and diverting to better ends than hoodlumism the "gang" instinct which is innate in the normal boy. The work thus done by a volunteer organization would be vastly extended and improved if it were made public and universal, and were coupled with a thorough course of instruction in the duties and ideals of American citizenship.

Juvenile Delinquency.

JUDGE WILLIS BROWN, originator and administrator of the juvenile court of Gary, Ind., and originator of the National Boy City at Charlevoix, Mich., is reported as having advocated recently a radical departure from the methods now considered as advanced in dealing with juvenile delinquency. According to a press report he says:

> The basic idea of it all is this: the child must be turned from evil to good not because of any personal regard for the Juvenile Judge or the Probation officer of the court, or even for its parents or guardian, but because of a supreme regard for morality and understanding of the difference in effect between right and wrong. Now how shall we do this?
>
> My idea is that the child must be guarded and guided by some influence as far removed from the idea of a criminal court as possible. He or she must be moved to right doing by a desire to gain benefits of right doing. No child can be moved to do right through fear of any punishment that can be meted out to him or her. They can only be made more criminal by getting a contempt for all law and all morality.
>
> I would have a parental farm attached to the public school and there I would take children of careless parents, and under the guardianship of the public school and not of the law, I would bring them to right thinking, systematically and scientifically.

The fundamental idea of the juvenile court system was to eliminate as far as possible the idea of crime, prison and punishment from the treatment of juvenile offenders, substituting the parental idea. Judge Brown's suggestions of course make for a further extension of this thought. In view of the manner in which the juvenile court has confounded the predictions of those who said it would not work, it may be foolish to indulge in a like scepticism as

to the later suggestions of so experienced a student of the problem. It is, however, impossible to avoid some doubt as to whether a delinquent boy will prove responsive to an appeal on a level too abstract to be effective with the average man. The Creator provided filial affection to bridge over the period of mental immaturity, and it is not certain that, for those to whom the opportunity for its exercise is denied, "personal regard for the juvenile judge" is not the best available substitute. The establishment of a "parental farm" moreover involves a considerable staff of persons each fitted for a difficult and delicate task. It is, we trust, not an undue pessimism to fear that in many instances its camouflage will not prevent it from having all the evils which are present in the average reformatory. Most observers will agree that in the majority of communities a higher standard of intelligence and humanity will be found in the judicial than in the educational department, and the transfer of the delinquent boy from the former to the latter will not be wholly to his advantage.

THE CONFIDENCE GAME

IT has been judicially determined that "a sucker is a person readily deceived" (*People* v. *Simmons,* 125 App. Div. 234, 109 N. Y. S. 190) and there is nonjudicial authority that one is born every minute. And not since the beginning of human history has there been a lack of those who would take advantage of his credulity. The sacred chronicle, relating how Jacob personated Esau, but instanced a practice which then was ancient history, and which yet remains. Fraud is as old and as ever new as human faith, human greed and human duplicity. The myriad frauds which are rendered possible by a confidence built up by long association, strengthened perhaps by ties of blood, are merely sordid, and their study affords little of profit. But the professional fraud, the studied system of the man who makes a living by playing on the weakness of his fellows, has been the theme of many stories of absorbing interest, and loses little when reduced to the more prosaic pages of the law reports.

For the obtaining of comparatively small amounts, apparently only a good appearance and an assured demeanor are essential. Thus in the afternoon of December 5, 1907, a well-dressed stranger walked into the office of the Clinton Wire Cloth Co. in Chicago and asked for the former cashier. Being told that he had severed his connection with the company, the prepossessing caller stated that in crossing the Rush Street bridge he had lost his pocketbook, and sought his friend the former cashier to obtain a small loan. After some parley he asked for a loan of $10 and got it so readily that he said, "Can't you let me have $20," and when that was laid out said, "Make it $30." Apparently sensing some reluctance at this point, he voluntarily gave his watch as security. Investigation made later of course revealed that the former cashier knew no such person, that the watch was worth $1.60, and that the same scheme had been worked on a number of other merchants. See *People* v. *Weil,* 243 Ill. 208, 90 N. E. 731.

But where a larger sum is desired a method so simple will not work, and whatever may be the device resorted to its psychological basis is always the same—the awakening in the prospective victim of the idea that he is going to get something for nothing. Thus in *Defrese* v. *State,* 3 Heisk. (Tenn.) 53, it appeared that a prosperous farmer of Union County, Tenn., was leaving Knoxville in his wagon when two strangers asked and obtained permission to ride. One of them left the wagon for a moment and while so doing dropped a folded paper from his pocket. The other stranger picked it up and unfolding it took from it, in sight of the farmer, a five cent piece and then refolded it. When the absent stranger came back the paper was returned to him, and after expressing his gratification at its recovery he offered to bet that there was a five cent piece in the paper. The finder of the paper said that he had no money and urged the farmer to bet, and the latter, having seen the five cent piece taken out, was nothing loath to do so. Needless to say, when the paper was unfolded it was found that there was another "jitney" within. Judge Sneed appends to the opinion a note relating an unreported case where the same trick was worked with a small metal ball containing, as the event proved, two pearl buttons.

Different in detail but identical in psychology was the trick which formed the basis of the prosecution in *People* v. *Shaw,* 57 Mich. 403. Shaw and Jones were confederates in the fraud. Shaw had introduced himself to Brown as a traveler for a tea-dealing firm in Cincinnati, and told him that one of the means for getting custom in a new place was offering purchasers a chance, by drawing cards, to get fifty pounds free, in addition to the purchase, if they drew the winning card. In order to carry out the scheme, he wanted Brown to accompany him, and showed him how to draw the lucky card, by a little dot on the back. While they were practicing, Brown succeeding each time in drawing the card, Jones came up, appearing to be a stranger, and inquired what they were doing. Shaw told him he would show him, and gave him the same explanation as to the mode of selling tea, but did not tell him about the marked cards. Shaw, after some talk, said that Brown could draw the 50 pound card. Jones offered to bet $100 that he could not, and held out to Shaw what seemed to be a roll of bills. Shaw said that he had not the money, but had a $300 check; Jones said that he did not want the check; he wanted money. Shaw asked Brown if he had it. Brown said he had not a $100, but had $80. Brown at Shaw's request handed him the $80, and Shaw whispered to him to draw the marked card. He drew it, and it was a blank.

Identical in principle again is the old "green goods" trick, which is well exemplified in *Crum* v. *State,* 148 Ind. 401. A farmer named Haines lived near Marion, Ind., and on him called one Evans and his wife. During the evening Mrs. Evans discoursed at length as to how well her husband was doing in business, of how slow a business farming was, reiterating the ancient adage which has led so many to their destruction that no man ever got rich by working. After this seed was well planted Evans got Haines aside and told him that he had a chance to get counterfeit money which no man could tell from genuine at "five dollars for one," and the rest of the story which has been told so often since the serpent offered to let Eve in on the ground floor. A genuine bill was of course exhibited as a sample. Evans, Haines and a confederate named Crum each put in $5000 which Evans took. The

entire shipment of counterfeit money was to come to Haines, but the box was not to be opened until all three were present. In due course a money express package came to Haines, and he hid the box in a pile of oats in his barn and sent for his fellow investors. That evening Evans and Crum came along and inquired if he had received the package, and then told him to bring it to a piece of woods about half a mile away. Crum cut the cords and unwrapped the package, and then asked Evans if the box looked as it did when he nailed it up. Evans said that the nails were larger in one of the lids than when he nailed it up. The lid was then pried off, and nothing but bunches of paper were found in the box. Evans then said it was not the way that he had left it, that he had counted the money, placed it in the box and then nailed it up. He said if they told about this they "would all go to the penitentiary." He then flew into a passion, exclaimed that he had been robbed, that Crum and Haines had robbed him and that he would kill them both. With that he drew a revolver and pointed it at Haines, but Crum interfered and kept him from shooting. Crum grabbed Evans and they had a terrific scuffle, during which Haines, in great fright, took to his heels and ran through the woods.

One of the most interesting and most successful confidence games, the "fake foot race," depends on the same basic principle of human nature. As narrated in *Johnson* v. *State,* 75 Ark. 427, 88 S. W. 905, it was worked by the so-called "Buckfoot gang" with great success in various parts of Utah, Missouri and Arkansas. The modus operandi involves a delegation to wait upon the prospective victim and tell him that in a nearby city there is an athletic club composed largely of millionaires, that the club has a runner in whom the members have great confidence, that he has been matched against a visiting racer who, he has found when too late, is much too good for him, and that therefore he desires to make something out of the situation by betting against himself. What he needs, it is explained, is some one unknown to his millionaire backers who can show himself to be a man of means, to bet his money for him, and he stands ready to give a handsome share of the winnings for this service. This seems to the "come on" to be easy and quite without risk. He is introduced to other members of the gang who pose as millionaire members of the club. They, in their capacity as financial autocrats, are exceedingly particular as to the standing of the persons with whom they bet, and the victim is induced to bring on money of his own to establish his financial status, the promoters of the game assuring him privately that it will be returned to him. The race is held, the visiting runner vindicates the reports of his prowess by leading handsomely down to the stretch, where he trips and falls, and the fool and his money are parted. It is of interest to note that the person defrauded in the Johnson case was no "babe in the woods" but the proprietor of four or five saloons in different Texas towns, over each of which was located a gambling hall. Other instances of the successful operation of this trick may be found recorded in *Stewart* v. *Wright,* 147 Fed. 321, and *Hobbs* v. *Boatright,* 195 Mo. 693.

While it is the human rather than the legal side of the situation which is sought to be presented, it may be noted that in each of the cases cited the courts held that the transaction narrated constituted "larceny by trick." Even the fact that the victim expected to profit by a crime has been held to be no defense, the court saying in *Crum* v. *State,* 148 Ind. 401: "The fact that the credulous, simple-minded prosecuting witness was himself willing to aid in circulating counterfeit money, does not lessen the guilt of his tempters, any more than the weakness of the denizens of Eden excuse the villainy of the arch fiend who corrupted them." There is however a line of New York cases holding that the unlawful intent of the victim bars a prosecution, which at one time made the metropolis the happy hunting ground of the green goods operator. See *McCord* v. *People,* 46 N. Y. 470; *People* v. *Livingstone,* 47 App. Div. 283. By virtue of that doctrine immunity was in *People* v. *Tompkins,* 186 N. Y. 413, accorded to the members of a gang who, pretending to have secured by tapping a telegraph wire advance information of the outcome of a horse race, induced their victim to bet $50,000 at a fake pool room. The rule has since been abrogated in New York by an express statutory provision. Penal Law § 1290 (McKinney's Consol. Laws, Book 39, p. 458).

The facts in these and many another like case not only adorn a tale but they point a moral. The general opinion seems to be that the sharper goes forth to prey on the honest and innocent, and that the more honest the victim the more certain his fall. On the contrary, from the yokel who, as related in *Rex* v. *Salomons,* 17 Cox C. C. 93, paid half a crown for a purse into which he thought he had seen a street vendor drop two half-crowns, down to the farmer in *State* v. *Crum,* who wearied of the slow earnings of honest labor and would invest in counterfeit money at five dollars for one to pass on his neighbors, it was the greed and dishonesty of the victim which barbed the hook which caught him. The law reports verify what the books of religion have taught, that simple honesty and unenvious contentment are more than a preparation for heaven; they are a sure guard against many of the pitfalls of earth.

W. A. S.

WORKMEN'S COMPENSATION ACTS

Purview of Statute

THE important element of ascertained responsibility is found in the fact that the calamity was foreseen, or might reasonably have been foreseen, by the person to be held liable. (See 20 R. C. L. 14 et seq.) And the fundamental idea of the statute in providing for the award of compensation is that the injury was foreseen as a result of the employee's engaging in the employment. Industrial enterprise inevitably leads to the injury and death of employees; these events are foreseen as a certain result of the service. *Ind. Comm.* v. *Brown,* (Ohio) 110 N. E. 744, L. R. A. 1916B 1277; *Stertz* v. *Ind. Ins. Comm.,* 91 Wash. 588, 158 Pac. 256, Ann. Cas. 1918B 354. The knowledge gained by common experience anticipates the event; and under the Compensation Act, it is in the light of human knowledge and experience existing at the particular time and place of the calamity, that any case is to be judged. The statute properly may be said to con-

template all those calamities which formerly arose out of the service, as well as others of a like nature, and such as may be produced in future by new conditions of the employment. In the course of human experience and acquired knowledge, the instrumentalities, the places, and the modes of employment, from being on first experiment of apparent safety, disclose in time inherent qualities of a dangerous nature. In a word: from the unforeseen we progress to the foreseen. And as new calamities become foreseen, they automatically are drawn within the provisions of the Compensation Act. Accordingly, inasmuch as the conditions of employment are ever varying with time and place, each case is to be decided in view of its own facts and circumstances.

The expressions in the opinions show very plainly that the Compensation Act should be held to be applicable to such cases, and to such cases only, as in the light of experience are the foreseen result of the employee's engaging in the employment. In deciding against the claimant the Massachusetts court says that "'there is nothing in the employment . . . which makes it likely that" the calamity will occur. *Milliken* v. *Travelers' Ins. Co.,* 216 Mass. 293, 103 N. E. 898, L. R. A. 1916A 337. Again by the same court, "The injury cannot be said reasonably to have been contemplated as the result of the exposure of the employment." *Hewitt's Case* (Mass.), 113 N. E. 572, L. R. A. 1917B 249. And where the injury resulted from the act of a trespasser on the premises, compensation was allowed because the event was "within the contemplation of the employer and employee." *Re Reithal* (Mass.) 109 N. E. 951, L. R. A. 1916A 304. Likewise, the House of Lords permitted compensation for an assault where it appeared that "there had been at least two previous assaults." *Trim Joint District School* v. *Kelly* [1914] A. C. 667, Ann. Cas. 1915A 104.

Insurance schemes are founded upon the same principle of foreseen calamities; and to a certain degree the Compensation Act may be said to insure the workman. But "the employee is not insured generally" against injury or death. *In re De Voe,* 218 N. Y. 318, 113, N. E. 256, L. R. A. 1917A 250. Viewing the course of development of the law, we see in the past the impositions of duty expressed in the judicial decisions, followed by the Factory Acts and Employers' Liability Acts,—in the present the Workmen's Compensation Acts,—and in the future an enactment which shall pension old age as well as disability. The Compensation Act "is not a substitute for disability or old-age pensions" (*Ind. Comm.* v. *Anderson,* (Ohio) 169 Pac. 135 L. R. A. 1918F 885; Re Madden, 22 Mass. 487, 111 N. W. 379, L. R. A. 1916D 1000); although the liberal tendencies of some courts have come very near to construing it as such. See *Re Heitz.* 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A 344; *Dzikowski* v. *Superior Steel Co.,* 259 Pa. St. 578, 103 Atl. 351, L. R. A. 1918F 888; *Stertz* v. *Ind. Ins. Comm.,* 91 Wash. 588, 158 Pac. 256, Ann. Cas. 1918B 354. Nor should the Act be unduly extended, for fear of defeating the purpose of the legislature "by an adherence to the concepts of liability for negligence, based on the failure to foresee and prevent accident, rather than to the principles of industrial insurance" (*Re Heitz,* 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A 344); inasmuch as the fundamentals of negligence and the basis of insurance rest in the same concept.

Actual Changes in Preëxisting Law

The question to be resolved at the outset is whether in the enactment of the Compensation Acts the legislatures of the various jurisdictions intended to change the common law, and, if so, how extensive a change was contemplated. Common law practice is abolished, but whether or not any change was intended in respect of the principles governing the employee's right of recovery is open to speculation. Does the statute create any new "right" in behalf of the employee, or does it impose any new "duty" on the employer? If the act does these things, what is the measurement of the "right" or "duty," and who is to decide whether it exists in any particular case?

Prior to the enactment of the statute, the correlative rights and duties of the parties differed widely in the several jurisdictions; the laws specifically prescribing safeguards varied very greatly, and the tendency of the courts to allow or to disallow a recovery in an employee's action differed somewhat with every state. The standards were established by the courts, and the courts tested their application to particular cases. But the words of the Compensation Acts are substantially the same everywhere, and consequently if they establish a new principle the decisions applying the principle must be generally uniform in all jurisdictions. Nothing, however, could be farther from the fact; the decided cases are inharmonious to exactly the extent that they were inharmonious at common law; and the tendency of any particular court to favor or disfavor recovery under a given state of facts has changed not at all,—except as the course of decision always changes with the times.

The reason of the thing, in view of the previous developments of law respecting safeguards to employees, is that the legislatures because of the rapidly changing conditions of industry, finding it impossible specifically to enumerate the "duties" of the employer, intended by the Compensation Act to impose a general duty in respect of all such dangers as are within human ken. And, inasmuch as this is the fundamental principle of the common law, the statute effects no change whatever in *legal principle.* What actually is done by the law, is to do away with trial by jury and the antiquated methods of the common law. The Act relates to practice, not to principle, and it is very doubtful whether any intention can be said to have existed on the part of any legislature actually to authorize the payment of compensation under circumstances which the common law (the judicial interpretation of public opinion) would deem insufficient to warrant a recovery. At any rate, this is the clear purport of the decisions in a majority of jurisdictions, notably in England and Massachusetts. "In general it was intended as in the nature of a substitute for actions of tort for personal injuries at common law and under the Employers' Liability Act by employees against their employers." *In re Maggelet,* 228 Mass. 57, 116 N. E. 972, L. R. A. 1918F 864. Of course it is not meant that the right to compensation is to be measured by the common law decisions of any particular époque. The common law was an expression of public opinion, and it changed as public opinion changed. The statute, exactly like the Factory Acts and other statutes imposing specific duties on employers, must be deemed to extend the sphere of responsibility of the employer. In effect, the statute is a warning to him to inform himself of the perils of his business,

and to take measures to prevent injuries therefrom. Through the new developments of industrial enterprise, the perils of injury and death constantly are increased, and in recent years most of the courts have kept fairly well up with the times in imposing new and more rigorous duties upon the employer. Cases may be found, no doubt, wherein it is stated that injuries formerly uncompensated are by virtue of the statute to be the subject of an award (*Sundine's Case,* 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A 318; *Boody* v. *K. & C. Mfg. Co.,* 77 N. H. 208, 90 Atl. 860, L. R. A. 1916A 10), but, had the statute not been enacted, would the court not have been astute to differentiate the former decisions and mould its opinion to the changed conditions and the current standards of duty? In sustaining the claimant's right to an award of compensation for injury caused by the act of a stranger on the premises, the Washington court noted that "it is but a slight extension of the common law assurance of a safe place to work." *Stertz* v. *Ind. Ins. Comm.,* 91 Wash. 588, Ann. Cas. 1918B 354. An expression of law, whether legislative or judicial in origin, is the product of public opinion, and it seems safe to say that the concept of the Compensation Act as to what the duties of the employer should be does not differ much from the concept of the courts as to the same matter.

Under the statute, as at common law, there is no responsibility for such calamities as could not have been foreseen by the employer. Injuries so occurring—if unforeseen also by the employee, are the result of what the law variously calls Vis Major, Force Majeure, Inevitable Accident, et cetera. See 20 R. C. L. 19. The statute charges the employer in general terms with the duty of informing himself as to the perils of the employment and thereafter to take whatever action may be necessary to prevent injury therefrom; and this is precisely what the common law exacts. But just as the common law varied with the locality, so the judicial interpretation of the statute is subject to geographical differences. As a general proposition, those localities which adopted statutes imposing responsibility solely upon the employer, leaving the dispute as to the employee's right to compensation open to controversy between employer and employee,—are characterized by decisions that depart very little from the existing common law; whereas, in states that have adopted the Industrial Insurance Act, and have removed from private controversy the contest as to the employee's right to an award, a right to compensation exists—if statements in some of the cases are to be relied upon—for practically every calamity that can happen to the employee. "If he had not been at the factory that day he would not have been struck by lightning," as it has been expressed. *Stertz* v. *Ind. Ins. Comm.,* 91 Wash. 588, 158 Pac. 256, Ann. Cas. 1918B 354. Neither would he have been struck by lightning if he had never been born. *Griffith* v. *Cole* (La.), 165 N. W. 577, L. R. A. 1918F 923. The statute interpreted to foresee such calamities becomes a Meteorological Insurance Act as well as a law to insure against industrial casualties.

Judicial Explanation of Terms of Statute—"Arising out of and in Course of" the Employment

In the words ordinarily employed by the Compensation Acts, an award is to be made in case of "injury by accident arising out of and in the course of" the employment; and the courts, in justifying the allowance or disallowance of claims to compensation, have dwelt at length upon the meaning of every part of this expression. The terms "injury," "personal injury," or "personal injury by accident," have each been considered as terms of circumscription or limitation, and compendious opinions have been written in elucidation of their import. The words, however, which have furnished a basis for the greatest number of decisions, are "out of and in the course of the employment." Practically every court has offered an explanation for these words,—but without success. The precedents of other courts are treated with suspicion; and later cases repudiate the labored explanations of the earlier ones;—to the result that the whole subject has been greatly confused and confounded. Indeed, the opinions under the statute have, if such a thing were possible, intensified the common law maze of apparently conflicting and often unintelligible statements, observations, and reasonings,—which thoughtful judges themselves loudly denounce. "Simple as these terms appear, they have filled volumes with discussion." *Stertz* v. *Industrial Ins. Comm.* 91 Wash. 588, 158 Pac. 256, Ann Cas. 1918B 354.

The courts are generally agreed that "arising out of" does not mean the same thing as "in the course of." It is said that "the legislature has imposed a double condition." *Thom* v. *Sinclair* (1917) A. C. 127, Ann. Cas. 1917D 188. And see opinion of Viscount Haldane in *Lancashire, etc., R. Co.* v. *Highley,* [1917] A. C. (Eng.) 352, Ann. Cas. 1917D 200. The injury must not only arise "in the course of," but also "out of," the employment. *Kimbol* v. *Industrial Acc. Comm.,* (Cal.) 160 Pac. 150, L. R. A. 1917B 595; *Griffith* v. *Cole* (Iowa) 165 N. W. 577, L. R. A. 1918F 923; *State* v. *District Court,* 138 Minn. 326, L. R. A. 1918F 881. "Proof of the one without the other will not bring a case within the Act." *Larke* v. *John Hancock Mut. L. Ins. Co.,* 90 Conn. 303, 97 Atl. 320, L. R. A. 1916 E 584. And see *In re McNicol,* 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A 306. "While an accident arising out of an employment almost necessarily occurs in the course of it, the converse does not follow." *Griffith* v. *Cole,* (Iowa) 165 N. W. 577, L. R. A. 1918F 923. And see notes: L. R. A. 1916A 40; L. R. A. 1918F 897. "An injury which occurs in the course of the employment will ordinarily arise out of the employment. But not necessarily so." *Larke* v. *John Hancock Mut. L. Ins. Co.,* 90 Conn. 303, 97 Atl. 320, L. R. A. 1916E 584. "The expression . . . applies to the employment as such—to its nature, its conditions, its obligations, and its incidents." *Thom* v. *Sinclair* [1917] A. C. 127, Ann. Cas. 1917D 193 (opinion of Lord Shaw of Dunfermline). "It must appear . . . that there is some causative connection between the injury and something peculiar to the employment." *Griffith* v. *Cole* (Iowa) 165 N. W. 577, L. R. A. 1918F 923. "The nature of the occupation may supply causative relation . . . But it is only as to some employments that this is so." *Griffith* v. *Cole* (Iowa) 165 N. W. 577, L. R. A. 1918F 923. "The court is directed to look at what has happened proximately, and not to search for causes or conditions lying behind, as would be the case if negligence on the part of the employer had to be established." *Thom* v. *Sinclair* [1917] A. C. 127, Ann. Cas. 1917D 188 (opinion of Viscount Haldane).

Weight Attaching to Dicta and Decided Cases

In examining the decisions under the Workmen's Compensation Acts, the investigator is impressed with the extraordinary inharmony that exists in respect of the meaning of the statute. Decisions by divided courts are very numerous. *Dennis* v. *White* [1917] A. C. (Eng.) 479, Ann. Cas. 1917E 325; *Herbert* v. *Samuel Fox & Co.,* [1916] A. C. 405, Ann. Cas. 1916D 578; *Mann* v. *Glastonbury Knitting Co.,* 90 Conn. 116, L. R. A. 1916D 86 (in which Mr. Justice Wheeler dissented as to the meaning of "arising out of," etc.); *Clem* v. *Chalmers Motor Co.,* 178 Mich. 340, L. R. A. 1916A 352; *In re De Voe,* 218 N. Y. 318, 113 N. E. 256, L. R. A. 1917A 250; *Venn* v. *New Dells Lumber Co.,* 161 Wis. 370, 154 N. W. 640, Ann. Cas. 1918B 293. And the judges themselves remark upon the conflict between the expressions of decided cases. *Plumb* v. *Cobden Flour Mills Co.* [1914] A. C. 62, Ann. Cas. 1914B 495; *Larke* v. *John Hancock Mut. L. Ins. Co.,* 90 Conn. 303, 97 Atl. 320, L. R. A. 1916E 584; *Griffith* v. *Cole,* (Ia.) 165 N. W. 577, L. R. A. 1918F 923; *Stertz* v. *Industrial Ins. Comm.,* 91 Wash. 588, 158 Pac. 256, Ann. Cas. 1918B 354. Said Viscount Haldane in 1917: "On examining the authorities I find that they are far from harmonious. I deal with some of the more important." *Thom* v. *Sinclair,* [1917] A. C. 127, Ann. Cas. 1917D 188. Where three judges dissented, in a case before the House of Lords, Lord Atkinson said: "I should have thought that this was an absolutely plain case." *Herbert* v. *Samuel Fox & Co.,* [1916] A. C. 405, Ann. Cas. 1916D 578. In this state of disharmony, the Minnesota court refuses to "review the decisions in England and in this country, rapidly increasing in number." *State* v. *District Ct.,* (Minn.) 158 N. W. 713, L. R. A. 1916F 957. And Lord Parmoor says that "there is little use in referring to previous cases." *Herbert* v. *Samuel Fox & Co.,* [1916] A. C. 405, Ann. Cas. 1916D 578. See also the opinion of Viscount Haldane in *Thom* v. *Sinclair,* [1917] A. C. 127, Ann. Cas. 1917D 188, wherein it is stated that "decided cases afford less guidance than usual on such a question."

The precedents under the statute stand discredited, and the judges themselves have been ready to recognize the reason therefor. The Connecticut court notes that "an attempt to frame an all-embracing definition so as to include all injuries arising in the course of one's employment would probably prove its inadequacy under the changing conditions of time." *Larke* v. *John Hancock Mut. L. Ins. Co.,* 90 Conn. 303, 97 Atl. 320, L. R. A. 1916E 584. See also *Heitz* v. *Ruppert,* 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A 344. And it is observed by Lord Parmoor, that "there is a tendency to overload the words of the statute by refinements based on case law." *Herbert* v. *Samuel Fox & Co.,* [1916] A. C. 405, Ann. Cas. 1916D. In the same case Lord Wrenbury says: "No recent Act has provoked a larger amount of litigation than the Workmen's Compensation Act. The few and seemingly simple words 'arising out of and in the course of the employment' have been the fruitful (or fruitless) source of a mass of decisions turning upon nice distinctions and supported by refinements so subtile as to leave the mind of the reader in a maze of confusion. From their number counsel can, in most cases, cite what seems to be an authority for resolving in his favor, on whichever side he may be, the question in dispute. My Lords, to my mind this is labor thrown away. I prefer to go back to the words of the statute, and, guided by certain broad principles which must be taken to be established, to seek to apply those words to the particular case before us." *Herbert* v. *Samuel Fox & Co.,* [1916] A. C. 405, Ann. Cas. 1916D 578. Lord Chancellor Haldane expresses the same opinion: "Having regard to the conflict which exists between judicial opinions expressed in some of the decided cases, the only safe guide appears to me to be the language of the Act of Parliament itself." *Trim Joint Dist. School* v. *Kelly,* [1914] A. C. 667, Ann. Cas. 1915A 104. See also the statements of Lord Shaw of Dunfermline in *Thom* v. *Sinclair,* [1917] A. C. 127, Ann. Cas. 1917D 188. And Lord Dunedin amplifies this position, in saying: "It is well, I think, in considering the cases, which are numerous, to keep steadily in mind that the question to be answered is always the question arising upon the very words of the statute. It is often useful in striving to test the facts of a particular case to express the test in various phrases. But such phrases are merely aids to solving the original question, and must not be allowed to dislodge the original words. Most of the erroneous arguments which are put before the courts in this branch of the law will be found to depend on disregarding this salutary rule. A test embodied in a certain phrase is put forward, and only put forward, by a judge in considering the facts of the case before him. That phrase is seized on and treated as if it afforded a conclusive test for all circumstances, with the result that a certain conclusion is plausibly represented as resting upon authority, which would have little chance of being accepted if tried by the words of the statute itself." *Plumb* v. *Cobden Flour Mills Co.,* [1914] A. C. 62, Ann. Cas. 1914B 495.

And so, after having tried in vain to discover some sound basis of decision, the courts have given the puzzle up. The reported cases, says Lord Buckmaster, have made the mistake of attempting "to define a fixed boundary dividing the cases that are within the statute from those that are without. This it is almost impossible to achieve. No authority can with certainty do more than decide whether a particular case upon particular facts is or is not within the meaning of the phrase." *John Stewart & Son* v. *Longhurst* [1917] A. C. 249, Ann. Cas. 1917D 196. Earl Loreburn puts this rule into practice, for in an important case he cited no authority for his conclusion,—remarking incidentally that "Precedents are of little value on such points, for the facts are almost always distinguishable and reasoning by analogy is dangerous, and the efforts made by courts of law, including this House, to throw light on this difficult Act have often proved disappointing." *Herbert* v. *Samuel Fox & Co.* [1916] A. C. 405, Ann. Cas. 1916D 578. But while asserting that precedents are valueless (*Owners of Ship Swansea Vale* v. *Rice,* [1912] A. C. 238, Ann. Cas. 1912C 899; *Herbert* v. *Samuel Fox & Co.,* [1916] A. C. 405, Ann. Cas. 1916D 578, opinion of Earl Loreburn; *Lancashire, etc., R. Co.* v. *Highley,* [1917] A. C. 352, Ann. Cas. 1917D 200), and that "each case depends on the special circumstances" (*Herbert* v. *Samuel Fox & Co.,* [1916] A. C. 405, Ann. Cas. 1916D. 578, opinion of Lord Parmoor; see also *Stewart* v. *Longhurst,* [1917] A. C. 249, Ann. Cas. 1917D 196, opinion of Lord Dunedin; *Heitz* v. *Ruppert,* 218 N. Y. 148, 112 N. E. 750,

L. R. A. 1917A 344), the courts continue to emphasize, criticise, and distinguish precedents, and also to evolve new explanations that may be suggested by new and different facts. Lord Sumner says in *Lancashire, etc., R. Co.* v. *Highley* [1917] A. C. 352, Ann. Cas. 1917D 200, "In the last analysis each case is decided on its own facts. There is, however, in my opinion, one test which is always at any rate applicable," etc.

Upon this showing it would seem that the principle of Stare Decisis is virtually repudiated; and if this be true, what is to be accepted as the basis for future decisions?

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WIFE AS AFFECTED BY HUSBAND'S CONTRIBUTORY NEGLIGENCE

AFTER standing for nearly forty years, the case of *Thorogood* v. *Bryan* (1849, 8 C. B. 115) was overruled by the Court of Appeal in *The Bernina* (56 L. T. Rep. 450; 12 P. Div. 58), and this decision was affirmed by the House of Lords (*sub nom. Mills* v. *Armstrong*, 58 L. T. Rep. 423; 13 A. C. 1). These cases relate to the rights of passengers in public conveyances, such as omnibuses and ships, to recover damages for injuries by collision or other accident in which the accident is caused by the negligence or default of those in charge of both conveyances. The theory acted on in *Thorogood* v. *Bryan* was that a passenger in a public conveyance is so far identified with the driver of the vehicle in which he is being carried that he is saddled with the consequences of that driver's contributory negligence, and so cannot recover against the owner or driver of the other vehicle in cases where his own driver has been in fault. The passenger was in fact placed in the same position as if he had himself been guilty of contributory negligence. This theory was exploded by *Mills* v. *Armstrong* (*sup.*). Lord Watson said: "The identification upon which the decision in *Thorogood* v. *Bryan* is based has no foundation in fact . . . there is no relation constituted between the driver of an omnibus and its ordinary passengers which can justify the inference that they are identified to any extent whatever with his negligence." And Lord Herschell said: "The very question that had to be determined was whether the contributory negligence of the driver of the vehicle was a defense as against the passenger when suing another wrongdoer. To say that it is a defense because the passenger is identified with the driver appears to me to beg the question when it is not suggested that this identification results from any recognized principles of law. . . . Two persons may, no doubt, be so bound together by the legal relation in which they stand to each other that the acts of one may be regarded by the law as the acts of the other. But the case of the omnibus passenger is not such a case."

It will be noticed that, although these cases relate to passengers in public conveyances, the principle laid down in the House of Lords is just as easily applied to the circumstances of privately owned carriages. Lord Bramwell (though concurring in the decision of the House of Lords) seems to have thought that the rule established as the result of the decision was open to some criticism for the very reason that it would apply to private conveyances. He put several hypothetical cases, apparently by way of a *reductio ad absurdum*. Among them was this: "Suppose the owner's wife is a passenger and injured, can she maintain such an action?"—*i.e.*, against the driver of the other vehicle when her husband's driver is also in fault. Lord Bramwell evidently thought that some way would have to be found of defeating any such supposed right of action in the wife.

This hypothetical case of the owner's wife in *Mills* v. *Armstrong* is referred to in Bevan on Negligence (3rd edit., 1908, p. 178 of vol. 1). After quoting Lord Bramwell's question, the author says: "True, she cannot, for personal injuries; because her position is a wholly exceptional one," and he refers in a footnote to sects. 2 [query 1 (2)] and 12 of the Married Women's Property Act 1882, concluding: "In short, her husband may break her leg, but not her watch." Though this remark is not directly relevant to the question of how far the wife would be affected by the contributory negligence of the husband, it is pretty plain that Mr. Bevan considers that she would be in such a legal relation to the owner of the carriage as to be "identified" with him and so barred by his contributory negligence.

Before the Married Women's Property Acts "a husband had an indefeasible interest in the personal wrongs or torts done to his wife. . . . Where the wrongs were done during marriage, he must have joined with her in the action": (see Eversley on Domestic Relations, 3rd edit., 1906, p. 177). This necessity of his being a co-plaintiff would, of course, formerly have prevented a wife in the most effectual way from suing the owner or driver of a vehicle, when her husband was, as owner or driver of a vehicle in which she happened to be, barred by his own contributory negligence from suing. Now, by sect. 1 (2) of the Married Women's Property Act 1882 the wife can sue, "either in contract or in tort or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff"; but, except for the protection of her separate property, the wife cannot (by sect. 12 of the Act) sue her husband "for a tort." Do these provisions enable a married woman to sue for an injury suffered in a street accident where her husband's carriage is in fault as well as the other vehicle? The question does not seem to have been raised in any reported case in England, but has recently been the subject of a decision of the Court of Appeal in British Columbia. Since the Married Women's Property Act 1882 has been enacted, with immaterial differences, in British Columbia, the case is one of considerable interest for English lawyers: (see *Brooks* v. *British Columbia Electric Railway Company*, 1919, 3 West. Weekly Rep. 109).

The facts of this case were these: The plaintiff (a married woman) was being driven along the street in her husband's motor-car, and the husband was himself driving the car. The motor-car came into collision with a tram-car of the defendants, and the plaintiff was injured. The jury found negligence on the part of the defendants, but found that the plaintiff's husband (the driver of the motor-car) was not guilty of contributory negligence. Judgment was therefore given for the plaintiff. On appeal the court, by majority, held that the verdict as to the contributory negligence was perverse, and would have sent the case down for a new trial if the plaintiff was to be identified with her husband's negligence. Since, however, the majority of the court were of opinion that the contributory negligence of the driver of the motor-car was not in law that of the plaintiff, any such contributory negligence became immaterial, and no new trial was necessary; the appeal was therefore dismissed and the plaintiff held entitled to retain her verdict.

The judgment of the majority of the court is based on *Mills* v. *Armstrong* (*sup.*), which it was held would have been applicable "had the plaintiff been an ordinary passenger in a conveyance driven by a stranger." The crux of the case was the

question whether the situation was altered by the legal relation of husband and wife being introduced, and the answer depended "upon the extent of the change made in the married woman's status by the Married Women's Property Act. After giving the general effect of sects. 1 (2) and 12 of the Act of 1882 (referred to above), it was observed that "one or both of two tortfeasors may, at the option of the person complaining of an injury to the person arising out of their joint negligence, be sued. The plaintiff might proceed against one only of the joint tortfeasors as she has done. . . . The husband has no interest in her cause of action. True, he might, but for his own negligence, have had a cause of action of his own arising out of the same tort, but that has nothing to do with the case. In relation to this action the common law doctrine of the unity of husband and wife is rendered non-existent by the statute." The distinction between the present case and *Mills* v. *Armstrong* (*sup.*), in that the wife here "was, so to speak, the guest of the husband, and not a passenger for hire," was also expressly referred to and held not to be material. The circumstance that part of the plaintiff's claim consisted of a large sum for medical treatment (for which the husband would have been primarily liable) was also held immaterial. The dissenting judge thought, "although not without some hesitation," that the plaintiff was "affected by the negligence of her husband," but the point was not discussed by him at any length.

The reference, in the above-quoted judgment of the majority, to "two joint tortfeasors" seems unnecessary. It is specially pointed out by Lord Bramwell in *Mills* v. *Armstrong* (*sup.*) that "the negligence of the driving is not a joint act. There are two several acts of negligence," and each omnibus owner could be sued separately and independently. From this point of view, the fact that one of the tortfeasors was the plaintiff's husband becomes less important. On the other hand, is it quite certain that the common law doctrine of the unity of husband and wife is abrogated for the purpose of this case? Torts are not completely dethroned from their common law eminence by the Married Women's Property Acts. The Court of Appeal have held that a husband is still liable for torts committed by his wife: (*Earle* v. *Kingscote*, 83 L. T. Rep. 377; (1900) 2 Ch. 585). On the whole, the balance of probability seems to be in favor of the English courts taking the view that a wife is not to be "identified" with her husband's contributory negligence under circumstances such as arose in *Brooks* v. *British Columbia Electric Railway Company*.—*Law Times*.

Cases of Interest

INCREASE IN COST OF LIVING AS AFFECTING DAMAGES FOR PERSONAL INJURIES.—In Noyes *v.* Des Moines Club, 170 N. W. 461, reported and annotated in 3 A. L. R. 605, the Iowa Supreme Court, in refusing to set aside as excessive a verdict for $8000 damages for personal injuries suffered by a person falling down an elevator well, held that the increase in the cost of living and in all the necessities of life over the cost at the time lower verdicts allowing damages for personal injuries were rendered must, to some extent, be taken into consideration in determining whether the verdict in the case at bar was excessive. On this point the court said: "We are invited to make comparison of the verdict returned by the jury herein with verdicts held excessive in numerous cases from other jurisdictions. We have examined a large number of the authorities cited, and some of them may not be in entire accord with the conclusion reached by us in this case; but conditions have changed greatly since many of the cited cases were decided. The immense increase in the cost of living and in all the necessities of life must be, to some extent, taken into consideration in determining whether the verdict was in fact excessive. It may be that plaintiff will entirely recover, and suffer little or no permanent impairment of his health, comfort, or earning capacity; but, under the evidence, the jury could have reasonably found otherwise. The question was peculiarly for the jury, and we do not feel that same should be interfered with by this court."

ORDER FROM SUPERIOR OFFICER AS DEFENSE TO POLICE OFFICER MAKING UNLAWFUL ARREST.—A subordinate police officer participating in a wrongful arrest is not, it seems, absolved from liability therefor by the fact that he is acting under the direct orders of a superior officer. It was so held in Grau *v.* Forge, 183 Ky. 521, 209 S. W. 369, reported and annotated in 3 A. L. R. 642, wherein the court said: "In support of the contention (*a*)it is urged that an inferior police officer is bound to obey the orders and directions of his superior, and that in doing so he is not amenable to the person arrested, although the arrest was wrongful and without warrant of law; and this conclusion is sought to be drawn by analogy from that principle of the law which excuses an individual from liability when called upon by an officer to assist in making an arrest, although the officer was proceeding without authority. . . . We do not doubt the principle of law which, under the circumstances mentioned, excuses a private citizen from liability, however wrongful the arrest might have been; but that principle cannot be extended so as to protect an officer, although subordinate to another, who directed the arrest. . . . When a citizen is called upon to assist an officer in making an arrest, the law makes it his duty to obey and act at once, and he is justified in assuming that the officer is acting within his official duties and under authority duly conferred by the law. To permit a citizen in such cases to delay the arrest by withholding his assistance until he can satisfy himself of the legality of the officer's proceeding would frequently result in the escape of criminals, and would seriously retard the enforcement of the law. Not so with an officer. He is conclusively presumed to know his duty, and to refrain from acting outside of such duty. The announcement of such a principle of law as contended for would greatly imperil the liberties of the citizen, and would in almost every case render the arresting officer immune from the consequences of his unlawful arrest, since it could be easily shown that some officer other than the one making the arrest had given the defendant orders to make it."

RECOVERY OF CAR AS AFFECTING INSURANCE COVERING THEFT OF AUTOMOBILE.—In O'Connor *v.* Maryland Motor Car Ins. Co., 287 Ill. 204, 122 N. E. 489, reported and annotated in 3 A. L. R. 787, it was held that under a policy insuring against automobile theft, and providing for payment sixty days after notice and proof of loss, the recovery of a stolen automobile after the expiration of the sixty days would not defeat liability on the policy. The court said: "The last provision of the policy, which it is particularly necessary to consider in order to reach a correct conclusion on the questions here involved, reads as follows: 'The sum for which this company is liable pursuant to this policy shall be payable sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company.' . . . A policy similar to the one here in question does not seem to have been construed heretofore by the courts of this state. The decisions from other jurisdictions on policies similarly worded may be persuasive as to

the conclusion to be reached, but are certainly not decisive. The correct conclusion on the questions here raised depends largely upon the proper construction to be given to the particular policy here in question. . . . This suit was instituted after the lapse of sixty days from the notice and proof of loss, but after the automobile had been found. Counsel for appellant seem to concede that, if the suit had been instituted before the automobile had been found, under the reasoning of the English cases appellee could have recovered for the full amount of the machine; that is, that the date of the starting of the suit fixed the time of recovery for a total loss, if the machine had not been found before that date. Obviously, in order to make an insurance policy of this kind of value to the owner of the property, there must be some time fixed after which the return of the automobile will not release the company from liability. Automobiles are so generally used in business affairs and other activities of life that public policy requires that a person having a theft policy should not be compelled to wait indefinitely on the chance of having the stolen automobile recovered, or be compelled to incur the expense of buying a new one and thereafter taking the old one back, if recovered. Fairly construed, we think this insurance policy intended to fix the date at sixty days after the notice and satisfactory proof of loss had been received by the company,—in other words, to fix the date at which the insured would not be compelled to take the stolen car back, even if recovered, at the date when the insurance money was agreed to be paid."

TAKING INTOXICATING LIQUOR FROM PERSON OF DEFENDANT AS SALE.—In Scoggins *v.* United States, 255 Fed. 825, the United States Circuit Court of Appeals, Eighth Circuit, reversed a judgment convicting the defendant of selling whisky unlawfully on the ground that the evidence showed only a taking of the liquor from the person of the defendant, and not a sale by him to the alleged buyer. After reviewing the facts the court said: "One party cannot make a contract of sale. No such contract can be made without assent of the minds of two parties at the same time to the sale and to the terms of the sale, to the subject-matter and the consideration of the sale; and as the alleged contract here was illegal, and its making criminal, the legal presumption was that the defendant did not make it, and this presumption prevailed until he was proved to have done so beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction. Our search for substantial evidence in this record that the defendant ever consented to sell any whisky to McDaniel has been in vain. The latter's testimony goes no further than this: That he saw the defendant on a side street on a Saturday night; that he put his arms around him and took a bottle of whisky out of the defendant's pocket; that he told him he would see him Tuesday; that he offered to pay him something on that day, and the defendant refused to take the money. The statements in his testimony that he bought the whisky and that he said something about paying for it, to wit, that he would see the defendant Tuesday, are nothing but his inferences from what he testified was said and done on that Saturday night, and they are immaterial. There is no evidence here that the defendant ever consented to the taking of the whisky by McDaniel; there is no evidence that he consented to receive any promise to pay any price or any consideration for the whisky; there is no evidence of the agreement of the minds of McDaniel and the defendant to the amount of the pretended price for it, or to any contract of any kind about it. Not only this, but the evidence is not only as consistent with the innocence of the defendant as with his guilt,—as consistent with the conclusion that he did not consent to make a contract to sell the whisky as that he did,—but it is more so. It is more consistent with the view that on that Saturday night McDaniel and the defendant were drinking together in a jovial mood; that such a thought as the selling of whisky to his companion never entered the mind of the defendant."

LIABILITY OF RAILROAD COMPANY FOR FAILING TO AID IN EXTINGUISHING FIRE SET BY ENGINE.—In Ginter *v.* Pennsylvania R. Co., 262 Pa. St. 474, 105 Atl. 824, reported and annotated in 3 A. L. R. 505, it was held that a railroad company whose engine, without negligence on its part, set fire to property adjoining its right of way, was not liable for the destruction of timber on nonadjoining property to which the fire spread because the crew of the train which started the fire refused to assist in extinguishing it. The court said inter alia: "We have repeatedly held that, where the railroad company takes the necessary precautions and employs a proper mechanism to prevent the escape of sparks from their engines, there can be no recovery of damages for any injury which results simply from the throwing of sparks, provided the mechanism is in proper condition. It is also true that one of the elements of damage taken into consideration by a jury when land is appropriated under the exercise of eminent domain by a railroad company is the possibility of fires which may occur without negligence on the part of the railroad company. Philadelphia & R. R. Co. *v.* Yeiser, 8 Pa. 366. If, therefore, the mere existence of a fire on land adjoining the right of way of a railroad company imposes no liability on the company unless there be proof of negligence, a fortiori no liability arises when the property destroyed is on land which is not adjacent to the right of way, but is separated therefrom by the land of several intervening owners, unless there be proof of actual negligence. If the fire is ignited by reason of the negligence of the railroad company, a different situation would arise, but where it is conceded, as here, that the fire was not started by the negligent act of the company, it does not owe the duty of care, protection, and vigilance to the plaintiff to the degree that it is liable in damages under the particular circumstances proved in this case. It is damnum absque injuria. . . . We are, therefore, of the opinion that in the case at bar the defendant company cannot be held guilty of negligence because of the failure of its crew to leave their trains and engage in the work of extinguishing the fire started on lands adjoining its right of way. To enforce this measure of duty would be to impose too heavy a burden on the company and one that would seriously interfere with the rights, not only of the company, but of the public as well. The delay incident to the movement of trains would be intolerable. For another reason it is equally true that there can be no recovery by the plaintiffs in this case. The negligence alleged is the negligence of the train crew in not extinguishing the fire. This duty was not within the scope of employment of the train crew. They were employed for the purpose of operating the train and moving it from one destination to another. Their employment related wholly to the movement of the trains. Their duties were confined to this and to this alone. It could not be successfully alleged that the terms of their employment contemplated the performance of any such duties as that of extinguishing fires. It is a well-recognized principle of the law of negligence that an employer is not liable for any act or omission of the employee that is not within the scope of his employment."

CONSTITUTIONALITY OF LEGISLATION DESIGNED TO PREVENT LARCENY OF LIVE STOCK.—In Park *v.* State (Nev.), 178 Pac. 389, reported and annotated in 3 A. L. R. 75, a statute making

it a felony to possess the hide of any cow, bull, steer, calf, or heifer, from which hide the ears have been removed or the brand defaced, was held to be unconstitutional as depriving the owner of his property without due process of law. The court said inter alia: "There is no ground for dissent from the conclusion that in this enactment the evil sought to be reached is the larceny of cattle. Its purpose is obvious from the wording of the statute and the conditions prevailing in this state. The business of raising cattle is one of the principal industries of the state, and has to do with property of a kind commonly subjected to the crime of larceny. Its value, the ease with which it can be moved from one locality to another, and its identity, destroyed by killing and skinning the animal, or by changing, mutilating, or removing the marks and brands, furnish the inducement for thieves. Particularly is the larceny of cattle a common crime in Nevada, where, as in other grazing states, large numbers of stock wander over wide expanses of range lands, unkept by herdsmen, and often unseen by the owner or his agents for long periods of time during the grazing season of the year. These range conditions create favorable opportunities for the theft of cattle, as detection is difficult and often impossible, and the loss to stockmen is increased by the resultant acts of larceny. When a stolen animal is killed it loses all marks of identity as soon as the hide bearing the earmarks and brand is removed. The legislature, recognizing these conditions and the difficulty that generally follows in proving identity and ownership, passed the enactment under consideration for the purpose of supplementing the law of larceny of cattle. . . . Does this statute deprive a person of his property without due process of law against the guaranties of § 1, article 14, of the Federal Constitution, and § 8, article 1, of the Constitution of this state? We are of the opinion that it does. True the statute under consideration does not work an active appropriation of hides from the owner, but it limits their use to an extent that destroys their value. . . . Hides of cattle constitute property, and are a valuable product of the cattle-raising business which is one of the principal industries in this state. Rawhide is used in a variety of ways by stockmen and others in making bridle reins and lariats, and in making and repairing various kinds of ranch equipment. Aside from the uses mentioned and which are sometimes crude, it is true, but by no means obsolete in this state, it is used for covering saddle trees, and, when converted into leather, for fully equipping the saddle. When converted into leather by the art of tanning its uses are many and diversified, and the manufacture of leather is a very important industry of the country. It is clear from the restrictions laid upon hides of the animals mentioned in the statute that they cannot be utilized for any of these purposes in this state without violating its provisions and subjecting the possessor to the penalty of a felony. And it is difficult to perceive how they can be used to obtain any benefit from the product, except by shipping it out of the state, for to devote the hide to any other use whatever would necessarily involve the removal of the ears and mutilation of the brand. This appears to us to be an unnecessary invasion of property rights, and therefore an unreasonable exercise of the police power."

LIABILITY OF PARENT FOR INJURY TO CHILD'S GUEST BY NEGLIGENT OPERATION OF AUTOMOBILE.—In Johnson *v.* Evans, (Minn.) 170 N. W. 220, reported and annotated in 2 A. L. R. 891, it appeared that the defendant owned and kept on his premises a five-passenger automobile for business purposes, and also for the comfort and pleasure of the members of his family. His minor son was authorized and permitted to operate and use it for either purpose. While the son was so using the car, under the defendant's permission, his negligent and careless operation thereof caused injury to the plaintiff, who was riding therein as his guest. It was held that, though using the car for his own personal pleasure and that of his friends, the son was the servant of the defendant within the meaning of the law, and that the defendant was liable for his negligent misconduct in operating the same. Said the court: "The evidence offered by defendant shows that the son stated to defendant that he desired to take the car to go to Ada, and without inquiring as to the purpose of the trip or the imposition of restrictions upon the use of the car on the particular occasion, the request was granted. The purpose of the son was one of pleasure, and the car was devoted to that purpose until the accident happened. And since defendant interposed no restrictions or limitations upon the use of the car, it should not be said as a matter of law that there was a departure from the authority granted, merely because the pleasure drive took the son and party beyond the village of Ada. The record furnishes no suggestion that the permission to use the car would not have been granted had the son made full disclosure of his plans. In fact it affirmatively appears that express permission had previously been granted for a like use of the car, namely, that of attending dances in the neighborhood. It is not fair to assume that the request in this instance would have been denied had the dance at Borup or Hadler been mentioned to defendant. And since there was no departure from the purpose for which defendant kept the car, the question whether the son exceeded his authority to an extent to discharge defendant from responsibility was, at least, one of fact. The verdict to the effect that there was no such departure is supported by the evidence. The case, in point of substance, comes within the rule applied by the authorities generally. Ploetz *v.* Holt, 124 Minn. 169, 144 N. W. 745; Kayser *v.* Van Nest, 125 Minn. 277, 51 L. R. A. (N. S.) 970, 146 N. W. 1091; Jensen *v.* Fisher, 134 Minn. 366, 159 N. W. 827; McNeal *v* McKain, 41 L. R. A. (N. S.) 775, and note, 33 Okla. 449, 126 Pac. 742; Denison *v.* McNorton, 142 C. C. A. 631, 228 Fed. 401; Griffin *v.* Russell, 144 Ga. 275, L. R. A. 1916F, 216, 87 S. E. 10, Ann. Cas. 1917D, 994. The important inquiry in this class of cases, governed generally by the law of master and servant, is whether the son had express or implied authority to use the car on the particular occasion, and whether the use being made of it was within the general purpose for which it was kept by the parent. And by the weight of authority and reason the liability exists, where the car is kept for the pleasure and comfort of the family, though a single member thereof be using it for his own exclusive pleasure. Kayser *v.* Van Nest, 125 Minn. 277, 51 L. R. A. (N. S.) 970, 146 N. W. 1091; Birch *v.* Abercrombie, 74 Wash. 486, 50 L. R. A. (N. S.) 59, 133 Pac. 1020; Lewis *v.* Steele, 52 Mont. 300, 157 Pac. 575; Davis *v.* Littlefield, 97 S. C. 171, 81 S. E. 487; Griffin *v.* Russell, 144 Ga. 275, L. R. A. 1916F, 216, 87 S. E. 10, Ann. Cas. 1917D, 994. Such cases as Slater *v.* Advance Thresher Co., 97 Minn. 305, 5 L. R. A. (N. S.) 598, 107 N. W. 133, and Provo *v.* Conrad, 130 Minn. 412, 153 N. W. 753, are not in point. In those cases, there was an undisputed departure from the uses for which defendant therein kept the automobile. In the case at bar, there was no departure from such purposes at all; it was being used until the accident happened, for the pleasure of the defendant's son."

POWER OF DOMINATING STOCKHOLDER TO DIVERT FUNDS OF BUSINESS CORPORATION TO HUMANITARIAN PURPOSES.—Minority stockholders have a right to force a declaration of dividends of a material portion of the surplus by a corporation dominated

by one stockholder, which has a surplus of almost a hundred and twelve million dollars, cash on hand of nearly fifty-four million, and a business producing net profits of nearly sixty millions per year, where the declared policy of the dominating stockholder is to use the surplus for increasing the size of the plant for the semi-eleemosynary purpose of reducing the selling price of the product below what is necessary, for the benefit of the public, and the increase of output for the benefit of employees at high wages, all of which will make the business less profitable. It was so held in Dodge *v.* Ford Motor Co. (Mich.) 170 N. W. 668, reported and annotated in 3 A. L. R. 413, wherein the court said in the course of a lengthy opinion: "The record, and especially the testimony of Mr. Ford, convinces that he has to some extent the attitude towards shareholders of one who has dispensed and distributed to them large gains, and that they should be content to take what he chooses to give. His testimony creates the impression also, that he thinks the Ford Motor Company has made too much money, has had too large profits, and that, although large profits might be still earned, a sharing of them with the public, by reducing the price of the output of the company, ought to be undertaken. We have no doubt that certain sentiments, philanthropic and altruistic, creditable to Mr. Ford, had large influence in determining the policy to be pursued by the Ford Motor Company—the policy which has been herein referred to. It is said by his counsel that 'although a manufacturing corporation cannot engage in humanitarian works as its principal business, the fact that it is organized for profit does not prevent the existence of implied powers to carry on with humanitarian motives such charitable works as are incidental to the main business of the corporation.' And again: 'As the expenditures complained of are being made in an expansion of the business which the company is organized to carry on, and for purposes within the powers of the corporation as hereinbefore shown, the question is as to whether such expenditures are rendered illegal because influenced to some extent by humanitarian motives and purposes on the part of the members of the board of directors.' In discussing this proposition, counsel have referred to decisions such as Hawes *v.* Oakland (Hawes *v.* Contra Costa Water Co.), 104 U. S. 450, 26 L. ed. 827; Taunton *v.* Royal Ins. Co. 2 Hem. & M. 135, 71 Eng. Reprint 413, 33 L. J. Ch. N. S. 406, 10 Jur. N. S. 291, 10 L. T. N. S. 156, 12 Week. Rep. 549; Henderson *v.* Bank of Australia, L. R. 40 Ch. Div. 170, 58 L. J. Ch. N. S. 197, 59 L. T. N. S. 856, 37 Week. Rep. 332; Steinway *v.* Steinway & Sons, 17 Misc. 43, 40 N. Y. Supp. 718; People ex rel. Metropolitan L. Ins. Co. *v.* Hotchkiss, 136 App. Div. 150, 120 N. Y. Supp. 649. These cases, after all, like all others in which the subject is treated, turn finally upon the point, the question, whether it appears that the directors were not acting for the best interests of the corporation. We do not draw in question, nor do counsel for the plaintiffs do so, the validity of the general proposition stated by counsel, nor the soundness of the opinions delivered in the cases cited. The case presented here is not like any of them. The difference between an incidental humanitarian expenditure of corporate funds for the benefit of the employees, like the building of a hospital for their use and the employment of agencies for the betterment of their condition, and a general purpose and plan to benefit mankind at the expense of others, is obvious. There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public, and the duties in law he and his co-directors owe to protesting minority stockholders. A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes."

News of the Profession

DEAN OF DUTCHESS COUNTY, NEW YORK, BAR DEAD.—Walter Farrington, the oldest Dutchess County lawyer, died Nov. 25. His age was ninety years.

THE KEOKUK, IOWA, BAR ASSOCIATION at a recent luncheon was addressed by Federal Judge Joseph W. Woodrough of Omaha, on the subject of the mob insurrection at Omaha in October.

OHIO JURIST DEAD.—Edmond Bothwell Dillin of Columbia, Ohio, judge of the Franklin County Common Pleas Court, died in November. He was born at Ironton and was fifty years of age.

SPOKANE BAR ASSOCIATION.—Recent speakers at the luncheon of the Spokane Bar Association included Congressmen Webster, B. H. Keyir, J. T. Burcham and Dix H. Rowland, chairman of the state board of bar examiners.

DEATH OF ST. PAUL LAWYER.—James R. Hickey, a widely known St. Paul lawyer, is dead. He was vice-president of the State Fair Board. He was born at Graceville, Minnesota, and was forty-six years of age.

CHANGES IN KENTUCKY JUDICIARY.—Governor Black of Kentucky has appointed Henry R. Prewitt of Mt. Stealing circuit judge of the judicial district in which he resides. He has been at the bar for more than twenty-five years.

ILLINOIS JUDICIAL CHANGES.—The Illinois Supreme Court has appointed Oscar E. Heard of Freeport, a judge of the Appellate Court, Second District, to succeed the late Duane J. Carnes, whose death occurred in Ottawa, Illinois, October 29.

FARGO LAWYER DIES.—John S. Watson of Fargo, head of the law firm of Watson, Young & Conmy, and prominently identified with the Russell Miller Milling Company and the Wells-Dickey Company of Minneapolis, died in the early part of November.

NEW MEXICO LAWYER MOVES TO ARIZONA.—After nine years of service in the federal land office, B. H. Gibbs, since 1915 chief of the field division with headquarters in Santa Fe, has resigned to open a law office in Phœnix.

DEATH OF MASSACHUSETTS LAWYER.—Daniel N. Crowley of Danvers, Massachusetts, prominent as a lawyer and in Democratic politics, died November 16. He was born in Danvers in 1854 and was educated at Holy Cross College.

ST. LOUIS LEGAL AUTHOR DIES.—Everett W. Pattison, 80 years old, died at St. Louis in November. He was born in Waterville, Maine, but settled in St. Louis after serving in the civil war. Since 1881 most of his time had been devoted to law writing.

OKLAHOMA BAR ASSOCIATION.—The Oklahoma Bar Association met at Oklahoma City in December. Harry H. Rogers, the president, was in charge of the meetings, and the speakers included Joseph Stone of Muskogee who spoke on "Indian Land Titles,"

Harry D. Smith of Tulsa who spoke on the "Income Tax," and James A. Veasey of Tulsa who spoke on "Oil and Gas Legislation."

SIOUX CITY BAR ASSOCIATION.—At the annual banquet of the Sioux City, Iowa, Bar Association officers elected for the ensuing year were: Carl R. Jones, president; J. A. Johnson, treasurer, and A. W. Johnson, secretary; J. P. Shoup, William Milchrist, Fred Schmidt, Guy T. Struble and T. P. Cleary were chosen for the executive council.

ILLINOIS LAWYERS MEET.—Members of the Fourth Judicial Bar Association met in annual convention at Rock Island, Illinois, in November. Fourteen counties were represented. S. R. Kenworthy, president of the association, presided. Addresses were made by Frederick A. Brown of Chicago, president of the state bar association, and Justice Orrin N. Carter of the Illinois Supreme Court.

IOWA LAWYERS WHO HAVE DIED.—A. N. Botsford, 71 years old, for many years one of the leading lawyers of Fort Dodge, died Nov. 23. He had practiced law in Fort Worth since 1877 and was dean of the Webster county bar. He was a member of the firm of Botsford, Healy & Healy. A. A. McGarry, a Des Moines attorney for the past 15 years, died Nov. 27. Mr. McGarry went there from Indianola. He ran for district court judge at the last election.

AMERICAN BAR ASSOCIATION.—Major William A. Hayes, of Milwaukee, Wisconsin, has been appointed a member of the committee on jurisprudence and law reform of the National Bar Association. During the war Major Hayes served in the judge advocate general's department. He is chief counsel for the Sault Ste. Marie division of the Canadian Pacific Railroad.

DINNER IN HONOR OF ILLINOIS SUPREME COURT.—The Justices of the Supreme Court of Illinois were recently entertained by the Illinois Bar Association at a dinner in the Congress Hotel, Chicago. Addresses were made by Chief Justice Frank K. Dunn, Justice Floyd E. Thompson, Judge Kenesaw M. Lauder and Judge Louis FitzHenry of the United States District Court and James M. Sheean, president of the Chicago Bar Association.

DEATHS AMONG MINNEAPOLIS ATTORNEYS.—Leslie S. Ogden of Minneapolis, formerly assistant county attorney under James Robertson, died November 28, at the age of 48. He was born in Hawkesbery, Ontario. W. H. Norris of the same city died November 9, at the age of 87. He was born in Hollowell, Maine, and was graduated from Yale College and Harvard Law School. He commenced the practice of law at Green Bay, Wisconsin. For many years he was attorney for the Chicago, Milwaukee and St. Paul Railroad.

OREGON BAR ASSOCIATION.—The Oregon Bar Association met at Portland, November 17. Oscar Hayter of Dallas, president of the association, delivered the annual address; Edward W. Hope, dean of the law school of the University of Oregon, spoke on "Legal Education." Other speakers included Jesse F. Brumbaugh of the Oregon Agricultural College, C. E. Ingalls, editor of the Corvallis *Gazette-Times*, and president of the state editorial association, and Judge John P. Kavanagh of Portland. A conference of Circuit judges was held at the same time.

DEATHS AMONG CHICAGO LAWYERS.—Edward R. Woodle of Chicago died Dec. 1. He had practiced in Chicago since 1876 and was 66 years of age. From 1878 to 1892 he was attorney for the Illinois Central Railroad. Davis S. Wegg, a well known railroad and corporation lawyer, is also dead. He was born in St. Thomas, Canada, in 1847 and took his law course at the University of Wisconsin. He commenced the practice of law in Milwaukee, and was at one time president of the Chicago and Northern Pacific Railroad Company.

KANSAS BAR ASSOCIATION.—Speakers for the annual meeting of the Kansas Bar Association in Topeka, January 30-31, have been announced as follows: "The Evolution of Property Rights" is to be discussed by Senator George W. Wark of Caney. "Courts of To-day" is a subject assigned to W. D. Vance, of Belleville. Judge Richard E. Bird of Wichita will discuss "The Community, the Bar and the Bench." James A. Allen of Chanute will tell the lawyers of "Non Par Stock." "Evidential Facts Contained in Disputed Documents" is the subject of an address by J. C. Shearman of Wichita. Judge John C. Hogin of Belleville is president of the association.

DEATHS AMONG NEW YORK CITY LAWYERS.—Daniel Tomlinson Kimball is dead at the age of 67. He was a native of New York city. William H. Harris of the same city, senior member of the firm of Harris & Toune, died in November. He was born in Delaware, Ohio, son of the late Bishop Harris of the Methodist Church, and was vice-president of the New York Law Institute. Another death is that of Joseph A. Beecher, a member of the famous Beecher family of Connecticut. He practiced law for thirty years in New York city. Robinson Leech died Dec. 1. He was a graduate of Yale, class of 1906. Adolph L. Pincoffs, of the law firm of David, Jessup & Pincoffs, is also dead. He was born in Rotterdam, Holland, in 1852. Before coming to New York Mr. Pincoffs practiced law in Rotterdam, having received the degree of LL.D. from Leyden University. Coming to New York in 1879, he was admitted to the bar after studying in Columbia Law School. He specialized in copyright and trade mark matters involving French and Dutch laws.

FEDERAL JUDGES GUESTS OF ST. LOUIS LAWYERS.—Judge C. B. Faris, newly appointed Judge of the United States District Court in St. Louis, and his predecessor, Judge David P. Dyer, who remains in service as an extra Judge, were guests of honor last night at the St. Louis Bar Association's first open meeting of the winter. Judge George W. English of the United States District Court in East St. Louis also was a guest. The proceedings in the main were informal, but a serious note was introduced when Judge Dyer referred to the coal miners' strike and warmly praised the Attorney-General of the United States for his stand in announcing that he would rigidly enforce the injunction order of Judge Anderson of Indiana if miners' union officials refuse to call off the strike.

CINCINNATI BAR ASSOCIATION.—At a meeting of the association held recently, Simson M. Johnson was elected president. Other officers chosen were: Vice-presidents, Province M. Pogue, Frank F. Dinsmore, Albert H. Morrell, Alfred G. Allen and Constant Southworth; recording secretary, Ben. B. Nelson; corresponding secretary, Thomas B. Paxton, jr.; treasurer, Philip Hinkle. Judge Maurice H. Donohue, who succeeded Judge John W. Warrington on the United States Circuit Court of Appeals; Judge Warrington; John Weld Peck, who succeeded the late Judge Howard C. Hollister as United States District judge, and Chief Justice Hugh Nichols, of the Ohio Supreme Court, were the principal speakers at the dinner. Judge Warrington, in his address, said that this was a period when bar associations should stand for Americanism as never before. "I have carried a musket in my time and I'll gladly do it again if my Government needs me," he declared. Tributes were paid to the memory of Judge Hollister.

English Notes*

FORTUNE-TELLING AND VAGRANCY.—Considerable prominence has been given in the lay Press to the decision of Mr. Ralph Banks, K.C., at the South-Western Police Court, dismissing a summons under the Vagrancy Act 1824 for professing to tell fortunes with intent to deceive. The ground on which the learned magistrate acted was that he was satisfied that the defendant believed that she had the power of foretelling the future. The dismissal of the charge was therefore the logical outcome of the decision of the Divisional Court in Davis *v.* Curry (117 L. T. Rep. 716), where Mr. Justice Darling and Mr. Justice Sankey held that an intention to deceive was one of the ingredients of the offense, though Mr. Justice Avory thought otherwise, considering that the question of bona fides was irrelevant. The present case apparently was one of those referred to by Mr. Justice Darling when he said, "I can imagine very few cases in which the magistrate would find it to be his duty to acquit," but, owing to the undoubted harm that results from the actions of palmists, clairvoyants, and the like, an absolute prohibition would be welcome.

SPECIFIC BEQUESTS OF FURNITURE.—There are perhaps few respects in which testators are more remiss than in gifts of furniture and household effects. The language of the bequest is often so defective that it is difficult to say to what articles it extends. The recent case of Re Baroness Zouche; Dugdale *v.* Zouche (121 L. T. Rep. 82; (1919) 2 Ch. 178) may be taken as an instance of this. There the bequest was of the "furniture, pictures, plate, and articles of vertu and curiosity at Parham House at the time of my death." It was held by Mr. Justice P. O. Lawrence, in a cogent and lucid judgment, that the bequest did not include a collection of books and manuscripts in a large library, as a whole, but that it did include rare antique and artistic books and manuscripts, as being articles of vertu or curiosities; and an inquiry was directed as to whether any of them came within that definition. His Lordship also held that the bequest did not include plate which, on the letting of the house furnished, was deposited with bankers for safe custody, and remained so deposited after the termination of the tenancy, and until the death of the testatrix; also that it did not include rare books lent by the testatrix to the British Museum, and which were still there at her death.

THE FREEDOM OF THE SEAS.—M. Clemenceau, in his recent speech in the French Chamber of Deputies in explanation of the Treaty of Peace, in a singularly noble passage said: "As regards the freedom of the seas, England had no need to demand it of anyone. She already had it, and there was no one to dispute it with her." M. Clemenceau, albeit unconsciously, echoed a celebrated declaration of Queen Elizabeth nearly three centuries and a half ago. When Mendoza, the envoy of Spain at the English Court, complained to Queen Elizabeth of the intrusion of English vessels into the waters of the Indies, she admonished him that "the use of the sea and air is common to all; neither can a title to the ocean belong to any people or private persons forasmuch as neither nature nor public use and custom prevented any possession thereof." Grotius gave sanction to Queen Elizabeth's declaration by reviving in his Mare Clausum, published in 1609, the old doctrine of Roman law that there can be no property in anything without occupation, to which the vagrant waters of the ocean cannot be subjected. The broad statement that the sea could not be made the subject of property Grotius no doubt qualified at a later day by the necessary admission that such limited portions of it as gulfs and marginal waters may be when bearing the proper relation to the adjacent land. As thus modified, the Grotian doctrine, which was an enunciation of Queen Elizabeth's declaration, has become the rule, after much contention, of modern international morality.

THE LAW OF PRESCRIPTION IN CRIMINAL CASES.—The arrest in the United States of a man on a charge of murder perpetrated three-and-twenty years ago will remind us, says the *Law Times*, that it is one of the peculiarities of English law, and of systems based on that law, that there is no general law of prescription in criminal cases. The maxim of our law has always been *Nullum tempus occurrit regi*, and, as a criminal trial is regarded as an action by the King, it follows that it may be brought at any time. "This principle," writes Sir Fitzjames Stephen, "has been carried to great lengths in many well-known cases. In the middle of the last [eighteenth] century Aram was convicted and executed for the murder of his child thirty-five years after his crime. In 1802 Governor Wall was executed for a murder committed in 1782. Not long ago [the learned judge was writing in 1882] a man named Sherward was executed at Norwich for the murder of his wife more than twenty years before, and I may add as a curiosity that at the Derby Winter Assizes in 1863, I held a brief for the Crown in a case in which a man was charged with having stolen a leaf from a parish register in the year of 1803. In this instance the grand jury threw out the bill." There are a very few statutory exceptions to this rule, as in prosecutions for blasphemy, offenses against the Riot Act, illegal drilling, certain offenses against the Game Laws, and offenses punishable on summary conviction. In one instance a limitation of the time within which a prosecution must be instituted is based on the highest constitutional principles in favor of the liberty of the subject. Under the provisions of the great statute of 1695 for regulating trials for treason (7 and 8 Will. III, c. 3, ss. 5, 6), prosecutions for high treason, other than treason by assassinating the Sovereign, must be prosecuted within three years.

SOLDIERS' NUNCUPATIVE WILLS.—The subject of soldiers' nuncupative wills—so important in these times of perpetual warfare—was briefly dealt with by Mr. Justice Horridge, in the early part of the past year, in the case of Re Stable; Dalrymple *v.* Campbell (120 L. T. Rep. 160; (1919) P. 7). But his Lordship was afforded the opportunity of going with much greater minuteness into the question of the validity of such wills in the more recent case of Godman *v.* Godman (121 L. T. Rep. 255). In the former case, his Lordship decided that a soldier who is in expeditione, although an infant and not entitled to the property in question until attaining a certain age, can nevertheless make a valid nuncupative will disposing of his vested interest in such property by expressing a definite desire as to its disposition; and, further, that it is unnecessary to prove that he knew at the time either that he was making a will or that he had the power to make one. From that extremely wide enunciation of opinion as to what the law is, Mr. Justice Horridge did not flinch in the remotest degree when pronouncing his judgment in the subsequent case. The test which his Lordship had declared in the former case was unhesitatingly repeated by him as the true one: Whether the soldier intended to give expression to his wishes as to what should be done with his property in the event of his death, is all that has to be ascertained in order to render a nuncupative will of the soldier capable of being admitted to probate. In the present case a

*With credit to English legal periodicals.

soldier who was a prisoner of war in Germany, and who had previously executed a valid written will and codicil, subsequently wrote, whilst a prisoner, an unexecuted testamentary paper varying the dispositions and dealing both with realty and personalty. He died before the date of the Wills (Soldiers and Sailors) Act 1918 (7 & 8 Geo. V, c. 58). It was decided by Mr. Justice Horridge that the unexecuted testamentary paper was a valid soldier's will, although it was only in the form of an instruction for the variation of the previous will, the true test of the validity of a soldier's will being that laid down in Re Stable; Dalrymple *v.* Campbell (ubi sup.). But as realty could not pass under a soldier's will prior to the Act of 1918, and as the unexecuted paper, which dealt both with realty and personalty, was written and the soldier died before that Act came into operation, its admissibility to probate had to be refused. The question of admissibility depended upon the decision in Tudor *v.* Tudor, sub nom. Gillow and Orrell *v.* Bourne (4 Hagg. Eccl. 192). And his Lordship considered that the soldier's intention would be defeated if effect were given only to the disposition of personalty, having regard to the fact that the realty and personalty were indivisibly connected in the unexecuted paper. Compelled as the learned judge was by long-established authority to arrive at that conclusion, that in nowise detracts from his ruling on the main question whether the unexecuted paper was a valid will. His Lordship deemed himself warranted in the opinion to which he gave utterance by authorities such as Bartholomew and Brown *v.* Henly (3 Phil. 318), Masterman *v.* Maberley (2 Hagg. Eccl. 247), In the Goods of Slim (63 L. T. Rep. 229; 15 P. Div. 156), and In the Goods of Joseph Baxter (87 L. T. Rep. 748; (1903) P. 12). And he adhered to the view which he had expressed in Re Stable; Dalrymple *v.* Campbell (ubi sup.), thinking that his decision in that case was right.

HEARSAY.—Viscount Haldane in his reminiscences with respect to the diplomatic communications and understandings between Great Britain and Germany previous to the war, published in the *Westminster Gasette*, remarks that much credence has been heretofore placed on "hearsay," which a well-known judicial rule excludes from admission in legal proceedings. Sir Fitzjames Stephen has observed that certain classes of cases which "in common life would usually be regarded as relevant are excluded by the law of evidence," and amongst them "the fact that a person not called as a witness has asserted the existence of any fact—in other words, hearsay." The exclusion of hearsay from the consideration of public affairs is unthinkable, and would be absolutely contrary to the spirit of the British Constitution, in accordance with which common repute is in itself a ground for the institution of impeachment proceedings. Hearsay is regarded as relevant in matters of state and of national well-being, which undoubtedly come within the category of matters with which we have to deal "in common life." A gentleman who had attained great eminence at the Irish Bar and was subsequently Lord Chancellor of Ireland entered the House of Commons for the first time when holding the position of Attorney General. He was little acquainted with the methods of parliamentary discussion, and created great merriment by the *naïveté* of his conclusion in following for the first time a parliamentary debate—namely, that the rules of evidence were absolutely disregarded. Sir Fitzjames Stephen thinks that the considerations which probably justify the rule excluding hearsay are "the importance of shortening proceedings, the importance of compelling people to procure the best evidence they can, and the importance of excluding opportunities of fraud," but, he adds, Baron Parke's illustrations of the operation of this rule in Doed. Wright *v.* Tatham in 1857 (7 A. & E. 313 408; 4 Bing. N. C. 489-574) "prove that in some cases it excluded the proof of matter which but for it would be regarded not only as relevant to particular facts, but as good grounds for believing in their existence." Lord Finlay, speaking in the House of Lords as Lord Chancellor on the 13th March 1917, in moving the second reading of the Titles held by Enemies Bill, which became law in the November following, justified departure from the observance of the rules of evidence in public affairs in certain cases, even when such cases would *primâ facie* be regarded as matters calling for judicial decision. Lord Finlay said: "The committee to be constituted under the provisions of the Bill are not to be bound by the law of evidence (in arriving at a decision). The laws of evidence have, of course, been very valuable in the courts of law, but I submit to your Lordships that the present case is one in which their application may to advantage be dispensed with. For this reason we are engaged in war. It might be difficult, if not impossible, to get the necessary legal evidence in the matters to which the attention of the committee is under this Bill to be directed. It was said by a brilliant writer that the rules of evidence exclude information on which every man would act in the most important affairs of life, and the fact that we are not at peace, but at war, would of course intensify the difficulty of establishing these facts, which, however, are capable of being ascertained beyond all reasonable doubt."

DEDUCTION OF INCOME TAX FROM ANNUITY.—With income tax on unearned incomes at its present rate, attempts are made to escape the payment of it that were unheard of in times less ruinous. That doubtless accounts for the circumstance that no authority was able to be cited in the recent case of Re Cain; Cain *v.* Cain, in which the precise question that was there raised has come before the courts: Was the recipient of an annuity entitled to payment of the same free from the deduction of income tax, or only subject to such deduction, there being a direction to pay the income of a trust fund to the extent of, but not exceeding, a specified sum, with no mention at all of deductions of any kind whatsoever as in some of the reported cases. Inasmuch as the decision of the Court of Appeal in the case, affirming that of the Deputy Vice Chancellor of the County Palatine of Lancaster, must be applicable to settlements and wills innumerable, it is of the widest possible importance. And it will serve, moreover, as a warning to settlors and testators who might otherwise be apt to overlook the fact that the prodigious increase in income tax renders it expedient for them to consider whether annuitants shall or shall not receive their annuities in full without any deduction on account of income tax. The facts of the case were that certain premises were to be held in trust, in a certain declared event, to pay the income to the extent of but not exceeding £2000 to the widow, if any, of a named person during her life so long as she should remain a widow, and provided that she would provide for, educate, and bring up the children of the marriage during their respective minorities. Nothing was said about her getting "a clear annuity," as in Re Loveless; Farrer *v.* Loveless (119 L. T. Rep. 24; (1918) 2 Ch. 1), nor an annuity "free of all duties" as in Re Saillard; Pratt *v.* Gamble (117 L. T. Rep. 545; (1917) 2 Ch. 401), nor "without any deduction whatsoever" as in similar cases. But the annuity was derivable from shares in a trading company, out of the dividends produced whereby income tax had been deducted at the source—less income tax in accordance with the statutory provisions—the dividend being received by the trustees of the settlement. And that cir-

cumstance was (inter alia) laid hold of as a reason why the widow was entitled to receive the sum of £2000 annually free from income tax. But Lord Justice Warrington felt no difficulty in disposing of that contention by referring to what was enunciated by the House of Lords in the oft-cited case of Ashton Gas Company *v.* Attorney General (93 L. T. Rep. 676; (1906) A. C. 10). It was explained in that case, said the learned Lord Justice, that income tax forms part of the income in respect of which it is payable, and that when a settlement or will directs trustees to apply the income of a trust fund, the income which is meant to be so applied is the income including the income tax and not the income as a tax-free fund although the tax may have been deducted at the source. The deduction of income tax at the source is nothing more than the machinery under the Income Tax Acts by which the revenue collects the tax from the person ultimately liable to pay. In the case of a company, it pays income tax on its own profits and gains, and under the provision of the Income Tax Acts it collects from the individual shareholders the amount of the income tax in respect of their shares—the ultimate recipients of the company's profits and gains. The decision in the House of Lords in Brooke *v.* Price (116 L. T. Rep. 452; (1917) A. C. 115) was much relied on in the argument which was adduced on behalf of the annuitant in the present case. The Court of Appeal, however, saw their way plainly to distinguishing it.

COMPENSATION BASED ON WORKMAN'S PROSPECTIVE EARNINGS.—The earnings which a workman who has suffered "personal injury by accident arising out of and in the course of" his employment, within the meaning of section 1 of the Workman's Compensation Act 1906 (6 Edw. VII, c. 58), would have been in receipt of if no accident had happened to him—"prospective earnings," in brief—are by no means incapable of ascertainment, approximately at any rate. Can such earnings be taken into consideration when computing the sum which the injured workman—or his dependents, if his death has resulted from the injury—is entitled to be paid by way of compensation? Is such a factor rightly to be regarded in making the assessment of the compensation? That was the question which called for decision by the Court of Appeal, consisting of Lords Justices Warrington, Duke, and Atkin, in the recent case of Sheldon *v.* Butterley Company, Limited. The point was not exactly bare of authority, because in Bennoldson *v.* Ellerman Wilson Line (11 B. W. C. C. 70) the Court of Appeal held that, in assessing a claim for compensation on the ground of partial dependency, the County Court judge was entitled in that case to take into consideration the probability of a prospective increase of earnings by the deceased workman if he had lived. But in that case the matter was somewhat summarily dealt with. Indeed, it was scarcely contended that the question whether prospective earnings ought to be taken into account was open to argument. Prospective wages at a higher rate were practically assumed to be properly amenable and ought to be regarded by the County Court judge. All that the Master of the Rolls (Swinfen Eady) said on the subject was that no hard-and-fast rule could be drawn capable of mathematical calculation; and that, if the judge had taken into consideration the fact that the workman's wages might have been increased, his Lordship was quite unable to say that it was unreasonable for him to have done so. In the present case, on the contrary, the question of the significance of prospective earnings formed the chief subject of controversy. It was very thoroughly discussed in the course of the arguments of counsel, and it was specifically determined in the judgments of the learned Lords Justices. What the infant workman would have been earning prospectively was minutely gone into. And the present being a case of partial dependence, the provisions contained in the first schedule to the Act concerning that particular contingency had to be given effect to. Applying those provisions, and looking to the requirement in section 1 (a) (ii.) of that schedule—that the compensation payable to a partial dependent is to be "reasonable and proportionate to the injury" sustained through the loss by death of the workman, who had been partially supporting the dependent—the taking into account by the County Court judge of the prospective earnings was held to be entirely consistent with, and warranted by, the Act. Quoting from what was said by Lord Macnaghten in Hodgson *v.* Owners of West Stanley Colliery (102 L. T. Rep. 194; (1910) A. C. 229), as to the arbitrator being at liberty to award compensation on a higher scale—that is to say, he may award as much compensation as would be awarded in a case of total dependency—it seemed clear to Lord Justice Warrington, as it did likewise to the other members of the Court of Appeal, that prospective earnings might rightly be included in making the assessment.

EXEMPTION FROM TAXATION AS EXEMPTION FROM LIABILITY TO INCOME TAX.—Exploring in every conceivable direction for fresh sources out of which to extract income tax, a ferry in Cornwall—which apparently had for nearly a century and a half escaped assessment, since 1790 in fact—has at length been attempted to be made assessable. But with no success, if Mr. Justice Rowlatt's decision in the recent case of Pole-Carew *v.* Craddock (121 L. T. Rep. 308) can be relied on. As to that, the question is a somewhat doubtful one. And seeing that no authority directly in point could seemingly be cited to his Lordship, the decision of a higher tribunal must be awaited before the owners of the ferry can consider themselves out of the wood. The interest in the case lies mainly in the discussion which it necessitated and occasioned as to whether a different rule of construction ought to be applied in drawing or not drawing a distinction, as regards past and future burdens, as between local and Parliamentary taxation—such as local rates and income tax. The discussion turned upon the provisions of a private Act passed in 1790—namely, 30 Geo. III, c. lxi.—which enacts as follows: "The promoters"—naming them—"shall not be rated or assessed for or toward the payment of any tax, rate or assessment whatever, Parliamentary or parochial, in respect of the said ferry." Did that enactment have the effect of exempting the owners of the ferry from liability to the payment of income tax? For ferries, under the general provisions of the Income Tax Acts, are assessable under the third rule of No. 3 of sched. A, sect. 60, of the Income Tax Act 1842 (5 & 6 Vict. c. 35) and sect. 8 of the Revenue Act 1866 (29 & 30 Vict. c. 36). In considering the present question, it has to be borne in mind that income tax was a tax unknown at the time of the passing of the Act in 1790. It was a tax that came into existence at a later period. Reference to the decision of the House of Lords in Associated Newspapers Limited *v.* Corporation of London (No. 2) (115 L. T. Rep. 419; (1916) 2 A. C. 429) suffices to disperse any doubt concerning local taxation. The principle of construction, distinguishing between local rates in force at the date of an exempting statute and local rates thereafter imposed, was disposed of by that decision. But it related to local rates only. Indeed, the claim for exemption was confined to such rates; it had no bearing on Parliamentary taxation. And as Mr. Justice Rowlatt in the present case was careful to point out, the learned Lords in their several speeches delivered in advising the House made it clear that they were not dealing with Parliamentary

taxation. What Mr. Justice Rowlatt had to determine, therefore, was whether the decision of the House of Lords was capable of being applied, by analogy, to the case before his Lordship. The learned judge was confronted by the statement of the law which Mr. Justice Bray gave utterance to in Stewart *v.* Conservators of River Thames (98 L. T. Rep. 900; (1908) 1 K. B. 893). He there said that it had been laid down quite clearly—alluding to the decision of the Court of Appeal in Sion College *v.* London Corporation (84 L. T. Rep. 133; (1901) 1 K. B. 617)—that, where an Act of Parliament contained an exemption from all Parliamentary rates and taxes, that meant, in the absence of any special words, rates and taxes existing at the time when the Act in question was passed, and that the exemption did not extend to rates or taxes subsequently imposed. Having regard, however, to the decision nearly ten years afterwards of the House of Lords to which we have already referred, Mr. Justice Bray's enunciation of the law can no longer be accepted as sound. All that had to be decided by Mr. Justice Rowlatt was whether local rates and Parliamentary taxes could be viewed as standing on a different footing in this connection. And the conclusion at which the learned judge arrived was that there is no difference in principle between the two forms of taxation in so far as exemption is concerned.

Obiter Dicta

HYLAN?—Sauer *v.* Mayor, 44 N. Y. App. Div. 305.

A ROUGH ASHLAR?—Craft *v.* Stone, 124 N. E. 473.

NOT HUNGRY.—Kidd v. Cereal Food Co., 145 Mo. App. 502.

PROSECUTING THE PROFITEERS.—State *v.* Hogg, 126 La. 1053.

A DAMAGE SUIT.—The controversy in Ross *v.* Horsey, 3 Harr. (Del.) 60, was over the right of the defendant to injure a dam.

BOOTLICKING SUPT. ANDERSON.—If Face *v.* Cherry, 117 Va. 41, can be said to suggest dislike for a cocktail, the publication of this joke ought to secure us life membership in the Anti-Saloon League.

SOME SENTRY!—In Hearell *v.* Illinois Cent. R. Co. (Ky.) 213 S. W. 561, it appeared that a sentry assigned to guard a trestle during the war failed to detect the approach of an express train and was killed thereby.

NOT NOISY.—In Deal *v.* Snyder (Mich.) 168 N. W. 973, a witness testified as follows: "It is not a noisy car; does not make any more noise than a Ford."—As to what a real noisy car would be, in the opinion of this witness, we cannot even surmise.

AND THE DEFENDANT PROBABLY CUSSED THE COURT.—Speaking of Torrent *v.* Damm, 66 Mich. 105, a contributor says: "Of course Torrent prevailed and was not reversed. But it seems like a hard case, when we read that Torrent operated a saw mill and sued Damm for the value of the work."

THE MEAN THING!—In Merritt *v.* Matchett, (Mo.) 115 S. W. 1066, a case involving a dog fight (N. B. the title), Judge Johnson unkindly said: "At this juncture the woman who owned the defeated dog appeared with a gun, and shot at the brindle dog. Of course she did not hit him."—Could His Honor have done better?

TAKING "PROHIBIT" OUT OF PROHIBITION.—Even if the sale of liquor after January 16 is absolutely prohibited, we are quite unconcerned. We have found a way out of the difficulty. In Scoggins *v.* U. S., 255 Fed. 825, the Circuit Court of Appeals for the Eighth Circuit holds it not to be unlawful to take liquor forcibly from the person of another—and we know a number of people who have plenty.

LEAVES A DRY TASTE IN THE MOUTH.—Rather bad taste, we should say, for a London law magazine, circulating among American lawyers, to print the following item: "By the withdrawal of the military régime in Paris and the substitution therefor of the ordinary police, the hour for opening places where alcoholic drinks are sold is fixed at 4 A.M., and the closing time at 1 A.M. Permission for extension may be granted on special occasions on cause being shown."—Only three dry hours in the Paris day!

CRIMINAL PLEADING.—Many of us think that the way pleadings are generally drawn is a crime, but now comes Mr. Justice Riddell of the Supreme Court of Ontario with a suggestion along these lines which we are sure will meet with unanimous approval. In the recent case of Gowans *v.* Crooker Press Co. (not yet reported) he says: "On the merits indeed (except as to the notarial fees) there can be no question—'hope springs eternal in the human breast,' and nothing but a statute making such a course a crime punishable by imprisonment will prevent clients and their solicitors pleading a contemporary oral agreement in variance with the terms of a note."

CONNUBIAL LONDON.—The calendar for the recent Michaelmas Sittings at London of the Probate, Divorce and Admiralty Division of the High Court of Justice contained 250 defended and 1769 undefended divorce cases. Why so many unhappy marriages in London? If we might moralize for a moment, the titles of many of the cases, particularly where the name of the co-respondent is given, furnish the answer. For instance, "Bond *v.* Bond (otherwise Hasty)," needs no further explanation. "Dasent *v.* Dasent" would seem to indicate constant nagging; "Eyes *v.* Eyes" implies watchful jealousy; and "Wish *v.* Wish" is of course indicative of incompatibility of temper. We can't go through the whole 2000, but mention simply must be made of the following: "Madden *v.* Madden and Cook;" "Campbell *v.* Campbell and Scullion;" "How *v.* How and Beer."

THINK 'EM OVER!—The page headings of the Index-Digest to volumes 1-3, A.L.R. show a number of rather amusing collocations of titles. For example, the second title in each of the following collocations seems to be a perfect sequitur of the first:

"Argument—Assault and Battery."
"Attorney's Fees—Automobile."
"Courts—Criminal Contempt."
"Eminent Domain—Entry."
"Erroneous Decision—Estoppel."
"Expenditures—False Return."
"Gaming—General Denials."
"Judges—Judgment."
"Robbery—Sale."
"Speed—State Industrial Farm."

THE INFLUENCE OF THE MOON.—"Mr. Justice Rowlatt's protest at the Berkshire Assizes," says the London *Law Times*, "that, in dealing with the case of a prisoner charged before him with attempted murder, he in any way countenanced the idea that changes of the moon had any influence in inducing insanity, or that they affected even remotely the prisoner's mental condi-

tion, carries us back in thought to the time when, as the word 'lunacy' itself indicates, there was believed to be a close connection between insanity and the moon's changes. It would seem that in some parts this ancient belief still lingers, notwithstanding the solemn pronouncement by Lord Chancellor Erskine in 1806 in *Ex parte Cranmer* (12 Ves. 445) that 'the moon has no influence.' The marginal note at p. 450 of the report is one of the few curiosities that came from the indefatigable Vesey's pen; it runs thus: 'In case of lunacy, the notion that the moon has an influence, erroneous.'"

"WILSON—THAT'S ALL."—In a recent issue of the *New York Tribune*, a contributor to the brilliant column known as "The Conning Tower" announced with great glee his discovery of the case of Peace *v.* Wilson, 186 N. Y. 403, with the added information that Wilson lost. Pshaw! This contributor didn't know the law reports. How about the case of Wilson *v.* Peace, 38 Tex. Civ. App. 234, a case much more to the point since Wilson defeated peace? And while we are on the subject, we might add that there are plenty more Wilson cases. Just to mention a few, it might be said that the following suggest the forthcoming fight for the Presidential nomination in the Democratic National Convention (the winner in each case being indicated in the parenthesis): Wilson *v.* Baker, 64 Cal. 475 (Baker); Wilson *v.* Daniels, 79 Iowa 132 (Daniels); Wilson *v.* Marshall, 10 La. Ann. 327 (Marshall); Wilson *v.* Reed, 3 Johns. (N. Y.) 175 (Reed); Wilson *v.* House, 10 Bush (Ky.) 406 (House); Wilson *v.* Palmer, 75 N. Y. 250 (Wilson). Superstitiously speaking, almost any one could beat Wilson for the nomination, but if he should get it, his fate at the election might be foreshadowed by the following: Wilson *v.* Coolidge, 42 Mich. 112 (Coolidge); Wilson *v.* Root, 43 Ind. 486 (Root); Wilson *v.* Wood, 34 Me. 123 (Wilson); Wilson *v.* Knox, 132 Mo. 387 (Wilson); Wilson *v.* Johnson, 30 Tex. 499 (Wilson). As suggestive of past events, we may cite Wilson *v.* Irish, 2 Iowa 260, with Wilson as the winner, and Wilson *v.* People, 94 Ill. 299, and Wilson *v.* United States, 144 U. S. 24, in both of which cases Wilson lost out. And finally, as to whether a third term is the proper stunt, we may say that in Wilson *v.* Wilson, 154 Mass. 194, a new trial was ordered.

"The maxim 'res ipsa loquitur'—literally translated 'The thing speaks for itself'—means merely that where an accident occurs through some agency or instrumentality under the control of a defendant, and the plaintiff is injured, in the absence of explanation by defendant, the occurrence itself furnishes prima facie evidence of want of care on defendant's part, which caused the accident."—Per Merrill, J., in Courtney *v.* Gainsborough Studios, 174 N. Y. Supp. 860.

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."—Per Mr. Justice Holmes in Towne *v.* Eisner, 245 U. S. 425.

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Deportation.

At last the patience of the patriotic American has been rewarded by the sight of the "soviet ark" carrying back to the land of their nativity aliens who professed to find our institutions so intolerable that they could see no cure other than revolution. May it be the precursor of a fleet which will continue to sail till there remains in our land no alien who is not glad to accept the privileges of American citizenship and render in return the duties of an American citizen. It cannot be said too often or too clearly that in the deportation of aliens there is nothing of punishment for crime or persecution for opinion. The American people have the same rights in their country that the citizen has in his home; they may extend or withhold their hospitality at will. If you find an invited guest maligning you to your children and inciting them to defy your parental authority you waste little time before executing a deportation. Deportation of seditious aliens is not, of course, a cure for all the sedition with which we are afflicted, but when we have rid ourselves of meddlesome outsiders we will have no great difficulty in composing our domestic troubles. Between men who love America there will be many and serious differences of opinion; their views will vary from ultra conservatism to ultra radicalism. For this situation our Constitution provides the remedy in the decision of the majority on a full and free discussion of opposing viewpoints. The constitutional formula will not work until we exclude from the equation those who despise our institutions, and who seek their destruction. The deportation of the seditious alien will not solve the problems of social reconstruction, but it is the logical and necessary first step to that solution.

Sedition Acts Old and New.

Not only the lay press but some people who should know better have compared the sedition laws recently passed with the sedition law of July 14, 1798, and have sought to draw some conclusions applicable to modern times from the odium which that act brought upon its authors. The comparison is wholly misleading. The sedition act of 1798 made it a criminal offense to publish any false matter against "either house of the Congress of the United States or the president of the United States" with intent to "bring them or either of them into contempt or disrepute." It was on this provision that all the reported instances of prosecution under the act were based. Callender went to jail for nine months for saying: "The reign of Mr. Adams has been one continued tempest of malignant passions. As president he has never opened his lips or lifted his pen without scolding; the great object of his administration has been to exasperate the rage of contending parties, to calumniate and destroy every man who differs from his opinions." *U. S.* v. *Callender,* 25 Fed. Cas. No. 14,709. Cooper was convicted and imprisoned for writing inter alia: "Nor do I see any impropriety in making this request of Mr. Adams. At that time he had just entered into office. He was hardly in the infancy of political mistake. Even those who doubted his capacity thought well of his intentions. Nor were we yet saddled with the expense of a permanent navy, or threatened, under his auspices, with the existence of a standing army. Our credit was not yet reduced so low as to borrow money at eight per cent in time of peace, while the unnecessary violence of official expressions might justly have provoked a war." *U. S.* v. *Cooper,* 25 Fed. Cas. No. 14,865. Matthew Lyon, a member of Congress from Vermont, was imprisoned for four months and fined one thousand dollars for writing, in the heat of a political campaign, a letter in which he said: "Whenever I shall, on the part of the executive, see every consideration of the public welfare, swallowed up in a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice; when I shall behold men of real merit daily turned out of office, for no other cause but independency of sentiment; when I shall see men of firmness, merit, years, abilities, and experience, discarded in their applications for office, for fear they possess that independence, and men of meanness preferred for the ease with which they take up and advocate opinions, the consequence of which they know but little of—when I shall see the sacred name of religion employed as a state engine to make mankind hate and persecute one another, I shall not be their humble advocate." Lyon's Case, 15 Fed. Cas. 1183. Just how such an act, thus enforced by an administration seeking re-election against the political adherents of the rival candidate, can be compared with a statute making it an offense to advocate the overthrow by violence of the government of the United States is difficult to see.

Punishment by Fine.

The various bills which have been introduced in Congress for the suppression of sedition contain almost uniformly, so far as the press reports disclose, a provision that a violation shall be punished by fine or imprisonment.

It is exceedingly doubtful whether punishment by fine is justifiable in any instance except for trifling misdemeanors where it serves to give point to a judicial reprimand. The practice of imposing a fine for food profiteering and the like, amounting to a license to violate the law in return for a share of the illegal profits, has been a stain on the administration of justice. But even this pales into insignificance beside the idea of imposing a fine for such acts as are embraced by the laws against sedition. The sedition with which we are now called on to cope is known to be organized internationally and is known to be in possession of ample funds for the purposes of its propaganda. If a fine is imposed, it will promptly be paid from the funds of the I. W. W., or of some "soviet" or some Russian "Ambassador," and the culprit will go free, with every encouragement to continue his agitation. It may be said that no judge will impose a mere fine. If so, why is the provision for a fine inserted? The provision is a fair enough announcement to the judge of the legislative belief that offenses under the act may in some cases be punished adequately by a fine. It is not a question of imposing drastic penalties. That has been tried often enough and has proven a failure. But the man who would rejoice to see the scaffold and the electric chair follow the quartering block into oblivion may without inconsistency disapprove of murder being made a misdemeanor. When punishment does not maintain a rational proportion to the enormity of the offense, penal law becomes ridiculous.

Revoking Ratification of Constitutional Amendment.

THE fact that the governors of at least three states have embodied in their messages a recommendation that the ratification of the 18th Amendment should be withdrawn, brings into prominence the fact that there has never been a decision on the right of a state to revoke a ratification once given. There have been congressional declarations against the right, disregarding the withdrawal by New Jersey and Ohio of their ratification of the 14th Amendment and the withdrawal by New York of its ratification of the 15th Amendment. See 15 U. S. Stat. at L. 706; 16 U. S. Stat. at L. 1131. There has been a like declaration to the effect that the rejection of an amendment does not preclude a subsequent ratification by the same state. 15 U. S. Stat. at L. 706. The distinction is based on the language of the Constitution that an amendment shall take effect when three-fourths of the states ratify it. If this is a true construction it is most unfortunate, for the unfairness of its result is obvious. An amendment may be submitted to a legislature elected without the least regard to that issue and with no thought that it will arise. That was true in most instances of the legislatures ratifying the 18th Amendment. The ratification may meet with unanimous popular disapproval, every legislator who voted for it may be retired at the next election, but the people are helpless to undo what has been done contrary to their will. So a ratification may be defeated in several successive legislatures, and then, when the issue has apparently lost its importance, a legislature elected without regard to that issue may ratify and again the people are helpless. The one safeguard of representative government lies in the fact that a misrepresentation of the will of the people can be corrected at the next election. But if the legislative ratification of an amendment is irrevocable, a misrepresentation of the people in a matter of vital importance is beyond cure unless they can get the people of thirty-five other states to co-operate. On the other hand, a strong argument may be based on the inconvenience of a system whereby a constitutional amendment duly put into effect would fall by the change of a single state. There is force in the analogy to the law of private contracts, whereby a man may reconsider any number of refusals to sign but is bound irrevocably when he signs. But if such is the law, its utter perversion of popular government most certainly demands a revision of the entire method of amending the Constitution.

Scope of the Power to Amend.

ANOTHER question of importance as to which the 18th Amendment should evoke an authoritative decision is whether the power to amend the Federal Constitution is unlimited or is subject to an implied limitation to amendments germane to the original instrument and which do not substantially alter the power delegated to the federal government by the states. It is a well-known matter of constitutional history that at the formation of the federal compact no subject was more jealously scrutinized than the powers of the central government, and that repeated compromises were necessary to secure the adhesion of all the colonies to the proposed Constitution. Certainly it was not in the contemplation of the framers that on the day after the Constitution was adopted three-fourths of the states could put into the Constitution all the proposals which were withdrawn to gain its acceptance by the minority. If such a thing had been suggested it would have defeated the entire project of union. If the control of the liquor traffic may, by the action of three-fourths of the states, be put into the hands of the federal government, there is no power now possessed by the states which may not in like manner be transferred; the right of representation in Congress may be taken away, the office of President may be made hereditary, or the entire structure of the government otherwise changed. Such a step could be taken by a minority of the people. The last federal census (1910) shows a population of ninety-one millions. By the same census there are twelve states whose aggregate population is over fifty millions. Therefore, by a majority of the other forty millions, or twenty-one millions, the entire structure of the government may be changed against the will of seventy millions and there is no remedy except civil war. The idea that at some future time the I. W. W. may be able to dominate the legislatures of thirty-six of the smaller states is no more preposterous to-day than the idea that the prohibitionists could do so seemed twenty years ago. There is a great deal of talk just now about upholding the Constitution. On broad questions of principle, quite apart from its merits as a measure, the 18th Amendment is the most serious attack that has ever been made on the Constitution.

Deluding the Thirsty.

IN *Hicks* v. *State*, (Ark.) 215 S. W. 685, it appeared that one Drake paid $21 for four quart bottles represented to contain "good whisky," and that when with high hopes he lifted a bottle to his lips he found that it

and its fellows contained nothing but colored water. The seller, being indicted for obtaining money by false pretenses, contended that "because liquor is contraband and without monetary value a false representation concerning it cannot be made the basis of a prosecution." The court said: "The error of this contention lies in the assumption that the essence of the offense is the value of the thing misrepresented not so. The gist of the offense of obtaining money by false pretense is fraud or deception perpetrated upon another to his injury." The decisions of late have contained little of aid or comfort to the man whose "clay with long oblivion is gone dry," and hold out little hope that he may again be filled with "the old familiar juice." But if the courts will do nothing to alleviate the drouth, they have at least declared that no man may with impunity profit by holding out a delusive hope to the sufferer; that none may for a price hold to our parched lips the cup of Tantalus. For this boon, worshipful masters, we give humble thanks.

Sunday Laws.

MR. JUSTICE MINTURN of the Supreme Court of New Jersey in a recent address (see N. J. Law Jour. Nov. 1919, p. 325) discusses the necessity of remodeling the Sunday laws, concluding that the solution is to be found "in the self-determination of localities, or what is called local option—a method by which the recognized American principle of a majority rule may determine the character and quality of the legal environment which it inhabits." Tracing the fundamental changes of the last century in American life he says: "In the agricultural days men, women, and children worked to satiety in the fresh air of the open, and longed for the church and meeting-house of Sunday. In these days their descendants stifle in a contaminated atmosphere within doors, and long for a glimpse of the fields. The boy in the cities, confined in school and house and workshop, longs for the vacant lot or the open river. The workman and woman look upon Sunday as the only day in which they can enjoy life and with their families imbibe the fresh air of the fields. In the woods, on the rivers, at the seaside, they throng in multitudes seeking rest and relaxation from an economic atmosphere that denies them both." Two objections, fundamental as applied to the laws of a republic, he urges against the existing Sunday laws, first that they run so far counter to the temper of the times that they cannot be generally enforced, and second that such enforcement as prevails is unequal and discriminatory, suppressing sternly the ball game of the mechanic and the "movie" of the tired factory girl, while leaving untouched the club and the automobile of the rich man. "Years at the bar and my experience on the bench," he adds, "have enabled me to perceive the inequality which results from this condition, and when the masses of the people recognize inequality in the application of the law and its enforcement, that decent respect for law and its administrators which in the earlier days was characteristic of American citizenship becomes endangered." Justice Minturn concludes with a thought which is most timely and worthy of serious consideration. The fundamental principles of religion are sorely needed to-day, as a cure for the sullen spirit of discontent which pervades the land. "The heart of America represented in the grime and soil of the mine, workshop and foundry is essentially religious and beats in unison with the prayer of the Nazarene as well as with the spirit of Patrick Henry." But that heart does not beat in unison with the self-congratulations of the Pharisee, and cannot be touched by a church which seeks to substitute legal regulation for sympathetic understanding. In this day of growing class consciousness an institution which tolerates the recreations of the rich and sends clamorous lobbies to suppress those of the poor can make no effective appeal to the masses. "In the last analysis an educated constituency in a church or in a political order cannot be enlightened or coerced by law. The appeal to the congregations outside the Church must be made upon a basis of Christian brotherhood and charity, which recognizes the changes which time and the new economic order have evolved in our manner of living, and the consequent demand for leisure and such recreation and reasonable diversion as the new conditions present and make necessary."

Public Executions.

THE sheriff of an Illinois county recently compelled the presence of some two hundred prisoners at the hanging of a condemned murderer. Among the many protests evoked is one from several members of the New York State Commission of Prisons, who said in part:

"It is indiscreet, offends public dignity, and only harm can come by pursuing such mediæval practices. Two things may result—lowering the morale of the people, or arousing their indignation. His claim that it tends to reform other prisoners is absurd. Quite the reverse is likely to follow. He should know that such barbaric action on his part tends to incite the spirit of mob violence. It is a despotic misuse of power and cannot be too strongly condemned."

There are but few students of penology who will not agree with the sentiments thus expressed. That public executions operate to deter the evil-minded from crime was once maintained, but the idea has long since been abandoned. The more enlightened states have carried the contrary tendency to the point of enacting statutes limiting strictly the persons who may be present at an execution and forbidding the publication of its details. The reason is of course that all experience has been to the effect that the brutalizing tendency of the spectacle far outweighs its deterrent tendency. This was strikingly exemplified by the fact that according to the press reports the Chicago hanging was accompanied by ribald jeers from the involuntary witnesses. Frightfulness as a governmental policy has always failed, for the simple reason that men are in the main courageous and their normal reaction to a threat is defiance. If you break that defiance by sheer force, the next reaction is the desire for revenge. The tendency of the Chicago experiment will be to produce, not to prevent, crime. These considerations force inevitably another reflection, that if the execution of a capital sentence is brutalizing and depraving in its effect on spectators, capital punishment is itself a wrong; a wrong minimized but not avoided by the secrecy with which modern practice surrounds it.

Criminal Trials in Federal Courts.

IT has long been a matter of general comment that the federal criminal code shows no trace of the tendency which has eradicated many relics of ancient barbarism from the penal legislation of the states. And in matters of practice Congress, in making any reform, seems sedu-

lously to confine its operation to civil cases. Thus for more than half a century it has been enacted that in civil cases the competency of witnesses is to be determined by the laws of the state wherein the federal court is held. (See Rev. St. § 858, enacted July 2, 1864, and amended June 29, 1906.) But in criminal cases the competency of a witness is to be determined by the law of the state as it existed when the state was admitted to the Union. *Logan* v. *U. S.* 144 U. S. 263; *McCoy* v. *U. S.* 247 Fed. 861. It is difficult to understand why in criminal cases every advance which the state has made since its admission should deliberately be rejected. Thus the defendant in a criminal case in a federal court has been held not to be entitled to testify in his own behalf because the state law giving the right was enacted after the admission of the state. *U. S.* v. *Hawthorne,* 1 Dill. 422. If the court sits in a state which was admitted early in our history a witness may be disqualified to-day because of religious belief, though a more enlightened age has long cast that disqualification into the rubbish heap. Apparently only the well-known congressional tenderness toward office holders has prevented a statute requiring marshals engaged in serving criminal process to travel by stage coach. This and a thousand similar illustrations which might be collated emphasize the thought that it is time that the entire regulation of procedure, both civil and criminal, was taken out of the hands of the legislatures and committed to a rule-making commission of the bench and bar.

Psychology in Trademark Cases.

A NEW field of usefulness in litigation seems to have been opened for the experimental psychologist. An attorney resisting the registration of "Chero Cola" as a trademark because of its similarity to "Coca Cola" engaged the services of an instructor in the laboratory of applied psychology at Columbia University, who conducted a series of experiments to ascertain to what extent his subjects would confuse the two names, as presented to the eye and to the ear, the result being that the names were confused in a varying but substantial number of instances. The examiner to whom the case was referred held the testimony of the psychologist to be admissible, and affirming that decision on a rehearing said inter alia: "With reference to the testimony filed by the opposer, the testimony of Paynter is especially criticised (see page 15) because the persons whose acts are referred to by Paynter were not called as witnesses. It is noted, however, that the applicant failed either to identify or call as witnesses the persons referred to by the dealers who testified in its behalf. This circumstance, however, does not make incompetent the testimony of either these dealers or the testimony of Paynter as to the acts of others (see page 15 of brief.) . . . The circumstance that the test is ex parte in nature goes to the question of the weight of the evidence and not to its competency (Greenleaf on Evidence, 16th edition, par. 162, p. (3), page 275). As previously pointed out (see page 10 of the decision of March 24, 1919), this is an adverse factor, but its significance here seems to the examiner to be small because (1) of the ease with which similar experiments could be made by the applicant for the purpose of rebuttal, and because (2) of the possibility of disclosing by cross-examination of the witness Paynter circumstances tending to lessen the evidential significance of these acts and which may have been incident to such ex parte presentation. In the mind of the examiner there is no doubt whatever that, other things being equal, the act of any such persons, referred to in the Paynter testimony, possesses an intrinsic evidential value far in excess of any assertion made by the same person, to the effect that he either would or would not be likely to be confused by the marks under the condition of the test. The substitution of acts for assertions in the nature of conjecture is the first step toward certainty." See XVIII Mich. L. Rev. p. 75, where the report of the psychologist is set forth at length. In infringement cases the proof as to the actual misleading of purchasers is usually conflicting and inconclusive. When, as in the "Chero Cola" case, the question arises on an application to register a new trademark, little or no evidence of that character is available. Accordingly, the case is usually decided in the speculation of the judge or examiner as to the possibility of deception. It is manifestly impossible for any man to estimate truly the workings of an intelligence either inferior or superior to his own. If the judge uses his own power of discernment as a standard, it is impossible for him, after having his mind charged by the argument with a minute knowledge of differences and resemblances, to put himself in the position of the casual buyer. In this connection it is of interest to note that the report heretofore referred to also covers experiments with some nine alleged infringements taken from reported cases with results varying widely from those arrived at by the courts. For example "Kalodont" was in one experiment confused with "Sozodont" in forty-eight per cent of the trials, while in the same test "Gold Drop" was confused with "Gold Dust" in but twenty-six per cent of the trials, though "Kalodont" has been held not to infringe, while "Gold Drop" has been held to be an infringement. It is of course clear enough that no laboratory experiment can duplicate exactly the psychological conditions of actual trade, but such experiments seem to rise to a much higher level of proof than mere judicial surmise.

Shorter Opinions.

THAT the recommendation of the committee on Law Reporting of the American Bar Association in favor of shorter opinions is still bearing fruit is shown in the case of *Lemmery* v. *Farmers, etc., Bank,* 247 Fed. 667, wherein it was said: "It is due to counsel, litigants, and this court to here add that the many cases, English and American, bearing on the double proof of claims in bankruptcy, which were cited and discussed at the hearing, have all had due consideration in the preparation of this opinion. Such consideration opens two courses: One, the tempting field of judicial discussion, covering pages and involving long lists of cases, copious extracts of what is now in the reports, and restatements of what has already been said or decided. The other course is to condense in a few lines a syllabus of these authorities. This latter course we have followed in saying that these cases eventually crystallized in the American courts holding that, where there was a double contract obligation in a security, there could be a corresponding double proof. We may add that, in abstaining from a protracted discussion of cases and confining ourselves to a statement of our deduc-

tions from them, we respond to that insistent and increasing demand that, in view of the startling growth of judicial reports in these latter days, courts should rigidly limit their opinions to those matters of fact and law which are absolutely necessary to a decision of the case in hand." In this connection, it may be noted that the volume from which the foregoing was extracted contains 218 cases in 1000 pages, or about 4½ pages of opinion per case. Estimating roughly the opinions average about two thousand words each. By a calculation made a few years ago the opinions of the federal supreme court averaged about 2300 words. And taking into consideration the number of cases in a volume of the Federal Reporter which are decided by the District Court in a few words, it would seem that the Circuit Court of Appeals is still unduly loquacious.

JUSTICE AND THE POOR.

THE recent Bulletin of the Carnegie Foundation for the Advancement of Teaching, on "Justice and the Poor," has been given in some quarters an interpretation which its contents does not justify and which its author did not intend. Mr. Taft quotes (in N. Y. *Times*, Jan. 4, 1920) a letter from Chief Magistrate McAdoo of New York city, saying inter alia:

"Radical publications and speakers have given it a wide circulation. They emphasize their point of view that there is no justice for the poor in New York city."

To any fair-minded man the exhaustive review presented by the Bulletin is a record of honest and high-minded effort toward equal justice; an effort which has achieved a considerable success and is pressing earnestly to a more complete success. The author, Mr. Reginald Heber Smith of the Boston bar, says at the outset: "The body of the substantive law, as a whole, is remarkably free from any taint of partiality. It is democratic to the core. Its rights are conferred and its liabilities imposed without respect of persons. While, in this age of transition, it is confronted with tremendous problems as yet unsolved, while it is slow to employ the more liberal premises demanded by a new era, it deserves to be recognized as a remarkably satisfactory human achievement."

Some minor inequalities in the substantive law he points out. He says truly that "much of our landlord and tenant law is still feudal in its conceptions." The fellow servant rule and the doctrine of assumption of risk come in for deserved criticism, but it is added that "happily this stigma no longer attaches because in the last seven years workmen's compensation statutes which supplant the outworn doctrines of liability with the principle of insurance have been enacted in nearly every jurisdiction." So, he concludes, "the existing denial of justice to the poor is not attributable to any injustice in the heart of the law itself."

Where the Fault Lies.

On the other hand, Mr. Smith asserts, and few lawyers will deny, that in the administration of the law the poor do stand at a disadvantage which in some instances amounts to a denial of justice. But with the assertion he couples this statement: "The present inequalities and defects in the administration of justice are not the result of any deliberate intention. No dominating group or class has consciously set out to foreclose the rights of the poor. The procedural laws have been passed by the legislatures in good faith. The courts have interpreted and applied the adjective law without bias or favor. Corruption has played no part."

The disadvantages of the poor man in court result from three things: (*a*) the possibility of long delay, bearing of course more heavily on the poor than on the rich; (*b*) the necessity of paying court fees and costs; (*c*) the necessity of employing counsel, coupled with the fact that an advantage may be secured by wealth in employing more distinguished and experienced counsel. The two first mentioned are of minor importance and the means of correcting them comparatively simple. Of delay it is said: "The outlook for a speedy reformation is promising. Already great strides have been taken. On this score the public conscience is aroused. The elimination of intermediate appeals permitting two trials on the facts has accompanied the creation of modern municipal courts and has done away with one of the most flagrant abuses. The municipal courts, despite their vast number of cases, are keeping abreast of their dockets. The intelligent propaganda of the American Judicature Society is clearly pointing to the methods whereby judicial administration can be lifted out of the muddle into which it has fallen, and there is an increasing disposition on the part of the courts, the bar, and the legislatures to make the needed changes. With the passing of delay one great cause of denial of justice to the poor will be at an end."

So as to costs, they, like delay, present in the main no fundamental or inherent difficulty. "A reduction of costs and provision for in forma pauperis proceedings can easily be effected. It is a question of the will to do it."

But with respect to the services of counsel, the situation is much more complex. Mr. Smith is probably conservative in stating that single persons earning less than $500 yearly and married persons with families earning less than $800 per year are never in a position to pay any substantial sum for attorney's services. From this basis he estimates that there are in the United States over 35,000,000 persons, men, women and children, whose financial condition is such that they cannot secure for themselves the legal services without which the machinery of justice is unworkable. The figures may be scaled down very materially and yet leave a very serious situation. That there should be a substantial class of persons who are debarred from the knowledge of their legal rights or the power to enforce them should be intolerable. The services of the lawyer are so essential to the enforcement of any right that the inability to secure those services amounts to a denial of justice as flagrant as though the legislature should enact that no man with less than a stated income should be heard in the courts. To borrow a homely figure of speech from the author of the Bulletin, the administration of justice may be likened to an automobile, in which the law represents the engine, the judge the control, and the attorney the gasoline. To give to two men exactly the same type of car and supply one with gasoline and the other with none and then to expect a

fair race is obviously preposterous. So long as the attorney is made necessary by the form of the machinery, equality can be had only if the attorney's services are available to every one.

The Remedies.

Recognizing that the expense of procuring counsel is the one fundamental factor in the problem of securing justice for the poor, the major portion of the Bulletin is devoted to a discussion of the various agencies which have been created in recent years. These may be divided into two classes—those which seek to dispense with the aid of counsel and those which seek to provide counsel at the public expense. Among the agencies of the former class may be named small claims courts, conciliation courts, arbitration, domestic relations courts and administrative tribunals and officers. These the Bulletin examines seriatim, discussing the several types and characteristics developed in different municipalities. One point of importance is emphasized in this connection, that small claims courts presided over by laymen are not satisfactory. As to the courts of this class it is said: "Any reputable layman may be the judge, and his duty is declared to be to give his decision not according to the law but according 'to the very right of the cause.' This means justice according to individual conscience after the manner of an Eastern Cadi. One may doubt whether in the long run this plan can succeed when like plans throughout our legal history have always ended in failure." So in connection with administrative tribunals, the most conspicuous of which are the workmen's compensation commissions, high tribute is paid to their efficiency, but one danger is discerned. Under the industrial accident commissions the lawyer's services are not entirely eliminated nor are they supplied. As time goes on, this gap will steadily increase. The burden of work will force the commissioners more and more back on their judicial function to the exclusion of their work in behalf of employees. As the law becomes defined in a thousand cases, precedents and rules grow up which require that each side be represented if the trial is to be fair. Under the older compensation acts this is already felt. Commissioners are reversing their attitude and are preferring to have employees represented by counsel. With regard to the difficulty of the expense of counsel, the net result of the administrative plan will probably be to provide machinery for automatically adjusting many cases, and for conciliating a few more, but as to cases requiring hearing or trial, the attorney will be increasingly necessary.

Legal Aid Societies.

While the various informal courts are proving themselves able to deal adequately with the wage claims, rental questions and the like which form the bulk of the legal concerns of the poor, it is clear that there is a field which cannot thus be covered. The opportunity to obtain advice as to legal rights is an absolute essential of justice. Without it, a right to litigate is as futile as the ancient privilege of an accused person to have counsel to argue on a question of law provided he had first contrived to discover and point out the point to be argued. Accordingly provision is being made to an increasing degree to furnish counsel at the public cost. The problem of securing legal assistance to persons accused of crime is a distinct subject matter, and will be discussed in a future issue of LAW NOTES. With respect to civil cases, the legal aid society seems to be the solution of the problem, and the work of the future lies in the development of this agency. This development has already proceeded to some considerable extent, there being in 1916 forty-one such societies in the United States, and it is said that these, "as their contribution toward making more equal the position of the poor before the law, have provided attorneys to 1,133,700 persons, have collected for their clients sums aggregating $3,590,681, and to accomplish this work they have expended $1,573,733." Of their personnel it is said: "The legal aid organizations of the United States are to-day providing a corps of one hundred and seventy-five attorneys, all members of the bar and admitted to practice in all courts. Of these, sixty-two devote their entire time to the work and one hundred and thirteen are employed for part of their time, which ranges from one-third to one-half of the working day. These attorneys are assisted by sixty-three clerks and stenographers on full time, six on part time, and by thirty-three investigators and social workers who spend their entire time in legal aid service. This force of two hundred and sixty-seven persons, especially trained in legal aid work, constitutes a mighty force for making the position of the poor more equal before the law. In addition to these paid staffs, there is a much larger number of volunteer attorneys and workers who give a measure of their time which in the aggregate forms no inconsiderable item." The extent to which the work has spread over the field to be covered is shown by the following table, in which, it is to be noted, each lower group includes the higher group.

Class	Total Cities of this Class in the United States	Legal Aid Work		
		None	Very Little	Definitely Established
1. Cities over 350,000...	18	0	0	18
2. Cities over 300,000...	21	0	2	19
3. Cities over 200,000...	33	3	4	26
4. Cities over 150,000...	41	6	6	29
5. Cities over 100,000...	71	27	10	34

The obstacle to the complete success of legal aid work is, as might be expected, a pecuniary one. "The greatest weakness of organized legal aid work, the one great factor which constantly bars its path, and which may ultimately prove its undoing, is its lack of funds. The reason that the existing organizations have not more completely answered the demand of the poor for legal assistance is that they are grossly under-financed." Particularizing somewhat, it is said for example that the Chicago society in 1914 was answering 64% of the total need for its service but in 1916 was able to meet but 46% of that need. The financial support did not materialize, and it was forced to make drastic retrenchments. "It is now able to keep its office open for clients only two hours a day, thereby mechanically reducing the number of applications, and it is forced to entrust much of its work to volunteers."

Most of the Legal Aid Societies now in existence are voluntary in character and are supported by private do-

nations. Here is presented a difficult and important question which must be solved in determining the future of these agencies—whether they shall be established as public agencies or shall continue as private organizations. Mr. Smith says that "theoretically, the argument for public legal aid is irrefutable." Justice is not a matter of charity but of right. The same reasons which induce the state to provide the court house, judge, clerk and bailiffs, dictate the furnishing of the legal aid without which the others are useless. Justice is not merchandise; it cannot be granted or withheld according to the purchasing power of the applicant. It is the affirmative duty of the state, at public expense, to do all that is needful to secure justice to every one. In the main this is perfectly recognized. The state does afford all that is necessary with the exception of the attorney. As this omission is fatal in certain cases, the argument concludes that the state must administer its justice better by supplying the attorney in such cases.

But passing from the theoretical to the actual, the Bulletin finds that existing political conditions create a serious obstacle to the apparently logical course. "It is a commonplace that many American municipalities possess improper and inefficient governments in which politics play an undue part. It is always a question whether it is safe to entrust an essential service, such as legal aid, to such a government. The privately incorporated societies in the larger eastern cities have frankly been afraid to surrender any part of their autonomy to political control." Particularizing, several instances are given of efficient municipal aid bureaus which have been destroyed or rendered ineffectual by an administration which sought to use them for petty political purposes, and it is said that "the only conclusions that can be drawn as to the respective merits of public and private legal aid organizations are local rather than general in application. Where local political conditions permit, there is every reason for organizing legal aid work as a public affair under public control. On the other hand, in cities where private legal aid organizations are well established, there is every reason for them to remain as they are."

Without attempting to combat the views of Mr. Smith as to existing political conditions, it is submitted that those conditions are not sufficient to rebut the argument in favor of public control. The same political considerations apply with equal force to the other agencies of justice which are now publicly controlled. It has not always been possible to keep the judiciary free from political influences, particularly in minor courts, but that condition is now so well in hand that no substantial cause for complaint exists. Attorneys for the several municipalities are in the main as faithful and efficient as those privately employed. There is not a department of municipal government in which abuses have not existed, yet no one thinks of substituting a volunteer municipal government supported by private subscription. There is reason to believe that in this particular the author of the Bulletin has generalized too hastily from a few instances, forgetting that by the same process every public institution could be condemned.

The Work of a Minority.

But while the profession may find much cause for congratulation in the fact that by its efforts institutions which are theoretically sufficient to insure the right of every man to justice have been devised, and have to a very considerable extent been put into practical operation, satisfaction over the achievement must be very considerably tempered by the reflection that this has been the work of a very small minority. "It is due to the zeal and enthusiasm of small and isolated groups of judges, lawyers, and laymen, working independently in different places, that the path of reform has been blazed." So, summarizing the financial support given to voluntary Legal Aid Societies in six large cities, it is pointed out that an average of 32% in amount of the contributions were received from lawyers, the figures varying from 58% in Boston to 10% in Philadelphia. In the same cities the number of lawyers contributing was less than 8% of the local bar, varying from 23% in Newark to 1.9% in Chicago.

Looking at the large amount of constructive work which remains to be done before it can be said that our laws afford full and equal justice to all men, and at the comparatively small proportion of lawyers who have given efficient aid in that work, it cannot be denied that the bar has fallen far short of the full measure of its duty. As is said by Elihu Root in a foreword to the Bulletin under discussion: "I think the true criticism which we should make upon our own conduct is that we have been so busy about our individual affairs that we have been slow to appreciate the changes of conditions which to so great an extent have put justice beyond the reach of the poor. But we cannot confine ourselves to that criticism much longer; it is time to set our own house in order. And as we do so we should recognize with gratitude the noble and unselfish men and women whom this book shows to have been devoting themselves to the task which most of us have been neglecting."

In this particular the legal profession has fallen far short of the achievements of the medical. To-day any man, woman or child in the United States can obtain needed medical attention, either from public institutions or from the gratuitous rendering of professional services. Until the opportunity to obtain justice can be asserted as unequivocally, the bar cannot escape just reproach. It is doubtless true that the superior achievement of the medical profession is due not to greater public spirit or better organization among its members, but to the peculiarly urgent appeal which sickness or injury makes to the sympathies of all. But it is no particular compliment to our mental and spiritual stature to say that we are more sharply conscious of a physical wrong than we are of a moral wrong. As Chief Justice Marshall said (10 Am. Statesmen Series, p. 249): "The judicial department comes home in its effects to every man's fireside. It passes on his property, his reputation, his life, his all."

At the present time, when Americanism is the paramount issue of the hour, when a thousand agencies are appealing to the poor and ignorant to resort to measures of lawless force, it is of peculiar importance that no man shall have the right to say that in no other way can he secure justice. The immigrant comes to our shores from a land where oppression and injustice have been his hereditary lot. He comes ofttimes with a childlike faith that in the "land of the free" he will receive justice and fair play. When he finds his hopes disappointed he has not the capacity to reason as to causes; he can only nurse the bitter sense of disallusionment which makes him an

easy victim of the forces of sedition and disorder. Taking a single instance, set out in the Bulletin and verified by narration in a speech of Mr. Roosevelt. "One afternoon, Arthur V. Briesen, President of the New York Legal Aid Society, took Theodore Roosevelt, then Police Commissioner of New York, to the Society's office to see what went on. They sat at the interviewing desk. A glazier came in and related that he had set twenty-two panes of glass in a barn and that the owner of the barn had refused to pay him $6.60, the agreed price. He had been out of work and needed this money to buy bread and milk for his family's supper. On his way home from the West Side, where he had worked, to the East Side, where he lived, he crossed Fifth Avenue at Forty-fourth Street and passed the luxurious restaurants on either corner. His own children went to bed supperless. The next morning he sought out a lawyer, who told him that to bring suit the costs and the fee would be ten dollars. This he could not pay. From there he went to the Municipal Court, originally known as 'The Poor Man's Court,' where he saw a judge, who was obliged to explain that he had neither the time, nor the money, nor the right to undertake the necessary proceedings; that as the man had no money, he could not prosecute the case; and that, inasmuch as the expenses would exceed the amount in dispute, he had better drop it. As the man told his story, sitting in the office of the Legal Aid Society, he was an incipient anarchist."

The emergency is imperative and it needs but to be understood to meet with a ready response from a profession which has never failed to meet any demand on its patriotic energies.

W. A. S.

IS THERE AN EIGHTEENTH AMENDMENT?

BY JUSTIN DUPRATT WHITE,[1] in the *Cornell Law Quarterly*.

THE statement[2] which has been promulgated[3] as the Eighteenth Amendment has been widely discussed in the press and periodicals. Its legal inception has been challenged because the proposing resolution was not adopted by two-thirds of all the members elected to both houses of the Congress, although by two-thirds of those present; the impossibility of the enforcement of its provisions and the illegality of concurrent legislation by the Congress and state legislatures have been considered; it has been pronounced economically unwise, commercially unsound, subversive of liberty, of good government, of the principle of local self-government (which is nearest to the point involved), and of the theory that the constitution should be limited to the fundamental principles of government, and as violative of all settled principles of property; and the sufficiency of its ratification by the legislatures of those states which have constitutional referendum provisions has been questioned. On the other hand, it has been supported and defended against all such attacks. But little if any discussion has appeared of the fundamental and controlling proposition that the "amendment" can have no validity unless duly ratified on behalf of the people of all of the states.[4]

The soundness of three legal propositions must be apparent without any very deep reading of the constitution or prolonged reflection on the theory of our government, namely, first, that intra-state prohibition cannot be the subject of a valid constitutional amendment in the sense in which amendments are referred to in the constitution; second, that such prohibition cannot be grafted upon the constitution without the consent of the people of all of the states; and third, that such consent cannot be given by the legislatures of the states, but must come from conventions duly convened in accordance with a specific vote of a majority of the enfranchised citizens of the states respectively.

Outside of and beyond the question as to how far, in an orderly and wise system of republican form of government, a constitution should embrace rules to govern the daily life and ordinary habits of a people—should, in a measure, supplant usual statute law[4a]—is the question of what would be proper or valid amendments within the meaning of Article V of the constitution.

It will not be contended, for example, that a constitutional amendment that destroyed the union would be valid if ratified by only three-fourths of the states.[4b] One of the declared purposes of the constitution was "to form a more perfect union," that is, more perfect than the "perpetual" union established by the Articles of Confederation. "It is difficult," said Chief Justice Chase, "to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble if a perpetual union, made more perfect, is not?"[5]

Nor would such an amendment so adopted be valid if it destroyed the entity and sovereignty of the states. The union is perpetual and indissoluble and the sovereignty of the states is equally so. The United States could not exist without the states, but the states might continue to exist even though disunited.[6] "The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible union composed of indestructible States."[7]

But the line between proper and improper "amendments" must be drawn on the basis of a principle, not on the basis of the imminence or remoteness of catastrophe—the destruction of the entity and sovereignty of the United States or of the several states. That principle is that nothing may be the subject of an amendment which is of a class that could lead to the destruction of either the United States or the states.

[1] Of White & Case, New York City bar.

[2] "Sec. 1. After one year from the ratification of this article, the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

"Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

[3] By the Hon. Frank L. Polk, acting Secretary of State, on January 29, 1919. *New York Times*, January 30, 1919.

[4] The legislatures of three states have not ratified the "amendment."

[4a] The Constitution was merely intended to regulate the general political interests of the nation, not to regulate every species of personal and private concern. *The Federalist* (Hamilton), 84 (Dawson's ed.).

[4b] "If anything can be regarded as settled in the constitutional law of any people, it must now be looked upon as placed beyond further controversy, that the Constitution of the United States is an instrument of government, agreed upon and established in the several States by the people thereof, through representatives empowered for the purpose, operative upon the people individually and collectively, and, within the sphere of its powers, upon the government of the States also. And that the Union which is perfected by means of it is indissoluble through any steps contemplated by, or admissible under, its provisions or on the principles on which it is based, and can only be overthrown by physical force effecting a revolution." Story on the Constitution 5th ed.), vol. 1, pp. 222-223a (by Cooley).

[5] Texas v. White, 7 Wall. (U. S.) 700 (1868), at p. 725.

[6] Lane County v. Oregon, 7 Wall. (U. S.) 71 (1868), at p. 76.

[7] Texas v. White, 7 Wall. (U. S.) 700 (1868), at p. 725.

Argument based on the possible consequences that might flow from a particular construction of an instrument is not always the most conclusive, but when such consequences would be so serious, far-reaching and pervading, so great a departure from the structure and spirit of our institutions, and would radically change the whole theory of the relations of the state and federal governments to each other and of both to the people, such argument has force and is irresistible.[8]

Thus an amendment abolishing the legislative or the executive branch of the federal government would not be a valid amendment. A sovereign government cannot be conceived of without agencies through which those powers can function. Those agencies might be changed in form or scope or even amalgamated, but they could not be abolished. Every sovereign government must have power to make and enforce laws. It may be a fair question whether or not by constitutional amendment all judicial authority under the United States could be annihilated.[9] All judicial functions might perhaps be surrendered back to the states, but without the destruction of the sovereignty of the United States there could not be an annihilation of its legislative or executive functions.

Nor would an amendment be valid which deprived the states of their power of taxation. The power of taxation is indispensable to the existence of the states; it is an essential function of government.[10] To deprive a state of this essential of sovereign power would differ only in degree from the entire annihilation of the state.

This is the true conception of our government—it is indestructible both as to the entity and sovereignty of the United States and as to the entity and sovereignty of the states, unless such destruction is accomplished by consent of the people of all of the states.

If this were not so, then three-fourths of the states could wipe out all state lines and laws and sovereign existence without the consent and against the will of the others, with the one exception that without its consent no state may be deprived of its equal suffrage in the Senate.[11] Nor is there anything in that exception that "no state, without its consent, shall be deprived of its equal suffrage in the Senate," that is inconsistent with such conception of our government. A state might have an unequal suffrage in the Senate without losing its sovereignty and, on the other hand, no state would be entirely destroyed if it retained such "equal suffrage."

The effect of the exception is to confirm the doctrine that no state without its consent can be entirely destroyed by action of the other states. If it continues to have equal suffrage in the Senate until it consents otherwise, not only must the Senate continue to exist, but the state as an entity also.

But if it is argued that except for the exception, three-fourths of the states might wipe out this last vestige of state entity and that that was the reason for the exception, the answer is plain that the exception was necessary, not because otherwise a state might be entirely destroyed against its will, but because the constitution contained provisions in respect of the Senate and the representation of the states therein, and those provisions would therefore have been susceptible of amendment by three-fourths of the states. If under such an amendment the representation in the Senate had been fixed on a population basis as in the House, the states would nevertheless still be sovereign states.

The argument is irresistible that the principle by which the validity of any amendment adopted by three-fourths of the states must be tested is whether or not the subject of it is of a class that, followed to the end by subsequent amendments, would result in the destruction of the United States or of the states. If it is, then the subject may not be embodied in a valid amendment, which means that valid amendments must be confined to changes in the powers and provisions which the several states surrendered to the United States and inserted in the constitution at the time of its adoption.

We are considering amendments within the meaning of that word as used in the constitution, amendments that may be ratified by the legislatures of three-fourths of the several states or by conventions held in three-fourths thereof.

All of the states, acting through the people thereof, could permit one of their number to withdraw,[12] and, without doubt, all of the states by unanimous action through the people of them respectively could dissolve the union. Without doubt also, all of the states by unanimous action so taken could make the union still "more perfect" by surrendering to the United States some or all of their reserved powers, to the extent even of completely destroying their entity and sovereignty, but without such unanimous consent no state may be lawfully deprived of any of the sovereign powers which it has never surrendered, but has affirmatively reserved to itself or to the people,[13] any more than, in the first instance, could either of the two states[14] that did not promptly ratify the constitution have been forced into the union. They were excluded not by any warrant in the Articles of Confederation, but by action which was really revolutionary in character.[15] To have established the constitution without the ratification of it by those two states may have amounted to coercion, but there has never been a suggestion in the books that any one ever thought that those two states could have been *compelled* to ratify. That they did subsequently voluntarily resume their places in the union does not weaken the argument.

Among those reserved powers is the police power,[16] upon which alone "prohibition" laws (except in connection with the regulation of interstate commerce) rest.[17]

It is "a most comprehensive branch of sovereignty, extending, as it does, to every person, every public and private right, everything in the nature of property, every relation in the State, in society, and in private life."[18]

[8] Maxwell *v.* Dow, 176 U. S. 581 (1900), at p. 590.

[9] Hollingworth *v.* Virginia, 3 Dall. (U. S.) 378 (1798), at p. 381.

[10] Lane County *v.* Oregon, *supra*, note 6 at p. 76.

[11] Article V.

[12] Texas *v.* White, *supra*, note 7 at p. 726.

[13] Tenth Amendment. Professor Parsons, in speaking of his father, the eminent Chief Justice, alludes to "his favorite clause of the Constitution—that which reserves to the several states all powers not expressly delegated to Congress:—a clause for which he may well have had the affection of paternity. Whether he valued this provision too highly, time will shew. I cannot but think, as I believe he thought, that it is to this principle our country,—if it is to remain one country—must look for political salvation, or look for it in vain." Memoir of Theophilus Parsons, by his son, Theophilus Parsons, p. 259.

[14] North Carolina and Rhode Island.

[15] Cooley, Constitutional Limitations (7th ed.), 9; IV Hildreth, History of United States, 147, 149; II Pitkin, History of United States, 396.

"Two questions of a very delicate nature present themselves on this occasion: (1) On what principle the Confederation, which stands in the solemn form of a compact among the States, can be superseded without the unanimous consent of the parties to it? (2) What relation is to subsist between the nine or more States ratifying the Constitution, and the remaining few who do not become parties to it? The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be sacrificed." *The Federalist* (Madison), 42 (Dawson's edition).

[16] Slaughter-house Cases, 16 Wall. (U. S.) 36 (1872), at p. 62; Barbier *v.* Connolly, 113 U. S. 27 (1885), at p. 31; in re Rahrer, 140 U. S. 545 (1891), at p. 554.

[17] License Cases, 5 How. (U. S.) 504 (1847); Passenger Cases, 7 How. (U. S.) 283 (1849); License tax Cases, 5 Wall. (U. S.) 470 (1867); United States *v.* Dewitt, 9 Wall. (U. S.) 41 (1869), at p. 45; Kidd *v.* Pearson, 128 U. S. 1 (1888); Mugler *v.* Kansas, 123 U. S. 623 (1887), at p. 657.

[18] Cooley, Constitutional Law (3d Ed.), 250.

It is as sacred and essential to sovereignty as the rights to establish courts of justice, to define crimes and provide for penalties, to levy taxes, to charter railroad and commercial corporations, institutions of learning, hospitals and banks, to provide for the education of the people, to provide for the devolution of estates, to regulate fiduciary and domestic relations, to establish laws of marriage and divorce, or to pass any other laws for the preservation of order and the protection of life, liberty and property. An "amendment" which takes away a part of the police power, this attribute of sovereignty, is in the same class as an "amendment" which would strip the states of all their sovereign powers, of all the essential functions of government. The line of distinction between the subjects which do and those which do not form a proper basis for valid amendments cannot be drawn through the middle of a class, cannot be drawn, as we have observed above, with reference to the imminence or remoteness of the ultimate sweeping away of the existence of any one of the states without its due consent. To the existence of the States, themselves necessary to the existence of the Union, these powers are indispensable.[19]

Nor is there any precedent to the contrary suggested by any of the existing seventeen amendments to the constitution. By none of those amendments did the states surrender any of their reserved powers.

"That the first ten Articles of Amendment were not intended to limit the powers of the State governments in respect to their own people, but to operate on the National Government alone, was decided more than half a century ago, and that decision has been steadily adhered to since." [20]

The first eight amendments were inhibitions upon the federal government alone and by them the states surrendered nothing.

The Ninth and Tenth Amendments were not additions to the unanimous agreement of the conventions of the people of the several states that adopted the constitution, but merely definitions of what the constitution meant, merely declaratory.

Nor can it be said that the Tenth Amendment was ratified by three-fourths of the states and so may be amended by three fourths, and that the "Eighteenth Amendment" is in effect merely an amendment of the Tenth Amendment. All of the first ten amendments were in reality the *meaning* of the original constitution and not changes in it. They were adopted in compliance with an understanding at the time of the submission of the constitution, that they would be so adopted; in reassurance and evincement to the enemies of the constitution, who based their opposition on their contention that it did not contain a bill of rights, of the good faith and sincerity of the friends of the constitution, who contended that it did in effect contain a bill of rights in its guaranty of republican forms of government and other provisions.[20a]

"The Constitution," says Story, "was accepted and put in force in anticipation of, and in reliance upon, the adoption of these amendments, and by them the instrument was completed.[20b]

The insertion of the bill of rights (first eight amendments) as inhibitions on the United States alone, necessitated the Ninth and Tenth Amendments under the doctrine *expressio unius est exclusio alterius*, but those two amendments neither added to nor changed the original instrument. The reserved powers, which are all the powers of sovereignty except the few and defined powers that were delegated to the United States,[21] resided somewhere and it is not credible that any one would contend that by the original instrument they were surrendered to the United States and then by the Tenth Amendment taken back by the states respectively or by the people.

The Eleventh Amendment was amendatory of the judicial power of the United States, and so far as it related to the sovereignty of the several states, it restored to them an element of sovereignty that originally the states had surrendered to the federal judiciary, the right of immunity from suit by citizens of another state or by citizens or subjects of any foreign state.

The Twelfth Amendment took nothing from the states, but merely changed the method of the conduct of the electoral college.

The Sixteenth Amendment extended the existing taxing power of the Congress to other sources of taxation and did not take away any of the powers of the states as to taxation.

The Seventeenth Amendment changed the method of electing senators.

The Thirteenth, Fourteenth and Fifteenth Amendments are the only ones which at first thought might suggest the surrender by the states of sovereign power. Those three amendments are *sui generis*. They were the outgrowth of the Civil War. Their sole reason for being was to confirm the freedom of the African race in this country.[22]

It would be idle to attempt to discuss, within the proper limits of this paper, the question of slavery either legally or historically. Libraries bulge with its literature. Before the union, during the construction of the union and through its early life, both sides of the great question occupied the thoughts and challenged the resources of the ablest jurists, statesmen, economists and pub-

[19] Said in reference to the power of taxation, Lane County v. Oregon, *supra*, note 6; "In the Constitution the term 'state' most frequently expresses the combined idea . . . of people, territory and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens occupying a territory of defined boundaries and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." Texas v. White, *supra*, note 5, at p. 721.

[20] Spies v. Illinois, 123 U. S. 131 (1887), at p. 166; Barron v. Baltimore, 7 Pet. (U. S.) 243 (1833), at p. 250; Livingston v. Moore, 7 Pet. (U. S.) 469 (1833), at p. 552.

[20a] The preamble to the resolution preceding the original proposition of the amendments by the first session of the first Congress of the United States shows that the amendments were regarded by the Congress as declaratory and restrictive. 8 Wendell (N. Y.) 85 (1831), at p. 100.

[20b] Story on the Constitution (5th ed.), vol. 1, p. 220n.

[21] "The powers delegated by the proposed Constitution to the Federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace negotiation and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs concern the lives, liberties and properties of the people and the internal order, improvement and prosperity of the State." *Federalist* (Madison), 44 (Dawson's ed.).

[22] We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him; it is true that only the 15th amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth."

"We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the 13th article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this Amendment may safely be trusted to make it void. And so, if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply though the party interested may not be of African descent. But what we do say, and what we wish to be understood, is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it." Slaughter-house Cases, *supra*, note 16, at pp. 71-72.

licists of this country and England. Three times it brought the union to the verge of disaster.[23]

Whatever may have been the varying statutory status of slaves in the colonies and the states under the confederation, the institution of slavery was not recognized by the law of England,[24] although the traffic was connived at in the colonies.

Slavery is repugnant to a republican form of government which, in strictness, is by no means inconsistent with monarchical forms where the powers of legislation are left exclusively to a representative body freely chosen by the people.[25] The rights of free men were inherent in each citizen of a state or of the United States and were inherited from Great Britain under the common law and Magna Carta.

The compromises of the constitution [26] on the subject left with the United States the power to prohibit the importation of slaves after the year 1808.[27] The subject was, therefore, in some measure recognized as within the purview of the constitution. "It is worthy of remembrance," says Cooley, "that the Constitution, as finally agreed upon, did not mention it (slavery) by name, but only referred to servitude and the slave trade in vague terms as things the existence of which under a free constitution was to be overlooked rather than recognized." [28] That truly was its status at the time of the convention. It had fallen more and more into ill favor, the avowed public sentiment against it was growing, and state after state was forbidding it. But in later years the invention of the cotton gin and the development of the agricultural interests of the southern states revived its strength rapidly and increased its defenders.

How long in the peaceful progress of the states the institution would have continued before meeting affirmative prohibitory law is a question of speculation that can have no practical value at this time.

Whatever may have been contemporaneous opinion as to the legality of the institution, the actual settlement of the question was not through legal development or constitutional provisions, but was by that last resort of humanity which must always be regarded judicially as the final determination. Slavery was the overshadowing and efficient cause of the Civil War and whether legalized or not, it perished in that struggle.[29] When a conclusion is presented as the arbitrament of war, courts are powerless.

The proclamations of President Lincoln and President Johnson made support of those proclamations and of the acts of the Congress conditions of amnesty and the emancipation of the slaves was confirmed, rather than ordained, in the insurgent states, by the Thirteenth Amendment.[30] That amendment and the two which followed it, progressively confirmed and established the decree of the war. None of them required from the states the surrender of any power which any free government should ever employ.[31] Had a state or its people asserted that the Thirteenth Amendment destroyed a right to support slavery by law or a right to hold slaves, the answer would have been, as it would be now, that disregarding the opinion of civilization or the precedents of law as to the existence or non-existence of such rights, the matter had been settled by the bitterness and force of conflict, and that if any such rights ever existed they were not taken away by the amendment, but the taking away culminated in the stern scene at Appomattox, from which there could have been no appeal.

Republicanism has its roots in the equality of the rights of the citizens. Every republican government is bound to protect its citizens in those rights. They were proclaimed in the Declaration of Independence—that all men are created equal and that among the unalienable rights with which they are endowed by their Creator are the rights of life, liberty and the pursuit of happiness. These the United States guaranteed in the constitution [32] when it guaranteed to every state a republican form of government. Those three amendments carry out this guarantee. They took nothing from the states, but merely emphasize the obligations inherent in the republican governments of the states. They were declaratory of the fact of the complete obliteration of slavery and of all conditions of servitude attaching to it. They are declaratory of human rights and liberty and of restraints on the powers of the states. But no power so declared to be inhibited ever was inherent in free governments under Anglo-Saxon liberty, and, if any property rights were denied to the people, they were those which the war had already decreed should not obtain.

We are not without sound authority for this theory. The Fourteenth Amendment contains three provisions relating to the liberties of citizens,—against laws abridging the privileges or immunities of citizens of the United States; against depriving any person of life, liberty or property without due process of law; and against laws denying any person equal protection of the laws.

The first provision relates solely to the privileges and immunities of citizens of the United States as distinguished from citizens of the states,—the privileges and immunities arising out of the nature and essential character of the national government and granted or secured by the constitution of the United States. The privileges and immunities of citizens of the states as such still rest in the care of states.[33]

The second [34] and third [35] provisions simply furnish additional guarantees against encroachment by the states upon the fundamental rights which belong to every citizen as a member of society.

"The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the Amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guaranty." [36]

The other sections of the Fourteenth Amendment are amendatory of matters already contained in the constitution, except perhaps the inhibition against the payment of a debt incurred in aid of insurrection or rebellion against the United States or for

[23] (a) The compromises of the constitution were embodied in art. I, sec. 2, sub. 3; art. I, sec. 9, sub. 1; and art. v. Von Holst, Constitutional History of the United States, vol. 1, 292.
(b) The Missouri Compromise; Cooley, Constitutional Law (3d ed.), 284.
(c) The Civil War.

[24] "The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law. . . . It is so odious that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England." Lord Mansfield in Somerset *v.* Stewart, 20 State Trials, 1, 82 (1772).

[25] Cooley, Constitutional Law (3d ed.), 214.

[26] Story on the Constitution (5th ed.), secs. 636-644, 1332-1337, 1807, 1811. Constitution, art. I, sec. 2, sub. 3; art. I, sec. 9, sub. 1; art. v.

[27] Art. V.

[28] Story on the Constitution (5th ed.), vol. 2, sec. 1916 (by Cooley).

[29] Slaughter-house Cases, *supra*, note 16, at p. 68.

[30] Texas *v.* White, *supra*, note 5, at p. 728.

[31] Cooley, Constitutional Law (3d ed.), 221.

[32] Art. IV, sec. 4.

[33] Ex parte Kemmler, 136 U. S. 436 (1889), at p. 448; Maxwell *v.* Dow, *supra*, note 8, at p. 593.

[34] Davidson *v.* New Orleans, 96 U. S. 97 (1877), at p. 101.

[35] U. S. *v.* Cruikshank, 92 U. S. 542 (1875), at p. 555.

[36] U. S. *v.* Cruikshank, *supra*, note 35, at p. 555.

the loss or emancipation of any slave. That inhibition was justified as a condition of reconstruction after the Civil War and was declaratory of a condition, as a war penalty, under which the Confederate States remained in the union.

The Fifteenth Amendment affirmed the principle of the equality of the human race under a republican form of government and strengthens the guaranty that no line, in the enjoyment of the suffrage, may be drawn on the basis of race, color or previous condition of servitude. That principle is inherent in a republican form of government. The amendment does not inhibit the restriction of the franchise on the basis of property or educational qualifications, but recognizes the right of the sovereign state so to limit the franchise.[37] It does, however, fulfil the guaranty of the underlying thought of a free people, "that *all* men are created equal."

The third proposition stated at the beginning of this paper is that the unanimous consent of the states necessary to graft upon the constitution a provision establishing intra-state prohibition cannot be given by the legislatures of the states, but must come from conventions duly convened in accordance with a specific vote of a majority of the enfranchised citizens of the states respectively.

Chief Justice Marshall, in repudiating the doctrine that the constitution was the act of sovereign and independent states and did not emanate from the people, said:

"The convention which framed the Constitution was indeed elected by the State legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation or pretentions to it. It was reported to the then existing Congress of the United States, with a request that it might 'be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves or become the measures of the state governments."

"From these Conventions the Constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, ensure domestic tranquillity and secure the blessings of liberty to themselves and to their posterity.' The assent of the States in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties."

"It has been said, that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the State sovereignties were certainly competent. But when, 'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all."

"The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."[38]

Such of the sovereign powers as were originally surrendered by the states to the United States were, therefore, so surrendered, not by the states as sovereignties acting through their legislatures, but by the people of the several states acting in the only way in which they can act, by conventions. If, in order to delegate to the United States those powers which were delegated by the constitution, it was necessary that the people as such should act in the matter and they did so act, equally is it necessary, in order to surrender other powers "not delegated to the United States by the constitution," but "reserved to the states respectively or to the people," that the people[39] should act in the same formal and specific manner.

The hysteria of the times finds in the state constitutions scope and facility for its tinkering tendencies almost equal to the opportunities offered by statute law, and these tendencies are manifesting themselves with more and more persistency, particularly in the younger states. But those opportunities do not satisfy the insatiable spirit of change and regulation, which seems to find peculiar pleasure in upsetting precedent and tradition and in taking advantage of public apathy, because of which a busy minority always can control. There is much more zest in raising a supposedly irremovable obstacle to the exercise of the public will than there is in putting up hurdles that may be easily overthrown by change or crystallization of sentiment.

The state constitutions are as elastic as the varying moods of the people of the respective states. The ultimate sovereignty,—except such as has been surrendered or delegated to the United States,—resides in the people of the respective states; they may do with it as they like. When they delegated certain powers they provided for changes in those powers and in the machinery for exercising them, and in that very provision delegated the power to make such changes. They left it to the Congress to determine whether such changes should be made by legislatures or conventions, and they agreed that, when three-fourths of the states agreed, it should be sufficient. They inherently have the right to control their legislatures by referendum or otherwise just as they so have the right to fix the size and arrange for the election of their legislatures.

A few such changes have been made. If the reasoning of this paper is sound, the only changes that have been made are in the Eleventh, Twelfth, Sixteenth and Seventeenth Amendments. All of the others (excluding, of course, the "Eighteenth Amendment") are merely expressive or declaratory of what the constitution means and originally was intended to mean, are declaratory of liberty and of the principles of it, and all of them are assertive of those fundamental rights which are the foundation of a republican form of government.

[37] U. S. v. Reeve, 92 U. S. 214 (1875), at p. 217.

[38] M'Culloch v. Maryland, 4 Wheaton (U. S.) 316 (1819), at p. 403 *et seq.*

[39] "People" as used in the Tenth Amendment means people of the States, not people of the United States. Curtis, Const. Hist., vol. 2, p. 160n.

But those powers and sovereign rights, which the people did not delegate, they reserved to the states *respectively*, not collectively, or to themselves, that is, to the peoples *respectively* of the several states. "No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass." [40]

Not having contracted away those powers and rights, not having delegated them or any control over them, not having made any agreement in respect of them, but having affirmatively reserved them for exercise or future disposition, the people of *each* state must consent before those powers and rights may go to reside elsewhere.

The "Eighteenth Amendment" brings the country, therefore, to a parting of the ways, not only, incidentally, as to the nature of the subject, in that it is the first attempt in the constitution to control or restrict individual liberty, but also because, under the guise of an amendment of the constitution, it seeks to take from the people and the states what never was granted by them, what was affirmatively reserved to the states *respectively* or to the people, and, without unanimous consent, to delegate it to the federal government. It is as if an attempt were now made by three-fourths of the states of the union, acting through their legislatures, to destroy state entity and sovereignty and to unite all features and functions of government in one central government, with the states as mere geographical names preserved for the purpose of giving equal suffrage in the Senate, but looking for every other right and power to the whole American people compounded into "one common mass." That is not the theory of our government nor could our government endure under that theory.

The fact that the "Eighteenth Amendment" violates the principle of local self government is, although without direct bearing on the legal propositions asserted and considered in this paper, convincing of the unwisdom of the enterprise. That principle of decentralization "is one which almost seems a part of the very nature of the race to which we belong." [41] It has obtained in England from the earliest ages. It is the rock upon which our Republic is founded. The absence of it has caused republics to fall. It finds expression not only in the limitations on the national government, but also in the subdivisions under the states. Commentators on our civil polity not only uniformly have noted it, but have ascribed to it the maintenance of the liberty we have continued to enjoy.

The reverse of that principle is the danger signal flashed by history. Particularly in this country of great territorial extent, of urban concentration and rural paucity of population, of diversity of climate, natural conditions, resources, habits, occupations, economic circumstances and social interests, the perils of centralization in respect of affairs purely local in their nature and not those specifically and wisely delegated in the constitution, are apparent from the lessons of the past. It is to the principle of local self government that "our country—if it is to remain one country—must look for political salvation, or look for it in vain." [42]

It is unfortunate that the test has come in connection with a matter that is by some regarded as a moral issue. Expediency is always an insidious argument and any diverting thoughts tend to cloud the true significance of a situation such as this that now confronts our country.

[40] M'Culloch v. Maryland, *supra*, note 38, at p. 403.
[41] Cooley, Constitutional Limitations (7th ed.), p. 268.
[42] *Supra*, note 13. In Story on the Constitution (5th ed.), vol. I, pp. 199-205, is an impressive note by Judge Cooley, citing many authorities and discussing this principle.

Cases of Interest

RIGHT OF INJURED SPOUSE TO DISCONTINUE PROSECUTION FOR ADULTERY.—In State v. Astin (Wash.) 180 Pac. 394, reported and annotated in 4 A. L. R. 1335, it was held by a divided court that the wronged spouse cannot, under a statute providing that no prosecution for adultery can be instituted except by his or her complaint, discontinue a prosecution once begun. Mackintosh, J., writing for the majority, said in part: "The case, after the complaint is filed, is no longer a matter of private concern, but has partaken of all the attributes of a public offense, and the injured spouse should have no more right to control the further disposition of the case than should the complaining witness in any other criminal action. To hold otherwise would be to open the door of a treasure room for a horde of blackmailers. A tender solicitude for persons whose misfortunes have already been exposed to public view by the filing of criminal charges certainly should not lead to the result that extortionists are to be equipped with a new set of weapons. In no other class of litigation is the opportunity for blackmail already so great, and to increase it by putting into the power of the complaining witness not only the institution, but the entire destiny, of the prosecution, is to close our eyes to a grievous situation, and add to its immense possibilities for the evilly disposed. If the complaining witness can dismiss the action at his pleasure, he may enjoy that right until final judgment; before, during, or after trial, at his whim, the defendant may be discharged. What becomes then of the argument that the right to control the action rests with the complaining witness, for the purpose of protecting innocent persons from the publicity attached to such actions? To allow such a result, especially in a class of crime where the making of complaint is so subject to abuse, is abhorrent to the fundamental principles of law and morals. The only authority holding to the contrary of the views here expressed is a three-line opinion by Chief Judge Cooley in People v. Dalrymple, 55 Mich. 519, 22 N. W. 20, where that distinguished judge decided that the dismissal at the request of a complaining witness, though against the letter, was not against the spirit of a statute similar to ours—a decision not consistent with rules of statutory construction which have never received better expression than that given by the same authority. The decision can only be explained by recalling that even great Homer is reputed to have sometimes nodded."

NECESSITY OF OBTAINING HUSBAND'S CONSENT TO OPERATION ON WIFE.—It seems that a married woman in full possession of her faculties has full power, without the consent of her husband, to submit to a surgical operation on herself. It was so held in Burroughs v. Crichton, 48 App. Cas. (D. C.) 596, reported and annotated in 4 A. L. R. 1529, wherein the court said, referring to one of the counts in the declaration: "The theory underlying this count is that a husband has absolute control over the person of his wife; that it is for him, and him only, to determine whether an operation shall be performed upon her, and, if so, upon what conditions. In other words, the theory is that in this respect the husband exercises the same control over his wife as is exercised by the owner of a chattel. This position is untenable. In Bronson v. Brady, 28 App. D. C. 250, 256, we said 'that the tendency of the times is to emancipate married women from the harshness and disabilities of the common law, and place them upon an equal footing with men.' A wife in the full possession of her faculties is as much entitled, both morally and legally, to determine whether she shall submit herself to

an operation as is the husband in respect to an operation on himself. And where a wife, in such circumstances, consents to an operation which is skilfully performed, the surgeon is not liable to the husband in damages. Pratt *v.* Davis, 224 Ill. 300, 7 L. R. A. (N. S.) 609, 79 N. E. 562, 8 Ann. Cas. 197; State use of Janney *v.* Housekeeper, 70 Md. 162, 2 L. R. A. 587, 14 Am. St. Rep. 340, 16 Atl. 382, 21 R. C. L. 392, 393. The following from the opinion in the latter case is pertinent here: 'Surely the law does not authorize the husband to say to his wife: You shall die of cancer; you cannot be cured; and a surgical operation affording an only temporary relief will result in useless expense. The husband had no power to withhold from his wife the medical assistance which her case might require. . . . The consent of the wife, not that of the husband, was necessary.' In the present case it is alleged that the defendant was a 'skilled and experienced physician and surgeon;' that plaintiff's wife was afflicted with cancer and that defendant performed an operation therefor. It is not averred that the operation was unnecessary or that it was unskilfully performed. Neither is it averred that plaintiff's wife did not appreciate her true condition and consent to the operation. Such averments being lacking, it must be assumed that the facts did not warrant them. The count, therefore, is fatally defective.

PLAYING BASEBALL AS COMMON AVOCATION OF LIFE.—In State *v.* Nashville Baseball Assoc. (Tenn.) 211 S. W. 357, reported and annotated in 4 A. L. R. 368, it was held that playing professional baseball is not within a statute making it unlawful for any merchant, artificer, tradesman, farmer, or other person to do or exercise any of the common avocations of life on Sunday, which was passed before the playing of baseball began. Said the court: "It appears that, at the time of the passage of the act in question, the game of baseball had not been invented and was unknown, and hence the legislature could not possibly have had such a game in mind at the time it passed said act. 'Intention is the cardinal rule in the construction of statutes.' 11 Enc. Dig. 529, where many cases are cited. 'It is a settled rule that penal statutes are to be construed strictly, and are not to be extended beyond the plain letter of the law.' McCreary *v.* First Nat. Bank, 109 Tenn. 128, 70 S. W. 821. Now, what was the legislative intent in the passage of this statute? The statute says: 'If any merchant, artificer, tradesman, farmer, or other person shall be guilty of doing or exercising any of the common avocations of life,' etc. Evidently the legislature intended to inhibit anyone from 'exercising any of the common avocations of life on Sunday,' and unquestionably it referred to, and the legislature had in mind, the common avocations of life engaged in by the people at that time. The legislature did not undertake to enumerate them; it was unnecessary, as they were commonly known and understood by the people, but they indicated what they had in mind by specifically mentioning merchandizing, one who does artistic work, a mechanic or manufacturer, a trader, and a farmer, and, speaking historically, this practically included all of the common avocations of that day. If you undertake to extend the statute to the many avocations that have since come into vogue, and which the legislature could not have had in mind, you are confronted with very serious problems, the result being that a very large number of our industrial and pleasurable operators are persistent violators of the statute. The thousands of men engaged in operating our railroads, traction companies, taxicabs, publishers of Sunday newspapers, the boys who vend these papers, bootblacks, musicians whose avocations as members of a band are to play in our city parks on Sunday afternoon for the entertainment of the large number of people who frequent such places for fresh air and sunshine, and even the professional musician, who sings as an avocation, and who hires himself to one of our church choirs and sings in church Sunday after Sunday—all of these are violators of the statute, and many other examples could be cited. So that, when you undertake to give this statute a broader meaning than was intended by its framers, and than a strict construction entitles it to, you are making law violators out of many of our citizens, and they are innocent offenders at that; and, furthermore, the question as to whether a particular act is a violation of the statute will depend largely on the personal views of the particular jurist making the application. One might consider it a violation, while another would not, and the result would be that the law would not be uniform, fixed, and certain."

APPLICABILITY OF BULK SALES LAW TO SALE BY FARMER.—In Weskalnies *v.* Hesterman, 288 Ill. 199, 123 N. E. 314, reported and annotated in 4 A. L. R. 128, it was held that the sale of a farmer's stock and utensils is within the provisions of the Illinois Bulk Sales Law, making void as against creditors the sale in bulk of the major part of a stock of merchandise, or other goods and chattels of the vendor's business, otherwise than in the ordinary course of trade. The court based its decision on the following grounds: "The first Bulk Sales Act in this state was passed by the legislature in 1905. Laws 1905, p. 284. That act was expressly limited in its application to the sale of stocks of merchandise, and in Charles J. Off & Co. *v.* Morehead, 235 Ill. 40, 20 L. R. A. (N. S.) 167, 126 Am. St. Rep. 184, 85 N. E. 264, 14 Ann. Cas. 434, it was held unconstitutional. It was pointed out in that case that the act did not apply to farmers, hotel keepers, livery or transfer companies, publishers, mine owners, and others mentioned, and the court held that there was no reason or qualification connected with a stock of merchandise, or persons dealing in the same, which authorized the legislature to mark it or them for special protective legislation, from which all other classes of persons, and property, were excluded. In 1913 the legislature passed another Bulk Sales Act. Laws 1913, p. 258. That act declared fraudulent and void as against creditors 'the sale, transfer, or assignment in bulk of the major part or the whole of a stock of merchandise and fixtures or other goods and chattels of the vendor's business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the vendor's business,' without compliance with the provisions of the act. Section 3 provides that the act shall include corporations, associations, copartnerships, and individuals who are parties to any sale of goods in bulk, but not to sales by executors, administrators, receivers, trustees in bankruptcy, or by any public officer under judicial process, nor to the sale of exempt property, nor to sales made in the ordinary course of trade and in the regular and usual prosecution of the vendor's business, nor to sales made in good faith at public auction when notice is published in a newspaper of general circulation in the county where the sale is made, ten days before the sale, or by posting notices in five public places ten days before the sale. That fact was held valid in G. S. Johnson Co. *v.* Beloosky, 263 Ill. 363, 105 N. E. 287. The court said: 'It must be assumed that the legislature, in passing the new act, had before it the decision of this court holding the former act unconstitutional because it was special class legislation, and that it was the intention of the general assembly, in passing the later act, to obviate this objection by passing a general act applicable indiscriminately to the sale of any goods and chattels in the manner inhibited by § 1 of said act. Construing the new act as a general law which prohibits the sale of any goods and chattels in bulk, otherwise than in the ordinary course of trade in the regular and usual prosecution of business, the objection to which the former statute

was open is obviated.' It seems very clear from the history of the legislation and the language of the act that it was intended to, and does, apply to the sale of the property made by Albert Weskalnies to plaintiff. It was a sale in bulk of the major portion of the vendor's property, and was not made 'in the ordinary course of trade and in the regular and usual prosecution of the vendor's business.' There was no error in the holding of the circuit and appellate courts that the sale was fraudulent and void as to creditors."

LIABILITY OF PHYSICIAN FOR NEGLIGENCE OF SUBSTITUTE.—A physician who sends a substitute, on becoming unable to fill a professional engagement, is not, it seems, answerable for his negligence or malpractice, unless the substitute acts as his agent in performing the service. It was so held in Moore *v.* Lee (Tex.) 211 S. W. 214, reported and annotated in 4 A. L. R. 185, wherein the court said: "The material facts proved were that plaintiff in error and defendant in error had entered into an agreement, whereby the wife of defendant in error was to have the services of plaintiff in error, as a physician, for an agreed fee, during the approaching confinement of the wife, who was visited and examined by defendant in error between 1 and 2 o'clock on the morning of February 6, 1911, and at that time plaintiff in error promised to return when needed. On account of the setting of a lawsuit against plaintiff in error and others, at Fort Worth, for February 6, 1911, and pressing professional engagements, plaintiff in error concluded that he would not be able to return to Mrs. Lee. It was the custom among the reputable physicians of Dallas, where the parties resided, for a physician, who determined that he could not meet all his engagements, to send some other physician, and about 8 o'clock on February 6, 1911, plaintiff in error telephoned Dr. Hardin that he might need him during that morning. Before 9 o'clock defendant in error notified Dr. Moore that it was time for him to come to Mrs. Lee, when Mr. Moore replied that, because of important business, he would be unable to come, but he would send another physician, to which defendant in error responded with a request to send him in a hurry. Until about a quarter past 9 o'clock, there was another physician in the neighborhood of defendant in error, with whom defendant in error talked, without asking him to attend Mrs. Lee. After being requested by defendant in error to send another physician in a hurry, plaintiff in error telephoned to Dr. Hardin, whose general reputation in Dallas as a physician was good, saying that he had a case to which he wanted to send him, that it was a partnership case, of which he expected to take care, and plaintiff in error requested Dr. Hardin to go out and look after the wife of defendant in error, and to notify him if he needed help or anything went wrong, whereupon he would either come himself or send assistance. Dr. Hardin reached the home of defendant in error about 10 o'clock and attended to the delivery of the child, and there was evidence to raise the issue of injury to Mrs. Lee through acts of negligence of Dr. Hardin. Defendant in error expressed no dissatisfaction to Dr. Hardin, at the time the child was delivered, and paid him on his second or third visit in full fee, which he testified he had agreed to pay plaintiff in error, and paid nothing to plaintiff in error. . . . The question is, simply, What was plaintiff in error's duty, under the law, when defendant in error asked him to speedily despatch another physician to treat Mrs. Lee? To our minds this question admits of no answer save that the duty of plaintiff in error was to exercise ordinary care in the selection of the physician to be sent, as the jury was instructed by the trial court. The opinion in Texas C. R. Co. *v.* Zumwalt, 103 Tex. 607, 30 L. R. A. (N. S.) 1206, 132 S. W. 113, declared that where a railroad company furnished an employee with a physician, the railroad company would not be held liable for the physician's negligence unless, in treating the employee, he was the agent of the railroad company. No more can plaintiff in error be held liable for Dr. Hardin's negligence or lack of skill, in the absence of facts to establish that Dr. Hardin was acting as the agent of plaintiff in error when he was treating defendant in error's wife. From the very nature of the employment, the physician who takes the place of another must, while he alone is treating the patient, exercise his own judgment and his own skill; and he is truly an independent contractor."

News of the Profession

KENTUCKY JUDGE RESIGNS.—County Judge Fred A. Vaughan of Johnson county, Kentucky, has resigned to become Secretary of State.

NEW KANSAS DISTRICT JUDGE.—Governor Allen of Kansas has appointed W. R. Mitchell of Mankato a district judge.

PIONEER LAWYER OF WASHINGTON DEAD.—Joseph H. Naylor, pioneer attorney of Everett, Washington, is dead at the age of 71. He was born in Oregon.

MULTNOMAH, OREGON, BAR ASSOCIATION.—A special meeting of the association was held in December to consider a resolution indorsing the re-establishment of capital punishment.

DEATH OF NEBRASKA JURIST.—Judge Samuel H. Sedgwick, for fifteen years a justice of the Supreme Court of Nebraska, is dead. He was previously a district judge.

DEMISE OF GEORGIA JUDGE.—Judge Augustus A. Fite of Cartersville, Georgia, is dead. He was judge of the Cherokee Circuit of the Superior Court for a number of years.

MILWAUKEE BAR ASSOCIATION.—Memorial services for the members of the Milwaukee Bar Association who died during the year 1919 were held December 29. The ceremonies were presided over by Circuit Judge Halsey.

DEATH OF NEW YORK LAWYER.—Augustus Jay of New York city is dead. He was the great-grandson of John Jay, the first Chief Justice of the United States, and was born in Washington in 1850.

DEATH OF IOWA LAWYER.—Jacob S. McKenney, of Fairfield, Iowa, died recently at the age of 84. He was a member of the firm of Leggett & McKenney which had been in existence for fifty-two years.

CALIFORNIA JUDICIAL CHANGES.—Governor Stephens of California has appointed Edward I. Butler of San Rafael judge of the Superior Court of Marin county, to succeed Judge Edgar T. Zook, who recently resigned.

DEATH OF OHIO SUPREME COURT REPORTER.—Emilius O. Randall, reporter of the Supreme Court of Ohio, died in December at the age of 69. He was a graduate of Cornell University and had held the office of reporter since 1895.

CHANGE IN PERSONNEL OF NEBRASKA DISTRICT COURT.—Judge George H. Thomas of Dodge county, Nebraska, district judge of the sixth judicial district, has resigned. Judge A. M. Post of Columbus succeeds him. He was formerly a supreme court judge.

FORMER ATTORNEY GENERAL OF UNITED STATES TO PRACTICE IN NEW YORK.—Thomas W. Gregory who resigned as attorney general of the United States last February has been admitted to the bar of the state of New York and is now head of the firm of Gregory, Earle & Wood.

RETIREMENT OF EMINENT NEW YORK SURROGATE.—Surrogate Robert Ludlow Fowler of New York city has retired from the post of surrogate of New York county, New York. He was a distinguished judge and previous to his service on the bench was an eminent practitioner and legal author.

ST. LOUIS BAR ASSOCIATION.—At a recent meeting of the St. Louis Bar Association in honor of Judge Thomas C. Munger, Robert T. Lewis, Kimbrough Stone and William C. Hook of the United States Circuit Court of Appeals, Judge Shepard Barclay and Chester H. Krum were the principal speakers.

FORMER VIRGINIA LAWYER DEAD.—Walter A. Watson of Richmond, Virginia, died December 24. At the time of his death he was a representative in Congress, where he had served some years. He had been a judge in the circuit court of the fourth judicial circuit of Virginia eight years, resigning that position to run for Congress.

DENVER BAR ASSOCIATION.—Charles R. Brock of the law firm of Smith, Brock & Ferguson was elected president of the Denver Bar Association in place of George L. Nye, at the annual meeting recently held. Bishop Irving P. Johnson of the Episcopal diocese of Colorado delivered the principal address.

DEATHS AMONG NEW HAMPSHIRE LAWYERS.—George I. McAllister of Manchester, New Hampshire, died December 31, at the age of 66. He was at one time a partner of the late United States Senator Henry E. Burnham. Another death in that state is that of Calvin Page, formerly mayor of Portsmouth and father-in-law of Governor John H. Bartlett.

PENNSYLVANIA BAR ASSOCIATION.—The midwinter meeting of the executive and other committees of the Pennsylvania Bar Association was held at Easton the last of December. Former Supreme Court Judge Edward J. Fox of Easton, president of the association, presided. Attorney General Schaeffer was one of the principal speakers.

ASSIGNMENT OF JUDGE TO FEDERAL COURT IN ST. LOUIS.—Judge Walter H. Sanborn of the United States Circuit Court of Appeals has appointed Judge David P. Dyer as assistant to Judge Faris in the United States District Court. The large number of cases on the docket will necessitate the maintenance of two federal trial courts, it is believed.

DEATHS AMONG PENNSYLVANIA LAWYERS.—Deaths among Pennsylvania lawyers include Harvey Roland of Ebensburg; William Grier of Philadelphia; Joseph A. Reed of Philadelphia; Harry S. Cavanaugh of Rome; Harry O. Schrader of Reading; Alfred C. Ferris of Philadelphia; Warren S. Long of Doyleston; David McMullen of Lancaster, and R. M. Ingram of Lewistown.

KANSAS BAR ASSOCIATION.—The annual meeting of the Kansas Bar Association was held at Topeka January 30 and 31. Among the speakers were Judge John C. Hogin, Belleville, president; Leo T. Gibbens, Scott City; State Senator George W. Wark, Caney; W. D. Vance, Belleville; Judge Richard E. Bird, Wichita; James A. Allen, Chanute; and J. C. Shearman, Wichita.

FORMER MINNESOTA CHIEF JUSTICE DEAD.—Charles M. Start, former chief justice of the Minnesota Supreme Court, is dead at the age of 80. He was born at Bakerfield, Vermont, and practiced law at Rochester, Minnesota. He began his judicial career as judge of the third Minnesota judicial district in 1881, becoming a supreme court judge in 1895, which office he held till 1913.

NEW SUPREME COURT JUDGE IN NEBRASKA.—District Judge George A. Day of Omaha has been appointed to the Nebraska Supreme Court by Governor McKelvie to fill the vacancy caused by the death of Judge S. H. Sedgwick of Lincoln. He was born in Iowa where his father was for thirteen years a supreme court judge. He went to Omaha in 1883 and was elected a district judge in 1902.

JUDGES FOR WESTERN DISTRICT OF MISSOURI.—Circuit Judge Walter H. Sanborn, senior judge of the eighth judicial circuit, has appointed judges to preside over the courts of the western district of Missouri in the event that Judge Arba S. Van Valkenburgh is absent or disqualified, as follows: Judge John C. Pollock of the Kansas district; William C. Hook, judge of the eighth judicial circuit; R. L. Williams, district judge for the eastern district of Oklahoma.

ILLINOIS THIRD JUDICIAL DISTRICT BAR ASSOCIATION.—The Federation of Local Bar Associations of the Third Judicial District of Illinois met at Champaign January 3. Justice Frank E. Dunn of Charleston and Silas Straun of Chicago addressed the attorneys upon the subject, "The Lawyer and the New Constitution." Frederick A. Brown, president of the Illinois State Bar Association, was a guest at the meeting.

DEATHS AMONG WISCONSIN LAWYERS.—James G. Flanders of Milwaukee, Wisconsin, died January 1. He was 76 years old and was graduated from Yale in 1867. Samuel Stebbins Barney, another Milwaukee lawyer, died December 31. He was at one time a judge of the United States Court of Claims, and had also been a representative in Congress for eight years. He was born in 1846.

BAR EXAMINER APPOINTED IN MONTANA.—The Montana State Supreme Court has appointed Wellington D. Rankin of Helena to the post on the state board of bar examiners made vacant by the resignation of C. S. Spaulding of Helena, who retired because, he said in a public statement, the examination held recently, in which a majority of applicants for admission to the bar failed, was in his opinion too strict.

ASSOCIATION OF AMERICAN LAW SCHOOLS.—At a meeting of the Association of American Law Schools held in Chicago December 30 and 31, a resolution was adopted to the effect that members of the association would no longer grant degrees to night law school students, and that after September of this year no schools giving night law courses would be eligible to membership in the association. There was considerable opposition to the resolution.

OKLAHOMA BAR ASSOCIATION.—The annual meeting of the Oklahoma Bar Association was held at Oklahoma City in December. A constitutional amendment designed to expedite and cheapen methods of obtaining justice in Oklahoma was proposed. The draft was made by a committee composed of eighty-five attorneys and contemplates a judicial commission composed of members of the State Supreme Court who would have authority to make and enforce rules of procedure in all courts throughout the state.

MASSACHUSETTS BAR ASSOCIATION.—The Massachusetts Bar Association at its annual meeting held at Worcester in December elected officers as follows: President, Frederick P. Fish of Brookline; Vice-Presidents, James M. Morton of Fall River, Frederic Dodge of Belmont, John W. Hammond of Cambridge, and Wil-

liam Caleb Loring of Boston; Treasurer, Charles B. Rugg of Worcester; Secretary, Frank W. Grinnell of Boston; Executive Committee, John Barker of Springfield, Stoughton Bell of Cambridge, Stanley E. Qua of Lowell, Charles M. Davenport of Boston, Henry H. Fuller of Lancaster, Edmund G. Ford of Lawrence, Charles Mitchell of New Bedford, Gardner K. Hudson of Fitchburg, Starr Parson of Lynn, Frank J. Lawler of Greenfield, John W. McAnarney of Quincy, John W. Mason of Northampton, Thomas W. Proctor of Newton, Arthur Dolan of Boston, C. C. King of Brockton, Robert D. Wesson of Cambridge, Edmund K. Arnold of Boston, William McKechnio of Springfield, Reginald H. Smith and John A. Sullivan of Boston.

THE NEBRASKA BAR ASSOCIATION met at Omaha December 29 and 30 for its twentieth annual convention. At a banquet held at the close of the convention the principal address was given by former Appellate Judge Clarence N. Goodwin of Chicago on "The American Judiciary." In the absence of Federal Judge T. C. Munger, who was expected to be present, Chief Justice Andrew M. Morrissey of the Nebraska Supreme Court spoke. Judge Morrissey discussed the work of the judiciary, of which he is the head, and said that for the first time in a long while the supreme court of this state was only one year behind, having only 561 cases on the docket. W. M. Morning of Lincoln was elected president of the state association for 1920. I. G. Beeler of North Platte, E. E. Wood of Wahoo and Edwin Crites of Chadron were named vice-presidents. Anon Raymond of Omaha was elected secretary and Raymond M. Crossman of Omaha treasurer. Fred A. Wright of Scottsbluff was elected in the executive council. Other members of this council continue in office. Resolutions regretting the death of the late Samuel H. Sedgwick, associate justice of the state supreme court, were passed.

English Notes*

THE EX-KAISER IN COURT.—The Kaiser is appearing in a new role, viz., that of suitor, says the *Law Times*. According to a dispatch from Stuttgart, an application was made recently, on behalf of the Kaiser, before the civil tribunal of Wurtemburg, to interdict the publication of the third volume of the Pensées et souvenirs of Bismarck. The ground of the application is that the book will contain letters from the ex-Kaiser, over which he claims to exercise his droit d'auteur, or copyright. The tribunal has granted the interdict, but the decision will be carried before the Supreme Tribunal.

AN OLD LAW BOOK.—A well known London bookseller has for sale a copy of the earliest edition of the first work of the famous Flemish jurist, Josse de Damhouder. The title is *Practyke ende Handbouck in Criminele Laaken*, and the date is 1555. Besides being the work of an able lawyer, his books are remarkable for the number of their illustrations. This volume contains more than fifty woodcuts representing every variety of crime and punishment, and is valued at £7. A further interest at the present time is that it is a good example of Louvain printing. Although Lincoln's-inn Library and the Middle Temple Library both contain examples of his works, neither appears to possess this edition of the first, but each has *Le Refuge et Garand des Pupilles, Orphelins, et Prodigues: traite fort utile et necessaire a tous Legistes, Practiciens, Justiciers et Officiers, aorné de figures convenables a la matière.* It was published at Antwerp in 1567, and the illustrations are certainly quaint. The book is still an authority in South Africa in connection with the application of Roman-Dutch law on guardianship. Gray's-inn Library contains a collected edition of Damhouder's works.

NON-DISCLOSURE OF LIFE POLICY BY BANKRUPT.—In Tapster *v.* Ward (1909, 101 L. T. Rep. 25, 503) it was held that where a person effected a policy on his own life and afterwards became a liquidating debtor under the Bankruptcy Act 1879, and continued to pay the premiums during the liquidation without the knowledge of the trustee in the liquidation, and continued to pay them after his discharge, his personal representative, on his death, had no claim to the proceeds of the policy. The reason of this is that every contract made by the debtor before or during the liquidation is the property of the trustee, and the policy is a contract which ought to be disclosed to the trustee. In the recent case of Re Stokes; Ex parte Mellish (121 L. T. Rep. 391) it was sought to distinguish Tapster *v.* Ward (sup.) on two grounds. The policy was effected not before but during the liquidation, and the premiums during the liquidation were paid out of the salary allowed to the debtor as clerk to the trustee who carried on the debtor's business. These two grounds were held, however, to be quite insufficient to distinguish the case from Tapster *v.* Ward (sup.), the principle of which case was followed in Re Philips (110 L. T. Rep. 939; (1914) 2 K. B. 689), for it obviously made no difference that the policy was effected during and not previous to the liquidation, and the contract was still the property of the trustee, in spite of the fact that the premiums were paid out of the debtor's salary. The position, however, is entirely different if the trustee is aware of the policy and stands by and allows the premiums to be paid by the debtor's wife. He cannot then intervene and take the benefit of the policy without allowing the wife the amount of the premiums paid by her: (Re Tyler, 97 L. T. Rep. 30; (1907) 1 K. B. 865; Re Hall, 97 L. T. Rep. 33; (1907) 1 K. B. 875). In such a case the principle of Ex parte James; Re Condon (30 L. T. Rep. 773; L. Rep. 9 Ch. App. 609) applies, where Lord Justice Farwell said: "The officer of the court must not embark upon a course of conduct, either of omission or commission, which is unworthy of the court so as to commit the court to do acts which it would feel bound to repudiate."

INTERNATIONAL CONFERENCE ON THE LEAGUE OF NATIONS.—The conference of associations in favor of the League of Nations sitting in committee in Brussels last week passed a resolution regarding the International Court of Justice. The committee adopted the principle of the equality of all States, that they shall have each the same number of representatives and the same number of votes—that is, one vote for each State. Another resolution adopted was to the effect that there shall only be one judge of the same nationality in the court. These recommendations will have to come before a plenary sitting of the conference for approval. At the second meeting of the committee, the following recommendations relative to disarmament were adopted: (*i*) Conformably to the views of the associated societies, measures shall be taken without delay to bring about the progressive reduction of all armaments in terms of art. 8 of the Convention (pacte) of the Société des nations. Each society in consequence shall undertake in its own country a campaign with the object of bringing about disarmament, and urging public opinion to accept any proposition in this sense put forward by the Société des nations. (*ii*) The conference considers it desirable that all parliaments shall pass a resolution inviting their respective governments to grant a mandate to their delegates to the next assembly of the Société des nations to propose the examination of practical measures to bring about a progressive

*With credit to English legal periodicals.

reduction of armaments and which in the result will bring about a general disarmament. (*iii*) The Conference of Brussels confirms the resolutions adopted unanimously by the Conference of London, having reference to arts. 8 and 9 of the pacte de la Société des nations. (*iv*) The committee proposes that its deliberations shall be resumed in Brussels as soon as the adhesion of America to the Société des nations has been agreed upon. The question of the participation of the Vatican in the Société des nations was discussed. M. Siebernagel, president of the Tribunal of Berne, declared that a great number of Swiss Catholics are opposed to the League of Nations, and will remain so until the opposition to Vatican representation is waived. The question arose as to whether the Vatican should be considered as a nation, but the opinion was in the negative, yet it was agreed that the Papacy is a Power, and that there were no strong reasons for excluding the Saint-Siège. Ultimately it was decided to refer the matter back.—*Law Times.*

Contract to be "Void" in Certain Event.—Contracts not infrequently contain a stipulation that, in a certain event, they shall be void, but that stipulation cannot always be taken literally. It will not enable one of the parties to take advantage of his own wrong. The judgments of the Law Lords in the comparatively recent case of New Zealand Shipping Company Limited *v.* Société des Ateliers et Chantiers de France (118 L. T. Rep. 731; (1919) A. C. 1) make this clear. There by a contract made in 1913, a French company agreed to build a steamer for a shipping company, to be completed by January 30, 1915, subject to an extension of time if the building was delayed by an unpreventable cause; and if the builders should be unable to deliver the steamer within, if France should become engaged in a European war, eighteen months from the date agreed upon for completion, the contract was to become void, and all money paid by the shipping company was to be repaid to them with interest. As everyone knows, in August, 1914, France became engaged in the great war, and the builders were prevented by unpreventable causes from completing the steamer within the time agreed upon. The question was whether the builders were entitled to treat the contract as void, notwithstanding that the shipping company required them to complete and deliver the vessel. It was held by the House of Lords (affirming the decision of the Court of Appeal and of Mr. Justice Bailhache) that the contract had become void, and not merely voidable at the opinion of the shipping company. Lord Finlay (the then Lord Chancellor) in the course of his judgment referred to the case of Roberts *v.* Wyatt (2 Taunt. 276)—a case between a vendor and a purchaser of land—in which Sir James Mansfield, C. J., said: "Something has been argued on the construction of the proviso that in case the vendor could not make a title the contract should be void. But, in order to adapt that defense to the present case, the argument must be that, if the defendant says he cannot answer the objection, it shall be absolutely void at the choice of either party. But that is not so; the meaning is that, if the seller cannot make a good title by the time mentioned, the contract shall be void as against him, and the plaintiff has a right to be off his bargain. So *e contra* if the plaintiff does not pay the money the defendant may avoid the contract; but the plaintiff cannot say, 'I am not ready with my money, therefore I will avoid the contract'; nor can the seller say, 'My title is not good, therefore I shall be off.'" Lord Atkinson in the New Zealand Shipping Company case said that it was undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract should be void upon the happening of an event over which neither of the parties had any control. But if the stipulation were that the contract should be void on the happening of an event which one or either of them could by his own act or omission bring about, then the party who by his own act or omission brought that event about could not be permitted either to insist upon the stipulation himself, or to compel the other party, who was blameless, to insist upon it, because that would be to permit him to take advantage of his own wrong—a principle at least as old as Coke upon Littleton.

Obiter Dicta

An Apostasy.—Abbott *v.* Church, 288 Ill. 91.

The Law's Delay.—Goodspeed *v.* Law, 260 Fed. 497.

Fair and Warmer.—Daily News *v.* Snow, 248 Fed. 1019.

A Deportation Proceeding?—People *v.* Albert Frederick George Vereneseneckockockhoff, 120 Cal. 497.

No Favoritism in This Court.—In Favorite *v.* Superior Court, 184 Pac. 15, Favorite lost.

Not an Artful Dodger.—In Dodge *v.* United States, 258 Fed. 300, the plaintiff in error sought in vain to reverse his conviction for violating the Espionage Act.

Not Recommended to Christian Scientists.—"Imprisonment in the penitentiary is a reality. It cannot be taken by absent treatment."—Per Amidon, J., in Morgan *v.* Ward, 248 Fed. 691.

Meaning Socialism?—"Because the Constitution of the United States was criticised it does not follow that anything that is criticised is as good as the Constitution of the United States."—Per Charles E. Hughes before the New York County Lawyers' Association.

In the Good Old Days.—In the case of Patton *v.* Brown, Fed. Cas. No. 10,832, decided in 1812, the reporter's statement of facts contains the following rather remarkable information: "The court was full, which was the reason why the counsel for the plaintiffs stirred them again."

Depends on the Viewpoint.—Under the caption "The Winner does not always win," Judge O'Neill of the Circuit Court of Wisconsin sends us a copy of his judgment in the recent case of Winner *v.* Winner wherein he refuses to grant the prayer of the plaintiff that his marriage be annulled on the ground of fraud.—Well, Judge, you can't exactly say that the defendant lost, can you?

Some Job!—In Rochford's Case (Mass.) 124 N. E. 891, it appeared that a factory employee during the noon hour was seated in a room in the factory with a girl sitting on his knee and two other girls talking to him. While rising suddenly, on the blowing of the whistle, he put his hand into a nearby machine. It was claimed by the employee that the injury arose out of and in the course of his employment, but the court refused so to decree.

Caught Him Napping.—In State *v.* Astin, 180 Pac. 394, Judge Mackintosh of the Washington Supreme Court, referring to a decision by Chief Judge Cooley holding contrary to the Washington jurist's own views, said that it was "a decision not consistent with rules of statutory construction which have never received better expression than that given by the same authority. The decision can only be explained by recalling that even great Homer is reputed to have sometimes nodded."

WHO WOULDN'T BE A JUDGE?—In Nishimiya *v.* United States, 131 Fed. 650, wherein was presented for decision the question whether Japanese saké should be classified as wine or as beer, Circuit Judge Townsend said: "A test of the sample by taste and smell and examination indicates that it is only remotely similar in quality to either wine or beer. In use it is like either liquid, being drunk for flavor and exhilaration."—Now, what we want to know is, how big was the sample and who tested it?

FEMALE FORGERY.—In Cowan *v.* Beall, 1 McArthur (D. C.) 274, Cartter, C. J., said: "These three exhibits presented by Mrs. Cowan are either true, or they involve a series of complications and forgeries that would do credit to the hand of a masculine adept who has had the benefit of two or three convictions and the experience of some years' service in the penitentiary. For it would require the discipline of a penitentiary education to prepare a man for the commission of such cunningly devised forgeries as are charged upon this woman."—Having in mind woman's highly developed faculty of imitation, our first impulse on reading the foregoing was to characterize it as pure bunk. But is it? Come to think of it, how many cases of forgery by women are to be found in the law reports?

THE PATHOGENY OF OUR FOREFATHERS.—In Alexandria *v.* Brockett, Fed. Cas. No. 182, decided by the Circuit Court of the District of Columbia in 1810, the statement of facts is as follows: "Debt for the penalty of two hundred dollars under a by-law against burning oyster-shells in Alexandria. The defendant pleaded that the penalty of the by-law was not a reasonable penalty, upon which the plaintiff took issue. Upon this issue the plaintiff moved the court to instruct the jury that if they should be satisfied that in the year 1803 (the year the by-law was passed) the yellow fever prevailed in the town, and was generally supposed to have been caused by burning oyster-shells, then the penalty was reasonable." Will some of the present day theories of medical science appear equally ridiculous a century hence?

A BIT TOO SMART.—The aphorism that a man who acts as his own legal adviser has generally a fool for a client has received exemplification in a recent decision of the French Court of Cassation, says the *Law Times*. An application to regain possession of a dwelling came before the *Commission arbitrale*, but the tenant ignored the citation by registered letter by refusing to accept it and writing on the envelope "refused," his contention being that the notice must be served by an official of the court personally. Following the conclusions of the *avocat général* Blondell, the *chambre civile* of the Court of Cassation held that the fact of the envelope being marked "refused" by the person interested was sufficient evidence to show that he was aware of the contents of the envelope, and this met the requirement of the spirit, if not the letter, of the law.

THE INTENT OF THE TESTATOR.—As indicative of the length to which the courts will go in the attempt to give effect to the intent of testators we beg leave to cite the case of Olssen's Estate (Cal.) 184 Pac. 22, wherein it was held that the following was a sufficiently intelligible writing to constitute an olographic will:

"4/12/17th

"mod clark 351 jones st progfeeld Apa Aparmass 201 I leev hore $2000.00 more cash mony

"JACK OLSSEN

"My my is cleere i leev hore alle

"JACK OLSSEN"

There is one thing at least about the case which is free from doubt, and that is the inability of anyone to demonstrate that the court's interpretation of the will is incorrect.

ANSWERED BY THE OFFICE BOY.—

To the Editor of LAW NOTES.

SIR: It seems to me that the Prohibition Party is a "dry trust" within the meaning of the Sherman Anti-Trust Act. Can you cite me any authority?

Louisville, Ky. LAW STUDENT.

[Maybee *v.* Maybee, 6 N. Y. Supp. 575.—Ed.]

To the Editor of LAW NOTES.

SIR: My son is determined to study law. Is it true that all lawyers are bad?

New York City. ANXIOUS MOTHER.

[Not all lawyers are bad. In Nygven *v.* Nygven, 42 Neb. 408, Good and Good were the attorneys for the appellee.—Ed.]

Correspondence

LONG EARS IN NORTH CAROLINA.

To the Editor of LAW NOTES.

SIR: We have been very much entertained by the recent contributions from your North Carolina correspondents on the subject of "Lie Bills and Cropped Ears." Would not the inalienable right of North Carolina citizens to wear long ears give their courts of equity jurisdiction to entertain Bills Quia Timet in such cases?

EUGENE A. JONES.

Washington, D. C.

THE "SILURIAN" MAMMOTH.

To the Editor of LAW NOTES.

SIR: The Nov.-Dec. number of LAW NOTES just received. On page 145 it reads: "a silurian mammoth." In what museum may a specimen of it be seen? What is it anyway? Does anything survive in a *bed of lava*?

JOHN T. COOK.

Albany, N. Y.

[Ye editorial writer, driven from juristic figure of speech to geologic exactitude, deposes and says:

1. The mammoth is usually ascribed to eras subsequent to the Silurian, but the authorities are in hopeless conflict.
2. Fossil relics of the mammoth have been found in gravel, rock, glacial ice, etc., but none, so far as known, in lava.
3. There is no reason why a fossil should not survive in lava—vide reports on excavations at Pompeii.
4. The mammoth is deader than John Barleycorn.

Wherefore the writer prays that his poetic license be not revoked.—Ed.]

MR. JUSTICE RIDDELL PRO SE.

To the Editor of LAW NOTES.

SIR: I crave the privilege of replying to the charge of the New York *Sun*, referred to in your November-December issue, that once addressing a jury, I said, "Gentlemen, how much?" and let it go at that. That I so charged is true: true that I said no more. But let me plead before my judicial brethren (all other lawyers will think I need no defense) by way of confession and avoidance. The case was tried at Hamilton, Ontario: it was one of personal injury by a collision, liability was admitted, an

offer had been made and refused—and the whole question was the quantum. Medical witnesses had testified, a wagonload on one side, a carload on the other, and medical reputations were in tatters: very able and eloquent counsel had addressed the jury exhaustively and exhaustingly. When at length—and at great length—they had said their last word, that jury looked at me in apparent pleading mingled with dread. I pitied them and said only "Gentlemen, how much?" The look of surprised gratitude on those weary faces was sufficient reward for unprecedented judicial restraint and reticence—there was no objection by counsel—"angels could no more"—*o si sic omnia*—and the jury in a few minutes brought in a verdict of about half the amount offered and refused. No appeal: everybody satisfied but the plaintiff and her lawyers. What say my very approved good masters of the Bench? Am I quit?

WILLIAM RENWICK RIDDELL.

Osgoode Hall, Toronto.

CONCURRENT JURISDICTION OF STATE AND FEDERAL GOVERNMENTS.

To the Editor of LAW NOTES.

SIR: Mr. Bronaugh, in his article on concurrent jurisdiction under the Eighteenth Amendment in the August number of LAW NOTES, argues that concurrent power to enforce the Amendment necessitates identical legislation by Congress and the legislatures of the several states if conflict is to be avoided. Mr. Wheeler in his reply apparently takes the ground that there will be no conflict because the offender against the laws may be punished under the federal or the state enforcement act, according as one or the other is the severer. Each writer seems to take it for granted that an illegal sale of liquor will constitute but one offense and that the seller can be tried but once for any single act. As a matter of fact, the seller may be subject to successive prosecutions by the United States and the state in which the sale is made, whenever such sale contravenes the provisions of the laws of both sovereigns. Concurrent jurisdiction of this sort is not anomalous, as Mr. Bronaugh avers. It has frequently been held that one who passes counterfeit money may by the same act be guilty of offences against both state and federal statutes and may be punished under both. Fox *v.* Ohio, 5 How. 410; United States *v.* Marigold, 9 How. 560. In United States *v.* Barnhart, 22 Fed. 285, it was decided that a previous acquittal of homicide in a state court was no bar to a subsequent prosecution by the United States, where the offense was the killing of a tribal Indian on an Indian reservation within the territorial limits of a state. In Moore *v.* The People of Illinois, 14 How. 13, the Supreme Court held that both Illinois and the United States could punish a man for harboring a runaway slave. The reasoning of these decisions has been cited with approval by the Supreme Court as recently as 1907, in Grafton *v.* United States, 206 U. S. 333, 353, although the facts of that case took it out of the rule.

These cases dispose of Mr. Bronaugh's argument that "to hold that a state could not enact a law enforcing the amendment which was in conflict with an act of Congress would certainly seem to deprive the state of its 'concurrent jurisdiction to enforce the article by appropriate legislation.'" It will be observed that in each of the above cases the statutes of the state and federal governments differed widely in form, although the subject matter was the same.

It appears, therefore, that in the rare instances in which the United States and a state have concurrent jurisdiction to enact and enforce laws on any subject, each can pass whatever legislation it chooses and can enforce that legislation; but neither sovereign can provide that certain acts shall not constitute a crime under the laws of the other, any more than the United States could formerly protect a bootlegger in a dry state by issuing to him an internal revenue certificate, or that a state could release a liquor dealer from the necessity of taking out a federal license. It follows that a state will not be able, by hurriedly trying an offender against the liquor laws in its own courts, to protect him from punishment under a federal law.

None of the cases cited above are overruled or weakened, either specifically or by implication, by Neilsen *v.* Oregon, 212 U. S. 315, which, as Mr. Wheeler demonstrates, is not in point.

If the views advanced herein are correct, the only possible conflict in the enforcement of the Amendment will be over the relatively unimportant question as to which sovereign shall try the offender first.

ARTHUR E. CASE.

Philadelphia, Pa.

"The charge to the jury and requests to charge should be based on the concrete facts of the case. A charge is not to be a mere legal essay."—*Per* Gaynor, J., in Sperry *v.* Union R. Co., 129 N. Y. App. Div. 594.

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Unseating Seditious Legislators.

THE proceeding to unseat the Socialist members of the New York Assembly will undoubtedly be looked to as a precedent in other states, and the fact that the bar of that state is divided in opinion on the subject suggests the propriety of careful consideration by the profession in other jurisdictions. As to the bald question of power there can be no doubt whatever. The legislative body is made the judge of the qualification of its members; the power being given without limitation or qualification. For its abuse the remedy is at the polls. But since arbitrary power is repugnant to the spirit of our institutions, it is a proper function of the bar, where such power is conferred, to use its influence to see that the power is exercised in a manner consistent with the general theory of due process of law. It is from this standpoint that the question is now presented to the profession. While the contention has been made that it is not consonant with the principles of free government to exclude a representative for any cause other than irregularity in his election or the want of the constitutionally prescribed qualifications, precedents which have met with full popular approval have negatived that view. The power to exclude because of conviction of crime has been exercised in many instances, the case of Berger being the latest. Several members of Congress who adhered to the Confederacy were expelled, and no question has ever been made of the propriety of this action. Yet more closely in point is the refusal of the United States Senate to seat Senator-elect Roberts of Utah. At the time of his election the Mormon church was more or less definitely divided into two factions; those who had in good faith abandoned polygamy in theory and practice and those who adhered to it either in theory or in practice. This line of demarcation the Senate carefully observed in refusing to seat Roberts and later in seating his successor, the present senior senator from Utah, who, though a Mormon in faith, established that in life and doctrine he conformed to the laws of the United States. Few men who are familiar with political history in Utah will now deny that the Senate acted wisely in each instance.

The Test of Unfitness.

FROM precedent and reason alike, at least one clear test of the unfitness of a legislator to sit may be deduced, viz., if the affiliations and declared views of a legislator elect are such as to falsify the oath of office which he is required to take, it is a travesty on government to allow him to take his seat. That oath is a constitutional declaration of the duty of a legislator. The man who refused to take it could not be seated, and it is difficult to understand the logic of those who contend that it is not competent to prove that a man who took it with his lips repudiated it in his heart. The oath prescribed for every legislator in the United States is in substance that he will support the Constitution of the United States, and that of the state in which he is elected. This whole proceeding which has been denounced as an infringement on the inalienable rights of citizenship involves nothing more than an assertion of the right to prove that this oath was taken falsely and with no intention to observe it. Citizenship duly granted may be revoked on proof that the oath of allegiance was taken without a real intent to renounce allegiance to a foreign sovereign. *U. S.* v. *Wursterbarth,* 249 Fed. 908. Is a state, investing a man with the power to make its laws, bound to accept the formal affirmation and powerless to investigate the fact? This view of the matter affords a clear answer to the contention that a specific crime must be proved as the basis of an exercise of the power to exclude. The oath to support the Constitution of the United States may be falsified otherwise than by the commission of a technical crime. If the principles of a party or an association are inconsistent with the Constitution of the United States and can be put into practice only by the destruction of that Constitution and the overthrow of the government erected under it, a member of that party or association cannot truthfully swear to support the Constitution, though he never personally committed a crime. There is a clean cut distinction between the acts which disqualify a legislator and the acts which warrant the imprisonment of a citizen, the same distinction which exists between unfrocking a heretical priest and the persecution of a layman for heresy. It is beside the question to point out the benefits which past revolutions have conferred. Whatever place there may be in our civilization for the revolutionist, that place is not in the legislative halls.

The Question of Procedure.

WHILE much has been made of the fact that the New York Assembly summarily suspended the Socialist members elect until an investigation of the charges against them could be had, it is difficult to see where any principle of law was violated thereby. It is well settled that it is proper to suspend a public officer pending the trial of charges warranting his removal. See note 16 Ann. Cas. 946. "The safety of the state, which is the

highest law, imperatively requires the suspension pending his trial of a public officer. . . . Such temporary suspension without previous hearing is fully in accordance with the analogies of the law. It is a constitutional principle that no person shall be deprived of his liberty or property except by due process of law, which includes notice and a hearing, yet it was never claimed that in criminal procedure a person could not be arrested and deprived of his liberty until a trial could reasonably be had or that in civil actions ex parte and temporary injunctions might not be issued and retained in proper cases until a trial could be had and the rights of the parties determined." *State* v. *Police Com'rs,* 16 Mo. App. 50, quoted with approval in *State* v. *Peterson,* 50 Minn. 244, and *Griner* v. *Thomas,* 101 Tex. 36. Moreover, it is not very clear how the power of the legislature could be exercised in any other manner. The power of a legislative body to judge of the qualification of its members is naturally to be exercised when they present themselves as members elect to be seated. Whether after a member has been seated the power to expel can be exercised except for matters arising during his term, is so doubtful that no careful lawyer would take the risk of thus foreclosing the entire question.

The Sentimentalist.

SENTIMENT is no mean factor in government. "Humanitarian impulses are the well springs of social progress" (Chadwick, J., in *Malette* v. *Spokane,* 77 Wash. 205). A government whose laws were made and executed in a spirit of cold intellectuality would not suit any one except the Hun. Mankind retains enough of brutality so that power unchecked by sentimental considerations always leads to grave abuses. The trouble with sentiment is that, however excellent it may be in itself, it tends to concentrate on a particular phase of a situation and forget all counterbalancing considerations. Thus many excellent ladies have sent flowers to condemned murderers while forgetting all about the children of the victim. Other well meaning persons revolted from the horrors of war and forgot that the alternative was the greater horror of German domination—an attitude about as logical as that of a person who should oppose the creation of a fire department because of the risk to its members and ignore the risk of the thousands exposed to fire in crowded tenements and factories. Just now the popular manifestation of this kind of sentiment is "parlor Bolshevism," a considerable number of perfectly well meaning clergymen, college professors and the like, protesting against the deportation of seditious aliens, appealing for the release of "political prisoners" and otherwise giving aid and comfort to the "Red" propaganda. It is fair to assume that they do not desire to overthrow the American government or to foment looting and assassination. They see in this country some poverty and suffering, some injustice, some economic evils, and lend themselves to a movement to destroy the whole system without stopping to think that a thousand times greater suffering and injustice would result. The same well meaning citizens who lend countenance (and perhaps money) to the "comrade" from Russia would be the first to shrink in horror from the conditions which Bolshevism has produced in Russia to-day. They do not know and do not take the trouble to find out what the high sounding phrases of the studio mean when translated into action by ignorant men inflamed with discontent and class hatred. Just because ideals are the most potent force in the world, an idealist without knowledge is the source of more danger than a bomb throwing ruffian.

Residence as Qualification of President.

THE press discussions of the various possible candidates for the presidency have raised an interesting question of constitutional law, *i.e.,* whether a person who has resided outside the United States at any time in the fourteen years immediately preceding election is eligible. The Constitution (Art. II, sec. 1, clause 5) provides: "No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty-five Years, and been fourteen Years a Resident within the United States." From the standpoint of reason it would seem that residence fourteen years immediately preceding election is required. The makers of the Constitution obviously intended to require that the President should be free from all possibility of foreign allegiance, that he should be of mature age, and that his actual residence should have been such as to familiarize him with local conditions and keep him clear of intimate association with foreign governments. The third of these objects would be entirely defeated if a boy born in the United States could leave its shores at the age of fourteen, reside for twenty-one or more years in Europe, perchance in close association with a European Court, and then be eligible to the presidency immediately on his return to his native land. Such a construction would give eligibility to a man who was for all practical purposes an expatriate, and whose candidacy was secretly promoted by a foreign power. An argument of some force can however be based on the history of the constitutional provision in question. As reported out of committee it read: "No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; nor shall any person be elected to that office who shall be under the age of thirty-five years, and who has not been, in the whole, at least fourteen years a resident within the United States." When the clause came up in convention "it was at once agreed nem. con." and referred to the committee on style, which reported it back in the form in which it appears in the Constitution. See Meigs on The Growth of the Constitution, 10 Fed. Stat. Ann. (2d ed.) p. 206. The committee on style, as its name indicates, had no function other than the improvement of phraseology without change of the meaning, and there is force in the suggestion that the present wording was accepted by the convention as the equivalent of the requirement of fourteen years' residence "in the whole" which it adopted. The fact remains, however, that this construction makes the constitutional provision wholly inadequate to accomplish the purpose for which it was obviously intended.

"Judicial Nullification."

A READER whose communication appears in this issue takes exception to the use of the phrase "judicial nul-

lification" as applied to a judicial declaration that a statute is void because in conflict with a constitution or other fundamental law. In one sense it is true that the nullity results from the fact of conflict and not from the declaration thereof. The conflict, however, is not a fixed and undeniable fact; it is a matter of opinion. Two departments of government having jurisdiction to consider the matter go on record as believing that there is no conflict. When another and independent department overrules that decision, overrules the opinions of the legislative and executive, it does not seem inappropriate to call it "judicial nullification," using the term in no invidious sense but as accurately representing the fact. With respect to the "constitutional history" to which our correspondent refers, a study of that history has led many learned jurists to the conclusion that it was the intention of the makers of the Constitution that each department of government should judge for itself whether its acts were in conflict with the Constitution. Sceptics are respectfully referred to Chief Justice Clark of North Carolina. There are weighty arguments, perhaps arguments of controlling weight, against unrestricted legislatures, but the proposition that such a legislature is a dangerous "autocrat" is not one of them. If three hundred members of Congress voting for an act, each one subject at the next election to be deprived of office if the people do not approve, constitute collectively an "autocrat," what is one to say of five judges, who against the opinion of their four colleagues can declare the act to be void and be answerable to no one on earth? With respect to laws passed in the exercise of the police power, the question of constitutionality is not determined by any fixed standards which may be definitely ascertained; it is simply a matter of opinion as to whether the statute may reasonably be considered as promoting the public health, safety or welfare. On that question it is difficult to see where a step towards autocracy is taken by giving the final decision to a large body of men directly responsible to the people rather than to a small body of men appointed for life. For example, the legislature of New York was of the opinion that night work is injurious to the health of women, and passed an act prohibiting it. The court of appeals nullified the statute on the ground that in their opinion it had no tendency to protect the public health. *People* v. *Williams,* 189 N. Y. 131, 12 Ann. Cas. 789. Eight years later the court discovered that it was wrong and the legislature was right, and sustained an identical statute. *People* v. *Schweinler,* 214 N. Y. 395, Ann. Cas. 1916D 1059. It is not particularly gratifying to American pride to note that in its second decision the court referred to European experience confirming the judgment of the legislature. In other words the most populous American state lagged behind Europe in protecting the health of women because a court assumed the power to bar the progress which the people demanded. Citations might be multiplied indefinitely to show that the courts nullify legislation purely because of disagreements with the legislature on questions of fact or policy. There is room for a contention that democracy will not work and that a stable government can be secured only by having somewhere an autocracy with power to thwart on occasion the will of the people. But no man who believes the autocrat to be an evil should be blind to the fact that the nearest approach to autocracy in the American Republic is the power of the courts.

Forging Finger Prints.

IT seems to be thoroughly established that a finger print is so absolutely distinctive that the chance of its being duplicated by the hand of another person is negligible in practice. Scientifically, the chance of duplication has been said to be approximately one in a number represented by one followed by sixty ciphers. See *State* v. *Kuhl,* (Nev.) 3 A. L. R. 1694, where the authorities are exhaustively collated. From the acceptance of that fact the average mind will be led to the conclusion that the finding of a finger print at the scene of a crime is proof positive that the person whose finger corresponds to that print was there present. In the case referred to a number of cases are cited in which finger print evidence contributed materially to a conviction. But Mr. Milton Carlson, a well known examiner of questioned documents, in a recent article (5 Va. Law Reg. p. 765) while in no way impugning the unique character of the finger print, asserts that it is capable of easy and undetectable forgery, and that by way of experiment he himself has made on a bloody knife an exact reproduction of a finger print published as having been found at the scene of a crime in a distant state. While Mr. Carlson with obvious propriety refrains from giving any details as to the process of reproduction, a man unskilled in the engraver's art can see that it is merely a matter of minute care and that far more difficult feats in the same art have been performed. Once the copy is accurately made, it is obviously true as pointed out by Mr. Carlson that the forgery is practically impossible of detection. The imitation of handwriting is almost always certain of discovery by an expert, chiefly for the reason that the actual writer cannot suppress his own unconscious "pen habits" without resorting to mechanical means which in themselves betray him. But the tracing of a finger print is purely mechanical, and granted its freedom from microscopic mechanical defects, it is difficult to see how its spurious character can be discovered. The possibility of forgery is not of course sufficient to exclude finger print evidence, any more than the like possibility will exclude a writing, but the possibility must be borne in mind by bench and bar lest undue weight be given to the print. It needs no undue cynicism as to police methods to contemplate the "framing" of a case against a person of that aggravating class who are believed to be criminals but cannot be proved to be such, by placing at the scene of a crime a reproduction of a finger print found in the police files. Not only could an innocent person be thus exposed to danger of conviction of robbery or murder, but a reproduction of his finger print might even be placed on a bottle of whiskey.

"Movies" as Evidence.

IN a murder trial recently held in California the defense sought to present its version of the tragedy to the jury in a novel and striking manner. Skilled motion picture actors enacted before the camera the entire scene of the homicide according to a description based on the testimony of the witnesses for the defense, and the picture was offered for reproduction before the jury, with the testimony of an eye witness that the picture depicted the events as he saw them. It was argued with considerable plausibility that, as thus verified, the picture did not differ in

principle from a "still" picture proved to represent accurately the scene depicted. In excluding the evidence, the trial judge pointed out two classes of cases in which motion pictures would clearly be admissible; where the picture is of the actual event under investigation and where the question is whether it is physically possible that the event could have taken place in the manner described by a witness. But where the issue is, not whether the facts could have been as related, but what they actually were, he held with undoubted correctness that a dramatic portrayal by persons who did not see the event is hearsay evidence. Answering the argument based on the admissibility of ordinary photographs, he quoted from Moore on Facts as to the possibility of misrepresentation in photographs (see on this point LAW NOTES, Vol. 19, p. 46) and the danger that jurors will attach undue weight to a pictorial representation. These dangers, he went on to point out, are peculiarly present in case of motion pictures. The actor representing the deceased, for example, being instructed by the "scenario" to depict him as the aggressor, could not duplicate the actual mannerisms of the deceased, but would naturally use his dramatic skill and training to act the part strongly and convincingly. Because of the many little mannerisms which play so important a part in motion pictures, it is impossible that the actual events should be reproduced accurately; in fact, as the court pointed out, "it would be extremely difficult, if not impossible, for the same set of actors, however skilled, to make this picture twice alike." In other words, the picture is inaccurate as to details in a matter where the smallest detail is of importance, and it is clear that under those circumstances a photograph would be rejected. Furthermore, even assuming the accuracy of such a portrayal, it is probable that a jury would give it undue weight, would fail to remember that it is entitled to no more credit than the witnesses on whose description it is based. Impressions received through the eye are more distinct and lasting than those received through the ear. Aaron Burr once said: "If you are told that a man unknown to you has been crushed by a falling tree it makes little impression, but if you see a man crushed by a falling tree you are unnerved for days by the horror of it." Every devotee of the "movies" knows the impression of reality made by a strong picture and how easy it is to forget that it is only a picture. While in the California case the motion picture was offered by the defense, if such evidence is admissible it would be equally available to the prosecution. In a case of murder or rape the natural revulsion produced in the minds of the jurymen by the facts of the crime is now a heavy handicap on the accused. If that feeling was augmented by a dramatic portrayal of the prosecution's theory, the defendant's alleged brutality being enacted with the practiced skill of the motion picture "bad man" and the victim's innocent charm depicted by some star of filmdom, the defendant's chance of acquittal would not be worth mentioning. There is a considerable field for motion pictures as an improvement over ordinary photographs in presenting actual scenes and conditions to a jury. A motion picture taken during the actual progress of a fire, a flood or a riot would be better than the testimony of twenty eye witnesses. But it is equally clear that pictures made after the event and based on a description thereof cannot meet the standards of reliability imposed by the courts.

The Language of the Courts.

THE statement is often made that the phraseology of the law is so ponderous and artificial that it precludes any common sense view of the merits of a case, and that there is a tendency of the courts to treat the technical phrases of the law as if they were magical formulæ whose pronouncement materializes the spirit of justice from the misty realms of doubt. Much of this criticism is doubtless due to a failure to remember that every art and science must have its technical terminology which is meaningless to the uninstructed. But occasionally one sees an opinion wherein a resort to the vernacular clarifies a question as to which many learned opinions have built up a monument of absurdity. A striking illustration may be found in the case of *Watkins* v. *Clark* (Kan.) 176 Pac. 131. The question under discussion was the liability of a father for the negligence of a child permitted to drive the family automobile for his personal amusement. Discussing the doctrine of liability asserted in the majority of jurisdictions (see article in LAW NOTES, December, 1918, p. 165) the court said: "If a man purchased an automobile and allowed his wife and his son and his daughter to use it, the use was his by virtue of representation, whether representation existed in fact or not. The deduction was facilitated by employment of the fine art of definition—putting into the definition of the term 'business' the attributes necessary to bolster up liability. So, if daughter took her friend riding, she might think she was out purely for the pleasure of herself and her friend, but she was mistaken; she was conducting father's 'business' as his 'agent.' As this incongruity became more and more apparent, a further concession was sometimes made. If the owner allowed a member of his family to use the automobile, he might not be liable, but it was 'presumed' the use was his by representation. If son took his best girl riding, prima facie it was father's little outing by proxy, and if an accident happened, prima facie father was liable. Some courts were inclined to get rid of the difficulty of resting liability on the one existing fact, ownership of the car, by declaring that the question of 'agency' was one for the jury, a process known in some quarters as 'passing the buck.' The sooner the courts settle down and deal on the basis of fact and actuality with a vehicle which has revolutionized the business and the pleasure of the civilized world, the better it will be, not only for society, but for the courts." It is an interesting and profitable experiment to explain a legal doctrine to an intelligent layman and see whether he approves its reason and justice or concludes with Mr. Bumble that "the law is an ass." There is more than one opinion in the books which would never have been written had the author submitted it to this test.

Robes for Judges.

INTEREST in the wearing of robes by judges in the United States is stimulated by the recent adoption of the practice in the Supreme Court of Virginia. The objection to the robing of judges was well stated in a recent communication to LAW NOTES by a former federal judge for Porto Rico (see Nov.-Dec. 1919 issue, p. 158), who condemned the practice as undemocratic and added that "if a judge (at least in a nisi prius court) cannot command the respect of the people and the bar without robing

himself like a church dignitary he should resign and seek some calling he is fitted for." It would seem, however, that this viewpoint loses sight of the value of the symbol as an aid to understanding. The judge in the discharge of his duties is more than a respectable lawyer sitting on a high bench. He is the representative of public law and public justice. It may be noted in passing that the bench which has become the synonym of judicial office is itself a symbol of authority. A table on the level of a court room floor would serve the utilitarian purpose as well. A great deal of the prevalent disrespect for law is due to the inability of many to realize that the laws of a republic possess at least equal sanctity with those proclaimed by imperial authority. That realization can come only by distinguishing between the man and the officer, a distinction which the unreflective mind will not readily make without being assisted hereto by some "outward and visible sign" of authority. The crown of the king, the robes of the priest, the distinctive badge of the head of a fraternal order are not the outgrowth of a mere love of display: they represent an innate recognition of the eternal fitness of an outward appearance which shall be suggestive of the inward fact. Tradition has power, as any man who has ever attended a long established college knows, and those indicia around which may gather a worthy tradition are no mean factors in human life. Robes are not essential to a judge any more than a flag is essential to a nation, but the one tends as surely to arouse respect for the judicial office as the other does to arouse patriotic fervor. Not only have judicial robes a tendency to inspire popular respect, but their reflex effort on the wearer is not negligible. It is a well known fact that men often rise under the responsibility of public station to levels which their private lives did not manifest. The man would be more than usually callous who could don a judicial robe without being thereby admonished of the responsibility of public service of which it was the badge.

Law Enforcement Gone Mad.

SOME three years ago Chief Justice Olson of the Municipal Courts of Chicago said: "Policemen 'snooping' around the corners for violators of minor ordinances are in danger of tripping over the bodies of men shot in burglaries and robberies." The conditions when he spoke pale into insignificance beside those presently existing. At the present time thousands of special officers are employed in the enforcement of federal regulations against the sale of intoxicants, and millions of dollars are being expended in that enforcement. Of course while the prohibition laws are in effect they should be enforced, but that statement applies with equal force to every other valid law, state or federal. Ordinarily when a new penal law is passed its enforcement is left to the ordinary agencies of government. There is no reason why the same course should not have been taken with the liquor laws. Those agencies are deemed good enough for the enforcement of the laws against murder, robbery and rape. Of all the myriad offenses created by the laws of the state and federal governments there is none more trivial in its nature than the violation of the prohibition law, yet for the enforcement of this act a special constabulary swarms over the land and the public money is spent without stint. The nation groans under the weight of taxation, needed reforms die in congressional committee because funds are not available, officers of the army and navy are resigning by the score because their pay is below the level of decent subsistence, schools are closed because salaries adequate to secure teachers cannot be paid, yet money without limit is available in aid of a mad crusade to suppress one trifling misdemeanor. It would be a stupendous comedy except for the fact that such vagaries of government are too serious in their consequences to be comic. Quite apart from the absurdity of this undue emphasis on a single law to the exclusion of others, there is another danger in the situation. The prime movers in these "crusades" are men who draw a stipend for their services from the contributions of the well meaning people whom they succeed in keeping excited by their activities. If in addition to private contributions the public treasury can be drawn on, the crusade industry will become one of the most popular and profitable in the country. The "anti-tobacco army" which is just beginning to break into print will be augmented by anti-dancing armies, anti-baseball armies, anti-racing armies, and so on ad infinitum, every loyal soldier going over the top with an eager eye on the national payroll as the objective of his drive. The number of leagues, unions, and associations which are now engaged in efforts to influence legislation is one of the outstanding evils of the times. The tendency to rule by compact minorities is rapidly subverting the entire theory of representative government. It is probable that nothing short of the general establishment of the referendum in national as well as state legislation will wholly restore popular self government.

Trousers as Vehicle.

THE press report of the arrest of a Chicago banker for carrying a bottle of liquor in the manner which once was conventional, viz., in his hip pocket, arouses of itself no interest other than a mild curiosity as to where he got it. The report proceeds, however, to raise a question of law which is delicate or otherwise according to the point of view. Does this use of the pocket make the trousers of the Chicago man a "vehicle" subject to condemnation and sale because used for the transportation of liquor in violation of law. It is needless to say that precedent is wholly lacking. In *U. S.* v. *One Automobile,* 237 Fed. 891, an automobile was held not to be within the law because such a vehicle was unknown when the statute was passed and could not therefore be deemed to have been within the legislative contemplation. But no comfort can be extracted from that decision, since trousers (and the carrying of liquid refreshment in the hip pocket thereof) have been known to Congress since the earliest days of the republic. Even the members of the present Congress are reliably reported to wear them, though a doubt is suggested by the recent prohibition legislation. On principle the argument for condemnation seems sound. Liquor, however great its intrinsic potency, is not automotive. "Liquor cannot be brought from without to a point within this state nor carried from point to point within the state without the use of some vehicle or conveyance." *Mack* v. *Westbrook,* 98 S. E. 339. Of course the accepted meaning of "vehicle" will have to be strained somewhat to bring in those nether garments, but what's the dictionary between prohibitionists? For instance, a

loan of liquor, to be returned in kind, is a "sale" thereof. *Leach* v. *State,* 53 S. W. 630. The importance of the question does not depend wholly on the fate of this particular pair of trousers, though trousers fit to adorn the legs of a Chicago banker are no trifle these days. But once this contention is granted does it not afford a sure basis for the claim that the offending garment is of itself inert and without power to convey anything, that it is like the body of an automobile and by that analogy requires the condemnation also of the propelling power, the graceless legs which bore this load of sin down the chaste streets of Chicago, the abandoned heart which ceased not its beating at the spectacle of such infamy, the vile brain in which rose the motor impulse? That would be a real triumph for prohibition. Let these hip pocket malefactors be condemned and sold to the highest bidder, the proceeds to be used of course for the hire of more "federal agents."

THE PUBLIC DEFENDER

THE advisability of creating the office of Public Defender for the defense at public cost of accused persons who are unable to hire counsel depends primarily on whether the present methods of providing for the defense of the indigent have proved to be inadequate. There is already sufficient multiplication of offices and only a real and pressing need can justify the creation of a new one. It would seem that if the necessity exists its existence could be clearly shown, but there is on the contrary a strong conflict of opinion between persons in a position to know the facts. In 1914 a sub-committee of the New York County Lawyers' Association addressed to each district and county judge in the state an inquiry whether "(1) there had been any substantial failure of justice under existing procedure in the case of indigent persons charged with crime; or whether (2) there was any basis for the assertion that ten per cent. of those sent to jail, after being defended by assigned counsel, were innocent; or whether (3) there was a lamentable failure of duty upon the part of counsel in any substantial proportion of those cases in which counsel had been assigned to defend the accused." Replies were received from thirty-one county judges and twenty-six district attorneys (about one-half of the total number addressed) and each answered all the questions in the negative. The report of the majority of the committee was adverse to the project. See IX Bench and Bar (N. S.) 309. On the other hand experienced judges in the same state have expressed strong opinions to the contrary. Judge Howard of the Appellate Division of the Supreme Court says in a foreword to Mr. Goldman's work on The Public Defender: "My experience as a district attorney and on the bench of the Supreme Court leads me to concur fully with Mr. Goldman in his contention that there should be a Public Defender to look after the rights of the poor." Presiding Judge Jenks of the same court is quoted in the same book (p. 22) as saying: "I believe there is a great deal in the idea of a Public Defender. I have seen so many poor, friendless, homeless wretches have their liberties put at stake through some inefficient tyro being named to defend them that I feel very strongly some change should be made." The inferences to be drawn from this conflict are equally doubtful. It may be said with some force that a real need will ordinarily leave little doubt as to its existence. On the other hand a familiar rule requires that greater weight should be given to the positive assertions of the experienced jurists quoted that they had observed evils in the present system than to the negative statement of others of equal experience. It may be noted in passing that the testimony of district attorneys cited by the Lawyers' Association is of comparatively little weight because human nature is such that the average district attorney honestly believes that every man whom he prosecutes is guilty and usually regards any acquittal as a miscarriage of justice. Since no definite conclusions can be reached from the testimony as to the fact, it is necessary to look at the theoretical aspect, and from this viewpoint the argument seems to be strongly in favor of the Public Defender idea.

The Existing Safeguards

The principal agencies now relied on to secure a fair trial for the indigent defendant are (*a*) the supervisory power of the court, (*b*) the fairness of the prosecuting attorney, and (*c*) the assignment of counsel. There are others of a minor value which space does not permit to be now discussed.

Taking these up in order, the fairness of the judges is beyond question. But as is well said by the author of the Carnegie Foundation report on "Justice and the Poor," "The trouble is that under our existing system the judge has so little opportunity to 'make inequality equal.' His hands are so much tied that he is more of an aloof umpire than an active protecting official. He rules on objections made by counsel, but does not himself interpose objections to testimony. Except in the federal courts he is forbidden to express any opinion or to instruct the jury on the facts. In an obvious miscarriage of justice he can order a new trial, but the practice is seldom to interfere with jury verdicts. The judge labors under the further difficulty of knowing only those facts that are introduced in evidence. A defendant who was unrepresented and could not secure the attendance of witnesses might have a valid defense of which the judge would be ignorant because the facts would not be before him. He could not learn the facts for himself, since he is neither empowered nor equipped to conduct any investigation."

It has frequently been urged that a public defender is unnecessary because the prosecuting attorney is a public officer whose function is to represent the people of the state—not merely to convict but to secure justice. This view was well stated by District Attorney Swann of New York County (see Goldman on The Public Defender, p. 27): "I believe that the district attorney should exercise the functions of public defender. He is the attorney for all the people, including the prisoner at the bar. He should consider carefully the prisoner's rights and if he should discover any evidence in his favor he should present it unhesitatingly to the jury along with the other evidence. He should not permit the instinct of the advocate to obscure his sense of justice to the defendant." While the theory is good, it requires but a brief study of the reported cases to show that it is nothing but a theory. Fultze (The Public Defender, 31 Am. L. Rev. 395) answers the con-

tention in one sentence dealing with the record of the prosecuting attorney as an impartial protector of justice. "An epitome of adjudicated cases reveals that he 'has misstated the facts and obtruded improper matter into his opening statement to the jury, has impressed the jury by the suggestion of crimes other than the one charged, has attempted to get improper matter before the jury, has abused witnesses, injected his personal and unsworn and damaging statements into the testimony, called the defendant all the vile names in his too plethoric billingsgate dictionary, and has resorted to all sorts of reprehensible devices to awaken prejudice.'" Every phrase in the foregoing is supported by reported decisions, and it can be added to almost indefinitely. This does not mean that the prosecuting attorneys are unworthy or below the average of their professional fellows. It means merely that the modern jury trial is organized on a basis of contention and that the average man trained in that school must of necessity become aggressive and partisan. And it must be remembered that it is not a question of what the best and most highminded, or even the average, prosecutor will do. Safeguards for the accused to be adequate must protect him against the worst man who may ever occupy the position of prosecutor.

The assignment by the court of counsel for the defendant is of course in vogue in every state, and the acceptance of such an assignment is regarded as a duty by every member of the profession. As a result, no man is ever put on trial for felony without having the assistance of counsel for his defense. Therefore the form at least of the constitutional guaranty is observed. But the rights of the poor man who is accused of crime are not fully protected unless he has a defense of ability and energy equal to that enjoyed by the man able to hire counsel of his own selection. It is hard to believe that the assignment of counsel secures such a defense. The counsel assigned, except in a capital case, are almost invariably young and inexperienced members of the bar. If a lawyer in active practice is assigned it is asking too much to expect him to give adequate attention to the investigation of all the facts. The trial of criminal cases is a specialty, in which the prosecutor and his assistants are experienced and the assigned counsel usually a novice. Even if equal ability and experience on the defending side is granted, the prosecution has unlimited purse and powerful machinery of the state to investigate and prepare a case, while the defense is compelled to rely on the statement of the prisoner and perhaps a few volunteer witnesses. Under these conditions it seems inevitable that a poor man charged with crime, particularly if he is densely ignorant, has nothing like a fair chance to establish his innocence. As against the ex parte opinions of prosecuting attorneys and trial judges there may be set the official declaration of an appellate court. In *Falk* v. *State,* (1914) 182 Ind. 317, 106 N. E. 354, reversing for want of evidence a conviction of assault with intent to rape, the court remarked: "Such defense as he had was, as the transcript obviously shows, perfunctorily made by an attorney appearing for him as a poor person." How many similar cases have there been where the money necessary to an appeal could not be obtained and the prisoner, convicted on insufficient evidence after a perfunctory defense, went to prison? Along the same line, it is worthy of note that in Los Angeles in 1913 assigned counsel secured acquittals in 20% of their cases. In 1914 the Public Defender secured acquittals in 34% of his cases. The conclusion is apparently warranted that in 1913 men were convicted who would have been set free had a more competent defense been made.

Advantages of the Public Defender

On the other hand it is hard to see how more perfect equality could be secured than by the introduction of the Public Defender. His office will normally duplicate that of the prosecuting attorney in ability, experience and in the possession of a staff of professional investigators having police powers. While the Public Defender will justify his existence if he does no more than secure a thoroughly competent defense for every man accused of crime, it is the belief of the writer that out of the work of such an office will come a very considerable reform in the administration of the criminal law. One of the favorite arguments against the Public Defender project is that the difficulty of securing convictions is at present a public scandal and that new forces of prosecution rather than of defense are required. It is of course true that delays, technical objections and the like mark the course of our criminal procedure and that our criminal law loses something of its efficiency because of the uncertainty of its enforcement. Guilty men are acquitted and other guilty men are discharged on technicalities without trial. But in the first place it is poor logic to say that because some have too much others should be given too little in order to preserve the average. The fact that a rich criminal may occasionally go unwhipped of justice will not be helped by "railroading" some poor wretch after a perfunctory trial. The evils of the present system arise from the fact that counsel hired for the defense puts himself in the shoes of the accused, and concerns himself solely with the effort to secure an acquittal. The prosecutor is driven of necessity to adopt a militant attitude and bend all his energies toward conviction. The result is a game in which the prize goes to the more skilful or more fortunate player. If each side was represented by an officer of the court, one charged with the duty of presenting the facts indicating guilt and the other charged with the duty of presenting those tending to show innocence, justice rather than victory would be the result striven for and both unjust acquittals and unjust convictions would be minimized.

By way of illustration, in 1914 the Los Angeles Public Defender in 260 cases of felony filed two demurrers, which were both sustained, and no motions to quash. In the same period paid attorneys in 514 cases filed 40 demurrers of which two were sustained, and 21 motions to quash of which two were sustained. Because judges and lawyers are in the main honest, and sincerely desire the just administration of law; because the faults of the present system are the outgrowth of tradition and not the result of any desire that justice shall be thwarted, the example set by the Public Defender cannot fail to influence strongly the course of procedure in the cases defended by paid counsel. A conflict between two ideals is represented—the ideal of the government seeking through agencies both of prosecution and defense to do exact justice, and the ideal of the citizen defending himself as best he may against the effort of the government to destroy him. In this, as in

every conflict of ideals, the better is certain of ultimate success.

The Question of Cost

If the need exists, the question of cost becomes secondary. In a government of law, justice is worth whatever it costs. Many millions are spent by governments, federal, state and municipal, every year for the purchase of things of less worth. At its maximum the cost of the Public Defender's office may equal that of the public prosecutor's. That cost in the largest American city was said in the report of the New York County Lawyers' Association Committee heretofore cited to be about $500,000 per year. Of course in no other city will it approach that figure. That cost, by the way, was less than one four-hundredth of the city budget for the year in which the committee reported, so that the proportional addition would be insignificant. But against this cost many items of credit may be set. Mr. Justice Howard of New York says of the Public Defender: "The creation of such an office would be not only justice but economy." Court costs, witness fees and jury fees form a large part of the annual expense of administering the criminal law; their aggregate amounts to a staggering total. If the work of the Public Defender results in reducing the number of trials and in shortening those actually held, his office will go far toward paying for itself. In Los Angeles in 1914, the average time consumed in a case where the Public Defender appeared was one day; where paid counsel appeared the average time was over a day and a half. The absence of dilatory motions has been referred to and a substantial saving of the time of public officers necessarily resulted therefrom. Between the prosecutor and the defender there would normally be a degree of confidence and cooperation which is impossible under existing methods. Either of them, finding himself in possession of convincing evidence, would not hesitate to communicate the fact to the other, and in many cases a trial would thereby be avoided by a dismissal or a plea of guilty as the case might be. Suspended sentence or release on probation is beginning to be recognized as the best means of reformation in many cases. Where both sides of the case have been investigated by public officers this disposition of a case can be agreed on with much more certainty that there has been no imposition or mistake. From these and similar considerations, it is not unreasonable to expect that within a few years the Public Defender's office will save practically its entire cost by the reduction of trial expenses.

It is said by way of objection that in practically every case accused persons would save the expense of hiring counsel by resorting to the Public Defender. What of it? If the accused is innocent, it is unfair to impose on him the burden of defending himself against an unjust charge. Many a man has been bankrupted by just that condition. If he is guilty, there is no more reason for making him pay for counsel than there is for making him pay rent for the court room in which he is tried. Justice is much better administered under our system of public prosecutors than if any injured person who was rich enough might hire private prosecuting attorneys having control of the case, and it is not certain that the complete substitution of public for private defenders would not be equally beneficial.

The Public Defender in Petty Cases

While the discussion of the Public Defender idea has been confined chiefly to the defense of persons charged with felony, the writer is strongly impressed with the possible usefulness of the plan as applied to persons arrested for minor offenses. Juvenile courts and probation officers have come to be a necessity in every large community. Their value, as compared with ancient methods, arises from the fact that they meet the alleged offender in a spirit of friendliness, inspiring and assisting him in efforts at self reformation, which is the only possible reformation. But outside the scope of these agencies this spirit is wholly absent. A poor and ignorant man must deal with the law as represented by a hostile policeman and a hurried magistrate. Awed by the unfamiliar situation, his stumbling and unintelligible words of explanation carry no weight, and a sentence is imposed, trivial in itself but sufficient to plant in his breast a life-long belief that the law is unfair and unfeeling. If every ignorant man haled into a police court for the first time had found that the law provided him with a friendly adviser to see that his story was heard and understood, had been made to understand not only that the law must be obeyed but that the law is just and reasonable, the present task of meeting radical propaganda in our large cities would be materially easier. "Fools talk of dangerous 'agitators.' There is but one—injustice."

W. A. S.

WORKMEN'S COMPENSATION ACTS

Comparative Knowledge as Basis of Decision

THE unrecognized, but nevertheless the true, basis of decision in this class of cases is the comparative knowledge of the parties respecting the dangerous place, instrumentality, or operation. The employee is entitled to an award of compensation when the fact of superior knowledge is shown to have been on the employer's side of the equation and not otherwise. (See infra, *McNicol's Case.*) The wording of the statute is not important, and the extended discussions as to the meaning of its terms, as well as the empirical rules that have been formulated in respect to the facts of particular cases, are quite aside from the true test of responsibility, and serve only to confuse and becloud the issue—as the courts themselves have been astute to observe and remark. (See LAW NOTES, January, 1920, p. 166.)

It is not to be denied that the statute contemplates a controversy between the employer and the employee—or, under the Industrial Insurance Acts, what is substantially the same thing, so far as the Principle of Comparative Knowledge is concerned—which under some circumstances may be decided in favor of the employee, and under others facts will be decided in favor of the employer. As yet, no statute gives to the employee an incontestible right to compensation, regardless of his *appreciation of the consequences of his conduct* at the time of the calamity. In any case that may arise it will always appear that the employer did or did not do something with more or less knowledge that his conduct exposed the employee to danger of the

injury—he provided a machine, appliance, or place of working; and it will be shown that the employee on his side, either did or did not do something with more or less knowledge that his conduct exposed him to danger of being injured—he operated the machine, or used the place or appliance. If we suppose that the calamity might have been prevented by one of the parties, then it surely will be he who might have prevented it, who is to be held responsible for its occurrence. And he who might have prevented it is he who possessed the superior knowledge as to the consequences of his conduct. This is the test of responsibility—as the decisions themselves incontestably demonstrate. (The Kentucky court appears to be the first to give direct recognition to the principle, in the opinion written by Mr. Justice Sampson in *Central Kentucky Gas Co.* v. *Cantrell,* 183 Ky. 291, 209 S. W. 1, dated 11 February, 1919—citing 18 R. C. L. 704.) But by reason of the fact that a basis of decision is sought in the empirical rules rather than in the circumstances bearing upon the issue of comparative knowledge, the reports of many cases fail to disclose it, or do so only obscurely and by inference.

Expressions Recognizing Fact of Knowledge on Part of Employer

It will be noted from an examination of the opinions that a variety of terms are constantly employed to express the idea that a party to a controversy possessed Knowledge of the consequences of his Conduct—"knew," "foresaw," and "anticipated," being the words most generally used. One may note in the opinions justifying awards of compensation such statements as that "the result either was or should have been in the contemplation of the employer" (*Jacquemin* v. *Turner, etc., Mfg. Co.,* 92 Conn. 382, 103 Atl. 115, L. R. A. 1918E 496), that "it must have been within the reasonable anticipation of his employer "(*Waters* v. *William J. Taylor Co.,* 218 N. Y. 248, 112 N. E. 727, L. R. A. 1917A 347), that the employer "knew of the custom or should have known of it in the exercise of diligence" (*State* v. *District Ct.,* 140 Minn. 75, 167 N. W. 283, L. R. A. 1918E 502), that "such practice was known to the employer" (*Von Ette's Case,* 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D 641). And, conversely, in the opinions reasoning against the right to compensation may be noted comments on the fact that the claimant's peril was unknown to his employer—as that he "was rendering no service which was . . . known to his superior (*Spooner* v. *Detroit Saturday Night Co.,* 187 Mich. 125, 153 N. W. 657, L. R. A. 1916A 17), that "there was nothing to put the employer on notice" (*Jacquemin* v. *Turner, etc., Mfg. Co.,* 92 Conn. 382, 103 Atl. 115, L. R. A. 1918E 496, and see *Van Gorder* v. *Packard Motor Car Co.,* 195 Mich. 588, 162 N. W. 107, L. R. A. 1917E 522), and the like. Where it appeared that the workman was killed by lightning the court said: "The vast majority would never think of lightning and appliances to insure safety from it in putting up such a tent." (*Griffith* v. *Cole,* 183 Ia. 415, 165 N. W. 577, L. R. A. 1918F 923.) The strongest proof of the fact of Knowledge on the part of the employer is, perhaps, evidence that similar calamities have occurred on previous occasions. This circumstance is very often commented on in the opinions.

Attention is invited to the celebrated McNicol's Case, which has become the leading American authority on the interpretation of the statute. (See infra.) In a frequently quoted passage, the Massachusetts Court said that the danger "need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." The case was one of assault by a fellow servant, and compensation was allowed. The court says and is authority for the proposition that the danger "need not have been foreseen," but the findings of fact showed that the fellow servant "when intoxicated was quarrelsome and dangerous," and that the employer "knowingly permitted him in such condition to continue at work." And the court squarely holds that "the injury . . . was due to the act of an obviously intoxicated fellow workman, whose quarrelsome disposition and inebriate condition were all well known to the foreman of the employer." The opinion was written by Mr. Chief Justice Rugg. It may be added that thoughtful judges in subsequent cases have distinguished McNicol's Case by expressly referring to the fact of Knowledge which there was shown to have been on the employer's side of the equation. (*Coronado Beach Co.* v. *Pillsbury,* 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F 1164; *Jacquemin* v. *Turner, etc., Mfg. Co.,* 92 Conn. 382, 103 Atl. 115, L. R. A. 1918E 496.)

Judicial Recognition of Fact of Knowledge on Part of Employee

Similarly, the opinions will be found to contain expressions which recognize the presence or absence of the fact of Knowledge on the employee's side of the equation. If the fact is found to have existed on this side, the plaintiff will have no right to an award. Thus, compensation is withheld where it appears that "he was informed of the danger and he knew it" (*Parker* v. *Hambrook,* 107 L. T. Rep. Eng. 249, Ann. Cas. 1913C 1), or where it is shown that "he had been instructed" concerning the machine and "must have known" of the danger (*Eugene Dietzen Co.* v. *Industrial Board,* 279 Ill. 11, 116 N. E. 684, Ann. Cas. 1918B 764). The House of Lords denied a right of compensation where claimant testified: "I know that to get on a wagon when moving was a very dangerous and forbidden thing" (*Herbert* v. *Fox,* [1916] A. C. Eng. 405, Ann. Cas. 1916D 578—see the opinion of Lord Shaw of Dunfermline). In an interesting case that came before the California Court, it appeared that the claimant sustained an injury from the discharge of a gun, which had been placed in a tool wagon by a fellow servant. Mr. Justice Henshaw, who wrote the opinion, reasons as follows: The employer *knew* that the fellow servant was taking the gun in the wagon; but the claimant, on his side, *knew* that the gun had been placed on the seat between them and did not object. It was not contended that the employer *knew* that the gun was loaded. And it was *quite open* to the injured man to object to the presence of the gun, and it was but a part of common prudence for him *to have seen* that the gun was unloaded. Thus, it was made to appear that the fact of superior Knowledge was on the side of the claimant; and as a consequence an award of compensation was annulled.

(*Ward* v. *Industrial Acc. Commission,* 175 Cal. 42, 164 Pac. 1123, L. R. A. 1918A 233.)

On the other hand, if the fact of Knowledge is found not to have existed on the employee's side of the equation, the plaintiff will be entitled to an award (unless the same fact is absent also from the employer's side). Accordingly, compensation was allowed where it appeared that "the occurrence was unforeseen" by the employee (*Trim Joint Dist. School* v. *Kelly,* [1914] A. C. Eng. 667, Ann. Cas. 1915A 104), that "he did not anticipate" the rupture of a cerebral blood vessel (*La Veck* v. *Parke,* 190 Mich. 604, 157 N. W. 72, L. R. A. 1916D 1277), or that the dangerous situation was hidden from view by obstructions (*Rayner* v. *Sligh Furniture Co.,* 180 Mich. 168, Ann. Cas. 1916A 386, 146 N. W. 665, L. R. A. 1916A 22). In a Michigan case Mr. Justice Steers said: "In the instant case the record is barren of any proof deceased knew that gasoline was in the tool house, that it was liable to vaporize and explode, or that the place was in any way dangerous;" and prior decisions are distinguished on the ground that there "the workman went where he knew or ought to have known" it was dangerous. (*Haller* v. *Lansing,* 195 Mich. 753, 162 N. W. 335, L. R. A. 1917E 324.)

It thus appears that the reasons for withholding an award of compensation are the same as those upon which a recovery was denied at common law under the theories of contributory negligence (see 18 R. C. L. 639 et seq.), or Assumption of Risk (see 18 R. C. L. 683 et seq.), and that the statute is in effect a practice act (see LAW NOTES, January, 1920, p. 167.)

Rule of McNicol's Case—Priestly v. Fowler

The leading American authority in respect of the meaning of the expression "arising out of and in the course of the employment," which is considered by the courts to be the most important provision of the Compensation Act, is *In re McNicol* (see supra) decided by the Massachusetts Court in 1913. (*In re McNicol,* 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A 306.) In the opinion, which was written by Mr. Chief Justice Rugg, it is said that the injury to the employee, in order to warrant a payment of compensation, "must both arise out of and also be received in the course of the employment. Neither alone is enough. It is not easy . . . to give a comprehensive definition of these words. . . . An injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of' the employment, when there is . . . a casual connection between the conditions under which the work is required to be performed and the resulting injury. . . . If the injury can be seen . . . to have been contemplated by a reasonable person familiar with the whole situation . . . then it arises 'out of' the employment. . . . The causative danger must be peculiar to the work, and not common to the neighborhood. . . . It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." This precedent has been cited and followed or distinguished in innumerable subsequently decided cases (*Kimbol* v. *Industrial Acc. Commission,* 173 Cal. 351, Ann. Cas. 1917E 312, 160 Pac. 150, L. R. A. 1917B 595; *Coronado Beach Co.* v. *Pillsbury,* 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F 164; *Jacquemin* v. *Turner, etc., Mfg. Co.,* 92 Conn. 382, 103 Atl. 115, L. R. A. 1918E 496; *Larke* v. *John Hancock Mut. L. Ins. Co.,* 90 Conn. 303, 97 Atl. 320, L. R. A. 1916E 584; *Mueller Const. Co.* v. *Industrial Board,* 283 Ill. 148, Ann. Cas. 1918E 808, 118 N. E. 1028, L. R. A. 1918F 891; *Griffith* v. *Cole,* 183 Ia. 415, 165 N. W. 577, L. R. A. 1918F 923; *Hewitt's Case,* 225 Mass. 1, 113 N. E. 572, L. R. A. 1917B 249; *Harbroe's Case,* 223 Mass. 139, 111 N. E. 709, L. R. A. 1916D 933; *In re Donovan,* 217 Mass. 76, Ann. Cas. 1915C 778, 104 N. E. 431; *Milliken's Case,* 216 Mass. 293, 103 N. E. 898, L. R. A. 1916A 337; *Tarpper* v. *Weston-Mott Co.,* 200 Mich. 275, 166 N. W. 857, L. R. A. 1918E 507; *Hopkins* v. *Michigan Sugar Co.,* 184 Mich. 87, 150 N. W. 325, L. R. A. 1916A 310; *Hulley* v. *Moosbrugger,* 88 N. J. L. 161, 95 Atl. 1007, L. R. A. 1916C 1203; *Heitz* v. *Ruppert,* 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A 344), the courts in some instances accepting Mr. Justice Rugg's explanation as a whole (*Industrial Commission* v. *Anderson,* (Colo.) 169 Pac. 135, L. R. A. 1918F 885; *Mann* v. *Glastonbury Knitting Co.,* 90 Conn. 116, 96 Atl. 368, L. R. A. 1916D 86; *State* v. *District Ct.,* 138 Minn. 326, 164 N. W. 1012, L. R. A. 1918F 881; *Hulley* v. *Moosbrugger,* 88 N. J. L. 161, 95 Atl. 1007, L. R. A. 1916C 1203) and in other cases emphasizing particular parts thereof—such as the "causative danger" being "peculiar to the work" (*Griffith* v. *Cole,* 183 Ia. 415, 165 N. W. 577, L. R. A. 1918F 923; *Donahue's Case,* 226 Mass. 595, 116 N. E. 226, L. R. A. 1918A 215; *Hewitt's Case,* 225 Mass. 1, 113 N. E. 572, L. R. A. 1917B 249; *Federal Rubber Mfg. Co.* v. *Havolic,* 162 Wis. 341, 156 N. W. 143, L. R. A. 1916D 968). Occasionally, the approving courts have made their decisions to turn upon the question whether "the injury can be seen . . . to have been contemplated" (*Hewitt's Case,* 225 Mass. 1, L. R. A. 1917B 249); and in some instances McNicol's Case has been distinguished on the ground that its facts disclosed the existence of the fact of Knowledge on the part of the employer. (See supra.)

And herein is the Rule of McNicol's Case: The employer knew better than the employee that the injury would result from the employee's engaging in the work. In accordance with this rule the cases hold that where the employer is shown to have had superior knowledge of the danger, compensation will be allowed (*Larke* v. *John Hancock Mut. L. Ins. Co.,* 90 Conn. 303, 97 Atl. 320, L. R. A. 1916E 584; *Von Ette's Case,* 223 Mass. 56, 111 N. E. 696, L. R. A. 1916D 641; *Zabriskie* v. *Erie R.* Co., 86 N. J. L. 266, 92 Atl. 385, L. R. A. 1916A 315); but if it be shown that the employee's knowledge was dominant, an award should not be granted (*Lancashire etc., R. Co.* v. *Highley,* [1917] A. C. (Eng.) 352, Ann. Cas. 1917D 200; *Herbert* v. *Fox,* [1916] A. C. (Eng.) 405, Ann. Cas. 1916D 578; *Plumb* v. *Cobden Flour Mills Co.,* [1914] A. C. (Eng.) 62, Ann. Cas. 1914B 495; *Northwestern Pac. R. Co.* v. *Industrial Acc. Commission,* 174 Cal. 297, 163 Pac. 1000, L. R. A. 1918A 286; *Mann* v. *Glastonbury Knitting Co.,* 90 Conn. 116, 96 Atl. 368, L. R. A. 1916D 86). The Rule of McNicol's Case is the same as the Rule of the celebrated case of *Priestley* v. *Fowler,* established over eighty years ago, upon the ex-

pressed proposition that "the plaintiff must have known as well as his master, or probably better," whether he was exposed to danger of injury (see 18 R. C. L. 641). In a recent Massachusetts case the court employs almost the precise phraseology of *Priestley* v. *Fowler,* in saying that the employee "appreciated as fully as his employer or anyone the dangers incident to the work." (*Ashton* v. *Boston, etc., R. Co.,* 222 Mass. 65, 109 N. E. 820, L. R. A. 1916B 1281.) And so, "if under such circumstances and with knowledge of them, an employee . . . is injured . . . it would be going far to say that he is entitled to compensation because the accident arose out of his employment." (*Borin's Case,* 227 Mass. 452, 116 N. E. 817, L. R. A. 1918A 217, citing no authority.)

Evidence on Issue of Comparative Knowledge—Review Where Facts Are Not Shown.

In the cases arising under the Compensation Acts the presentation of the facts and circumstances attending the occurrence is noticeably less complete than in actions at law—perhaps because the finders of fact have not the experience of our common law judges. At any rate, on the issue as to whether the employer or the employee had superior knowledge or appreciation of the danger, there is frequently little or no direct evidence. ("The record contains none of the testimony offered upon the trial, and the case must be considered solely upon the findings of the trial court, and determined upon deductions therefrom." *State* v. *District Ct.,* 138 Minn. 250, 164 N. W. 916, L. R. A. 1918F 918). It is left to inference from the nature of the employment whether the employer might have foreseen the occurrence, and also whether the employee did know or ought to have known of the peril, in view of his age, intelligence, experience, and situation at the precise time of the injury. This unfortunate state of affairs has not failed to impress the courts, and opinions may be found which register a protest against the meagreness, or even complete absence of evidence bearing on the all important issue. In a case before the Minnesota court, Judge Holt complained that the employer "may even have known and acquiesced" in the act of the employee, and that the latter would have been entitled to compensation if it had been shown that he acted "with the knowledge and assent" of the employer. (*State* v. *District Ct.,* 138 Minn. 326, 164 N. W. 1012, L. R. A. 1918F 881.) The result of this incomplete presentation of the facts has been a general relaxation in behalf of the employee's claim, the decisions, for lack of proof, being influenced by the growing tendency to favor servants' actions. For example, in one of the earlier Massachusetts cases, the report shows only that the claimant "was injured at about noon, after she had left the room in which she worked, for the purpose of getting a lunch, and upon a flight of stairs which . . . affording the only means of going to or from her workroom," etc. It does not appear whether she slipped, or whether the stairs collapsed, or whether she was assaulted, or what not. So far as the report goes, her husband may have thrown her down the stairs, for family reasons. (*Sundine's Case,* 218 Mass. 1, 105 N. E. 433, L. R. A. 1916A 318.) Nevertheless, the court affirms an award of compensation—and herein is disclosed a situation that must be reckoned with by the investigator. In truth, it is a farce for the appellate courts to act on such a case as the one last cited—for without a statement of the circumstances attending the injury no intelligent opinion can be formed or expressed. If there is no evidence on the issue of Comparative Knowledge, the application for compensation should be dismissed.

It may be remarked of some of the cases that the fact of Knowledge appears on the employee's side of the equation—and that it appears, indeed, in a degree the same as or even greater than on the employer's side. This may be thought to be the situation of the parties in *State* v. *District Court,* 134 Minn. 16, 158 N. W. 713, L. R. A. 1916F 957, wherein it appeared that the applicant, who was a bartender, sustained an injury by being struck by a glass, which was hurled by a drunken patron—and also in cases where guards or watchmen are injured or killed while guarding the employer's property from invasion, destruction, or loss. In view, however, of the meagre statements in the reports, the investigator should be cautious in offering criticisms. It should be borne in mind that on the issue of Comparative Knowledge is to be considered the habit of the employee to yield instant obedience to orders, rather than to reflect and act on his own knowledge of the circumstances. In most situations, he has a right to assume that the employer knows more about the dangers of the employment than he does, and that he may rely upon the employer to take such measures as may be necessary to avoid doing him an injury. When these matters are taken into consideration, it will be found that the decisions harmoniously adhere to the Principle of Comparative Knowledge, and that the "maze of confusion," which is denounced by Lord Wrenbury (see LAW NOTES, January, 1920, p. 169), is the result of efforts to substitute therefor an infinite number of empirical rules derived from particular fact settings.

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Northport, Long Island, New York.

DRINKS, DRINKERS, AND DRINKING.*

THE dry and thirsty days of summer are here once more. Drinking is the order of the day. Our bodies require to be constantly moistened internally, else with the thermometer among the nineties, quickly would the human form divine become little heaps of dust and ashes. If we cannot drink just now let us think about it. Longfellow says: "He who drinks beer, thinks beer; and he who drinks wine, thinks wine." Let us for a few minutes fondly imagine the converse of this to be true, and while we think of beer, cider, wine, and ale, let us drink in fancy. In dealing with this subject let us take the division suggested by Lindley Murray's definition of a noun, and speak of "person, place, and thing."

Then, firstly, as to the "person." A "common drunkard" is not a regular tippler, but one who is frequently drunk. Proof that one was drunk six times on six different days in three months, when there was no evidence of his state on the other days, does not entitle him to the presumption that he was sober on the other days. *Com.* v. *McNamee,* 112 Mass. 285. The rule of law is that things are presumed to continue in statu quo.

* Interpolated without explanation and without credit of authorship in 1 Kulp (Pa.) 183 (published in 1882) and now republished as a matter of historic interest.—*Ed.*

An "habitual drunkard" is one who has the habit of indulging in intoxicating drink so firmly fixed that he becomes drunk whenever the temptation is presented by his being near where liquor is sold. *Magahy* v. *Magahy*, 35 Mich. 210.

The phrase, "addicted to the excessive use of intoxicating liquors," means not the occasional excessive use, but the habitual excessive use. *Mowry* v. *Home Ins. Co.*, 1 Big. Life and Acc. Ins. Co. Cases, 698.

A court being called on to define in an insurance case what was meant by saying that "a man had always been sober and temperate," very wisely concluded that such a thing could not be said of one who, although usually sober and temperate in his habits, yet occasionally indulges in drunken debauches, which sometimes end in delirium tremens. *Mutual Benefit Life Ins. Co.* v. *Hotterhoff*, 2 Cin. Sup. Ct.

To say that a man is "intemperate" does not necessarily imply that he is in the habit of getting drunk. *Mullinex* v. *People*, 76 Ill. 211. We fancy, however, the courts would not hold the converse of this.

A "saloon keeper" is one who retails cigars, liquors, *et hoc genus omne*. *Cahill* v. *Campbell*, 105 Mass. 60.

In England, one who on Sunday walked to a spa two and a half miles away from his home for the purpose of drinking the mineral water for the benefit of his health, and then took some ale at a hotel (to keep the water down, we suppose), was held by the Court of Common Pleas to be a "traveler." *Pepler* v. *Richardson*, L. R. 4 C. P. 168.

England is a small country; one cannot travel far in any direction without getting his feet damp, like Canute and his friends. We presume this is why what would here be called "taking a stroll" is there dignified by the name of "traveling."

In considering the question of selling liquor to a "minor," the court held that the fact that a youth wore a beard and said that he was twenty-one was no proof that he was an adult. *Getty* v. *State*, 41 Ind. 162.

The bench doubtless believed that, although every American boy may become President, still every one is not a George Washington; but that, as Mark Twain says, "Some Americans will lie." As to beards, nature occasionally "bursts out with a chin-tuft" before her turn, or where she should not.

Now as to "place." Judges do not exactly know—at least when on the bench—what a "saloon" is. They say that it does not necessarily import a place to sell liquors; that it may mean a place for the sale of general refreshments (*Kelson* v. *Mayor of Ann Arbor*, 26 Mich. 325); or that it may mean a room for the reception of company, or for an exhibition of works of art, etc. *State* v. *Mansker*, 36 Tex. 364. This latter idea shows how high-toned Texan judges are, and that they have traveled in foreign parts.

Neither an inclosed park of four acres in extent, nor an uninclosed and uncovered platform, erected for the votaries of the terpsichorean art, and where lager beer is sold, can rightly be considered a "saloon," or a "house," or "building," within the meaning of the Connecticut statute forbidding Sunday selling of intoxicating liquors, etc. *State* v. *Barr*, 39 Conn. 41.

We opine that the Texan court would have held both this park and platform a "saloon," as there would certainly be "room for the reception of company," and if the dancing was good, and the dresses of any worth, these would be an exhibition of works of art.

A "cellar" may be referred to as "the above-mentioned house." *Com.* v. *Intoxicating Liquors*, 105 Mass. 181.

In England it was held that a covenant not to use a house as a "beer house" was not broken by the sale under a license of beer by retail to be consumed off the premises. *L. & N. W. Railway Company* v. *Garnett*, L. R. 9 Ex. 26. One Schofield had a license to sell beer, "not to be drunk on the premises," the bartender handed a mug of beer through an open window in Schofield's house to a thirsty soul, who paid for it, and immediately drank it standing on the Queen's highway, but as close as possible to the window; the Court of Queen's Bench considered that this was not a case of selling beer "to be consumed on the premises." *Deal* v. *Schofield*, L. R. 3 Q. B. 8.

As to the "thing" itself. The phrase "spiritous liquors" does not include fermented liquors." *State* v. *Adams*, 51 N. H. 568.

Cider is not a "vinous liquor." *Feldman* v. *Morrison*, 1 Ill. App. 469. This seems reasonable enough in view of the decision that "vinous liquors" means liquors made from the juice of the grape. *Alder* v. *State*, 55 Ala. 16.

A "dram" in common parlance, in Texas, means something that has alcohol in it—something that can intoxicate; at least so say the judges. *Lacey* v. *State*, 32 Tex. 227.

Some years ago in Indiana they were very virtuous, and the court decided that the opinion of a witness that common "brewer's beer" was intoxicating was not sufficient to prove that it was so, unless the testimony of the witness was founded on a personal knowledge of its effects, or of its ingredients, or mode of manufacture; and the court could not take judicial notice that it was intoxicating. *Glaso* v. *State*, 43 Ind. 483.

But alas for the good old days and the childlike innocence of judges and jurymen! Now both courts and juries in that State will take notice of the fact that "whisky" is an intoxicating drink without any proof. *Eagen* v. *State*, 53 Ind. 162.

In Massachusetts a jury was held warranted in finding "ale" to be intoxicating, merely on the testimony of a witness who saw and smelled but did not taste it. *Haines* v. *Hanrahan*, 105 Mass. 480. Perhaps these twelve men, good and true, had had a view themselves.

In Maine one may be indicted and convicted for selling for tippling purposes "cider and wine," although made from fruit grown in the State, if the jury find that they are intoxicating. *State* v. *Page*, 66 Me. 418.

How much and how long would it take the jury to find this out? Would they be allowed to take specimens with them into their drawing-room, as they do documents, to examine? Or would the judge look upon cider and native wine as Mr. Justice Creswell did upon water? A counsel once objected to a jury having water while considering their verdict. "Why not, Mr. ——, why not?" queried the judge, "water is neither 'meat' nor 'fire,' and no sane man can say it is 'drink;' let the jury have as much as they want."

The "Sabbath night" includes as well the time between midnight on Saturday and daylight on Sunday, as the time between dark on Sunday and midnight. *Kroer* v. *People*, 78 Ill. 294.

In England "habitual drunkenness" is not cruelty in the eye of the law (N. B.—'Tis strange that justice should be blind and law a Polyphemus), so as to entitle a wife to divorce. L. R. 1 P. & M. 46.

As to the mode of selling, Richards, C. J., thought that selling a "bottle of brandy" for $1.25 was selling by retail. *Reg.* v. *Durham*, 35 U. C. R. 508. And in another case Haggerty, C. J., said that he would assume that a sale of a "bottle of gin" at sixty cents was a sale by retail. *Reg.* v. *Stracham*, 20 C. P. 184. While in Illinois the court held that proof that intoxicating liquors were retailed "by the drink" warranted a finding that the sale was in "no larger quantity than a quart" (as restricted in the Ill. Rev. Stat. 1845). *Lappington* v. *Carter*, 67 Ill. 482. See also *United States* v. *Jackson*, 1 Hugh 531. The judges

of this court clearly never heard of the Duke of Tenterbelly. Bishop Hall tells us that this famous nobleman, when returning thanks for his election, took up his large goblet of twelve quarts, exclaiming should he be false to their laws, "Let never this goodly formed goblet of wine go jovially through me," and then, says the historian, "he set it to his mouth, stole it off every drop, save a little remainder, which he was by custom to set upon his thumb's nail and lick it off, as he did."

Cases of Interest

INSANITY AS AFFECTING DIVORCE FOR DESERTION.—In Wright *v.* Wright (Va.) 99 S. E. 515, reported and annotated in 4 A. L. R. 1331, it was held that where a husband abandons his wife, and thereafter, but before the time fixed by law for divorce for desertion has elapsed, becomes insane, the insanity bars a suit by the wife for divorce. The court said: "While it may be regarded as settled by the great weight of authority that the insanity of the defendant is no bar to the prosecution of a suit for divorce for a cause which accrued before such insanity began, yet the precise question presented by this record appears to have arisen in very few cases. If the desertion had continued for three years before the insanity of the defendant intervened, then the cause of action would have been complete, and the insanity would have been no defense. This was determined in Fisher *v.* Fisher, 54 W. Va. 146, 46 S. E. 118, 1 Ann. Cas. 251. Here, however, within three months after the alleged desertion, the defendant became insane. While the cases have been few, the prevailing view is that in such a case the insanity of the defendant is a bar to the suit. . . . Under the Virginia statute, at any time during the three years succeeding the abandonment the offending party has the undoubted right to return to the other, and if that right is exercised there is no ground for divorce. For three years, in Virginia, such offender may repent and return. The ground for an absolute divorce does not accrue from the mere abandonment. It must be wilfully continued for the period fixed by the statute, and the cause of action does not accrue until that time has elapsed. Of course, an insane person is incapable of forming the intent, either to continue the desertion or to seek a reconciliation. It follows logically that in this case the cause of action has not accrued, and that the decree of the trial court sustaining the demurrer is without error."

VALIDITY OF STATUTE MAKING IT PENAL OFFENSE TO POSSESS AUTOMOBILE WITH MANUFACTURER'S NUMBERS REMOVED.—In People *v.* Johnson, 288 Ill. 442, 123 N. E. 543, reported and annotated in 4 A. L. R. 1535, it was held that the Illinois statute making it a penal offense to possess a motor vehicle from which the manufacturer's serial numbers have been removed is a valid exercise of the police power. The court said inter alia: "It is contended by plaintiff in error that one might be guilty under this act by having a car in his possession from which the numbers had been removed without his knowledge. The constitution does not require that scienter be a necessary element of any law where an offense is malum prohibitum. One may violate the law without any intent on his part to do so. . . . Laws cannot be held invalid merely because some innocent person may possibly suffer. The principle of police regulation is 'the greatest good to the greatest number.' The essence of the offense contemplated by § 15*b* of the Motor Vehicle Law consists in the 'purpose of concealing or destroying the identity' of the vehicle. If it could be shown that the possession of an automobile with mutilated numbers was not for the 'purpose of concealing or destroying the identity' of such automobile, we apprehend that a prosecution, not to say a conviction, would be unlikely. We feel that there is no merit in the contention that the enactment of this statute was not a valid exercise of the police power of the state. People *v.* Fernow, 286 Ill. 627, 122 N. E. 155. As to the objection to the validity of the statute, to the effect that it deprives the defendant of his liberty and property without due process of law and denies him the equal protection of the laws, it is sufficient to say that we have had occasion to discuss these constitutional limitations at length on prior occasions, and a reference to those decisions, without discussing them, will show that there is no merit in this contention. Burdick *v.* People, 141 Ill. 600, 24 L. R. A. 152, 41 Am. St. Rep. 329, 36 N. E. 948, 952; Munn *v.* People, 69 Ill. 80. We are unable to see how plaintiff in error was deprived of any 'liberty or property without due process of law.' The act does not deprive him of the use of the cars. He is merely prohibited from changing the numbers for the purpose of destroying the means of identification. What loss this will cause him is not revealed. The value of the act for the protection of the property rights of the citizens in general is too patent to need discussion."

MEASURE OF DAMAGES FOR DESTRUCTION OF COMMERCIAL MOTOR TRUCK.—In Louisville, etc., R. Co. *v.* Schuester, 183 Ky. 504, 209 S. W. 452, reported and annotated in 4 A. L. R. 1344, it was held that the owner of a motor truck operated daily over a scheduled route as a carrier of goods and passengers was entitled to recover as an element of damages for its wrongful destruction the rental value of the use of a truck to take its place in the business until a new one could be procured. The court, after reviewing a number of Kentucky decisions, said: "The theory upon which consequential damages were rejected in the cases from this court decided prior to the case of Schulte *v.* Louisville & N. R. Co. [128 Ky. 627] and cited above, was, as we have seen, that they were too remote for judicial ascertainment, and there can be no fault found with the rule in such cases as it is applicable; but the reason for both the rule and its application fails when consequential damages, which result proximately and naturally from the wrongful or negligent destruction of personal property, are capable of accurate ascertainment. So the correct rule, if the compensation is to be as nearly adequate as the circumstances will permit, as it of course should be, is to allow consequential damages when they can be accurately estimated, but to reject them as too remote or speculative for judicial ascertainment, whenever they are incapable of accurate estimation. This is the general rule applicable to all damages, long applied in this state and elsewhere for injury to personal as well as real property, and for breach of contract, and there is no good reason why it should not also apply to the destruction of personal property. For why should the injured party not be permitted to recoup his whole loss, including consequential damages proximately resulting, when his personal property is completely destroyed, as well as when it is injured merely, or if his contract is violated? The only sound reason for ever denying him any part of the loss he may suffer as the result of the wrongful act of another is that it is incapable of accurate estimation, and therefore, as a necessary rule of practice, is too remote or too speculative for judicial cognizance. Here the plaintiff was operating his truck daily as a common carrier over a scheduled route, and, until he could replace it, he had either to rent another or abandon his business; and the rental value of the use of a truck until a new one could

be provided was of easy and accurate ascertainment, as was also the value of the truck at the time and place of its destruction. The loss of the use was the approximate and natural result of its destruction, and having been pleaded as special damages, was a proper element of compensatory damages."

PERSONAL LIABILITY OF PUBLIC OFFICER FOR WRONGFULLY REMOVING ANOTHER FROM OFFICE.—In Stiles *v.* Morse, 233 Mass. 174, 123 N. E. 615, reported and annotated in 4 A. L. R. 1365, it was held that members of a municipal council who removed the city treasurer from office without following the methods provided by statute for so doing were personally liable for the injury thereby inflicted on him. Said the court: "These are two actions of tort brought to recover damages for two attempted removals of the plaintiff, the first in January, 1917, and the second in February and March, 1917, from the office of city treasurer and collector of taxes of the city of Lowell. The defendants on those dates were three of the five members constituting the municipal council of Lowell. The municipal council of Lowell was clothed with authority to remove the city treasurer from office for such cause as it deemed sufficient, provided it proceeded in accordance with the law regulating the civil service. Stat. 1911, chap. 645, § 40. It had no power in that regard except by following the terms of that law. The provisions of the Civil Service Law required as essential preliminaries that reasons be specifically given in writing, and that the person sought to be removed should be notified of the proposed action and furnished with a copy of the reasons claimed to constitute just cause of removal. The defendants, being a majority of the municipal council, joined in going through the form of adopting orders removing the plaintiff from the office of city treasurer without notifying him of the proposed action and without giving him copy of reasons for removal. Therefore it has been held expressly that the orders 'were a nullity and were wholly ineffectual' as attempts to remove the plaintiff from office. . . . Treating the liability of the defendants in its executive or administrative aspect, they are bound to act in accordance with the law. They acquire no authority in the premises except such as the law confers. . . . Personal liability attaches to executive or administrative officers who interfere with rights of individuals in ways not authorized by law. The cloak of office is no protection to them even when acting in good faith. . . . If their position is approached from the viewpoint of exercising the judicial faculty, the same result follows: 'All inferior tribunals and magistrates . . . if they act without any jurisdiction over the subject matter or if . . . they are guilty of an excess of jurisdiction . . . are liable in damages to the party injured by such unauthorized acts. . . . It is plain that the defendants never acquired a jurisdiction to exercise their quasi judicial functions respecting the removal from office of the plaintiff, because they never notified him, and never gave him a copy of the charges against him, and he did not voluntarily submit himself to their action, but has resisted and asserted the invalidity of their procedure at every point. The full performance of all conditions established by the statute are essential prerequisites to the jurisdiction of the municipal council over the subject-matter of the removal of an officer. . . . The municipal council was clothed with the power of removal of city officers so long as there was conformity to the requirements of the law. When the members ceased to comply with the law, they were acting outside of their official capacity and were subjected to responsibility as individuals."

LUNCH WAGON IN STREET AS NUISANCE.—In Strong *v.* Sullivan (Cal.) 181 Pac. 59, it was held that the maintenance of a lunch wagon in a public street, to the obstruction of ingress and egress to and from abutting property, and injurious competition with business thereon conducted constitute a nuisance. The court said: "Among the findings are the following: 'That for a period of more than four years last past, defendant, J. Sullivan, and his predecessor, have on every evening, at about the hour of 6 o'clock P.M., brought a portable lunch wagon and lunch counter to that portion of Seventh street directly in front of the premises of the plaintiff, and a few feet east of that portion of the building occupied by a restaurant and café; that said defendant has kept and maintained said portable lunch wagon and lunch counter at said point until about the hour of 2 o'clock A.M. the next morning; . . . that it is true that said lunch counter and lunch wagon obstructs the free use of the public street in front of the plaintiff's premises; that it is true that it interferes with the right of ingress and egress of plaintiff and of his tenants to and from his premises; that it is true that said lunch wagon and lunch counter occupies a portion of the public street, and it occupies the same under a license from the city of Los Angeles held by defendant J. Sullivan; that it is true that it does not pay any rent for the space so occupied; that it is true that said lunch wagon and lunch counter does enter into direct competition with a tenant of the plaintiff engaged in the restaurant business, who is compelled to pay rent to the plaintiff.' At the trial the defendant introduced in evidence a certain license of the city of Los Angeles, granting him permission to transact 'the business of lunch wagon' in conformity with the provisions of ordinance No. 20,000 (new series). He also presented a permit issued by the health commissioner of the city to conduct a lunch wagon at No. 1244 East Seventh street. This purports to be under the provisions of 'ordinance No. 25,035 (new series);' but, as the terms of that by-law are not set forth in the record, we shall assume that the permit merely indicates that the place described and the manner of conducting the business are not dangerous to public health. . . . Obviously, the court refused relief to plaintiff under the belief that a license under the ordinance above cited was a permission from the city to defendant to establish a nightly 'stand' or place of business in any public street, without regard to the surrounding conditions. This view was erroneous, and we are of the opinion that the ordinance and the license introduced in evidence failed to sustain the finding that the business was conducted at that place under license and the conclusion that plaintiff was therefore not entitled to the relief for which he prayed. The finding that defendant's wagon obstructed the ingress and egress of plaintiff and his tenants to and from his property, and interfered with the free use of the public street in front of his building, was equivalent to a holding that defendant was maintaining a public nuisance which was especially injurious to plaintiff, and which, therefore, might be enjoined at his suit, because any injury to the use of the street which impairs plaintiff's private easements in the street in front of and adjacent to his lot amounts to an injury giving plaintiff, as an abutting owner, the right to maintain an action for damages or for an injunction."

"Experience has shown that common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple."—Per Mr. Justice Grier in Phalen *v.* Virginia (1850) 8 How. (U. S.) 163, 168.

News of the Profession

MILWAUKEE BAR ASSOCIATION.—General Samuel T. Ansell, acting judge advocate of the army during the war, addressed the Milwaukee Bar Association in January.

DECEASE OF VIRGINIA LAWYER.—Robert Turnbull of Lawrenceville, Virginia, died January 23, aged 69 years. He was a representative in Congress for several years.

THE WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA held an annual banquet at the Hotel Lafayette in January. Miss Mabel T. Boardman of the Red Cross was the principal speaker.

CLEVELAND BAR ASSOCIATION.—President P. L. A. Lieghley of the Cleveland Bar Association has appointed an Americanization Committee. The Committee will co-operate with the Cleveland Americanization Council.

PENSION LAWYER DIES AT WASHINGTON.—Jefferson B. Cralle, one of Washington's prominent pension attorneys, died January 23. He was born in Northumberland county, Virginia.

ILLINOIS LAWYERS WHO HAVE DECEASED.—Judge C. D. Myers of Bloomington died in January, and A. C. Bardwell of Chicago died the same month. The latter was a former state's attorney of Lee county.

NEW ASSISTANT ATTORNEY GENERALS IN MARYLAND.—Attorney General Armstrong of Maryland has announced the appointment of J. Purdon Wright and Allen Fisher, both of Baltimore, as assistants in his department.

BOSTON LAWYER PASSES AWAY.—William M. Richardson, a Boston lawyer, died January 12, in his sixty-second year. He was born in Portland, Maine, and was a partner of Robert M. Morse.

KANSAS CITY BAR ASSOCIATION.—Governor Charles H. Brough of Arkansas was one of the speakers at a recent meeting of the Kansas City Bar Association. His subject was "The Influence of the Bar in Stimulating American Patriotism."

KENTUCKY LAWYER APPOINTED ATTORNEY TO RAILROAD.—Judge Sam R. Crewson, a Kentucky lawyer, has been appointed a local attorney of the Louisville & Nashville Railroad Company to fill a vacancy caused by the recent death of Wilbur F. Brower.

NATIONAL CONFERENCE OF WOMEN LAWYERS.—A national conference of women lawyers was held in Chicago in February under the auspices of the Illinois Woman's Bar Association, the purpose being to consider the unification of laws concerning women.

FORMER ATTORNEY GENERAL OF MINNESOTA DEAD.—George P. Wilson, former attorney general of Minnesota, died at his home in Minneapolis January 21. He was sixty years of age and was born in Pennsylvania.

THE SAN FRANCISCO BAR ASSOCIATION at a recent meeting was addressed by William C. Dennis, until recently legal adviser to the Chinese Government, his subject being "The Shantung Question from the Standpoint of International Law as Viewed by the Chinese Government."

NEW JERSEY DEATHS.—Gilbert Collins, Justice of the Supreme Court of New Jersey from 1897 to 1903, died January 29 at his home in Jersey City. J. Kearney Rice of New Brunswick is also dead. He was at one time a United States district attorney.

DISTRICT OF COLUMBIA BAR ASSOCIATION.—Leon Tobriner has been elected president of the Bar Association of the District of Columbia. He succeeds H. Prescott Gatley, whose term expired under the rules of the association. Alexander H. Bell is first vice president and C. F. R. Ogilby second vice president.

UNITED STATES DISTRICT ATTORNEY BECOMES SPECIAL ASSISTANT ATTORNEY GENERAL.—John A. Fain, United States District Attorney for the western Oklahoma district, has resigned to become special assistant attorney general in charge of the Red River land cases, so called. He was appointed United States Attorney in 1914.

DEATH OF NEW HAMPSHIRE LAWYER AND EDITOR.—Bertram Ellis of Keene, New Hampshire, is dead. He was graduated from Harvard Law School in 1887, and was one of the founders of the *Harvard Law Review*. He practiced in Denver two years and then entered newspaper work at Keene.

OHIO BAR ASSOCIATION.—The Ohio State Bar Association held its annual convention in Dayton in January. Hon. William R. Riddell, Chief Justice of the supreme court of Ontario, delivered one of the principal addresses. The Ohio Prosecutors' Association met in conjunction with the bar association.

NORTH CAROLINA JURIST DEAD.—Judge Francis L. Osborne of North Carolina is dead. He was a member of the Charlotte bar. Judge Cotton Mather Cooke, a resident of Louisburg, is also dead. He was a trustee of the University of North Carolina and of Wake Forest College.

JUDICIAL CHANGES IN NEBRASKA.—Charles A. Goss, former United States district attorney, and for many years a prominent practicing attorney of Omaha, has been appointed a judge of the fourth judicial district, succeeding Judge George A. Day, who replaced the late Judge Sedgwick on the state supreme bench.

NEW LAW REPORTERS.—Chief Justice Nichols of the Ohio Supreme Court has announced the appointment of John L. W. Henney as law reporter of that court, succeeding E. O. Randall, deceased, who served fifteen years. In Maine Terrence B. Towle of Bangor, supreme court reporter, has been succeeded by state senator Freeman D. Dearth of Dexter.

DECEASED PENNSYLVANIA LAWYERS.—The Pennsylvania bar has lost by death Edwin S. Dixon of Philadelphia, Judge Edward L. Whittelsey of Erie, Judge Edward A. Anderson of the Orphans' Court, Philadelphia, Alexander Mitchell of Butler, Joseph B. Dimmick of Scranton, and Beater R. Swift of Easton.

EAST ST. LOUIS BAR ASSOCIATION.—C. E. Pope has been elected president of the East St. Louis Bar Association to succeed Henry Driemeyer. The other officers are: Daniel McGlynn and Judge Silas Cook, vice presidents; John W. Freels, secretary, and Martin F. Oehmke, treasurer.

MISSOURI JUDICIAL CHANGES.—Governor Gardner of Missouri has appointed Thomas H. Bagnell of Marshall a judge of the county court of Saline County. D. C. Wilmer has been appointed presiding judge of the county court of Jasper County, succeeding the late James A. Daugherty, once a member of Congress from the fifteenth Congressional district of Missouri.

APPOINTMENTS BY BALTIMORE'S NEW STATE'S ATTORNEY.—Robert F. Leach, Jr., Baltimore's new state's attorney for the next four years, has named Horton B. Smith as deputy and Henry M. Siegel, Fleet W. Cox, Bernard J. Wells and Capt.

Gaylord Lee Clark as assistants. The two first named, who were in office with the former state's attorney Harry W. Nice, will serve temporarily, by request of Mr. Leach.

DEATHS AMONG MISSOURI ATTORNEYS.—Former Circuit Judge William Haynes of St. Joseph died in January. He was 72 years of age, and was a native of Monticello, Kentucky. The death of Judge James A. Daugherty, presiding judge of the Jasper county court, also occurred in January, as did that of James M. Rollins, who practised law in St. Louis, and was born in Durham, North Carolina.

KANSAS BAR ASSOCIATION.—At a meeting of the Kansas Bar Association, held in Topeka in January, Joseph D. Houston, of Wichita, was elected president; Ben S. Gaitskill, of Girard, vice president; D. A. Valentine, of Clay Center and Topeka, secretary, and J. G. Slonecker, of Topeka, treasurer. W. C. Harris, Emporia; Chester I. Long, Wichita, and James A. Allen, Chanute, were chosen members of the executive council.

DEATHS AMONG WISCONSIN LAWYERS.—Martin J. Ryan of Wisconsin is dead. He practiced law for many years in St. Paul. Another death recorded is that of J. H. M. Wigman, 85 years old, of Green Bay. He practiced fifty-seven years, and was born in Holland. Still another death is that of James B. Erwin, 73 years old, who practiced in Milwaukee for forty years. At the time of his death he was senior member of the firm of Erwin, Wheeler and Woolard. He was born in New York and was graduated from the University of Michigan law school in 1871. Felix Benfey, 74 years of age, the oldest member of the Sheboygan county bar, is also dead, as is E. J. Goodrick of Antigo.

VERMONT BAR ASSOCIATION.—The annual meeting of the Vermont Bar Association was held at Montpelier January 7. The following officers were elected: President, Marvelle C. Webber of Rutland; vice presidents, E. B. Moore of Burlington, E. A. Porter of St. Johnsbury and John C. Sherburne of Randolph; secretary, E. W. Hill of St. Johnsbury; treasurer, E. M. Harvey of Montpelier. Ex-President John G. Sargent delivered an address upon "A Plea for Preserving the Purity of Our Representative Government." At the banquet which ended the meeting Governor Clement was a speaker.

NEW YORK LAWYERS WHO HAVE DIED.—New York lawyers who have died recently are Charles H. Duell of Yonkers, formerly an associate justice of the court of appeals of the District of Columbia; Clarke M. Rosencrantz of New York city, a member of the firm of Sullivan and Cromwell, and formerly a Milwaukee lawyer; J. Warrant Castleman of Rochester; Judge Charles R. Paris of the State Court of Claims; George S. Scofield of Staten Island; Judge Richard H. Smith of New York city; and H. Fred Lyons of Binghamton.

FEDERAL BAR ASSOCIATION ORGANIZED IN WASHINGTON.—James W. Witten of the solicitor's office, Interior Department, was elected president of the newly formed Federal Bar Association, composed of lawyers in the federal departments, at an organization meeting recently at the Department of the Interior; David D. Caldwell of the Department of Justice was elected vice president, Alexander McCormick of the Navy Department, secretary, and Miss Clara Greacen, Treasury Department, treasurer. Two hundred and five names were on the original roll at the meeting, and President Witten said he anticipated about 500 members within a short time. The organization will hold monthly meetings for the purpose of promoting legal relations between departments and to discuss governmental law questions.

NEBRASKA BAR ASSOCIATION.—Judge W. M. Morning, president of the Nebraska Bar Association, has appointed standing committees as follows: Committee on Legislation—W. W. Slabaugh, Omaha, chairman; J. H. Broady, Lincoln; Ralph D. Brown, Crete; Leonard A. Flansburg, Lincoln; Thomas W. Morrow, Scottsbluff; L. M. Pemberton, Beatrice; Charles L. Anderberry, Minden. Committee on Legal Education—C. Petrus Peterson, Lincoln, chairman; Edward E. Good, Wahoo; Anson A. Welch, Wayne. Committee on Inquiry—Charles A. Goss, Omaha, chairman; C. C. Flansburg, Lincoln; C. E. Eldred, McCook. Committee on Judiciary—John B. Raper, Pawnee City, chairman; Thomas F. Hamer, Kearney; Hanson M. Grimes, North Platte.

English Notes*

THE SALARIES OF JUDGES.—A weighty letter in favor of an advance in judicial salaries is contributed to the current number of the *Spectator*, but, as our judges are not in the habit of publicly pushing their claims in this matter, it is not unlikely that these will continue to be overlooked. Yet, surely, there are substantial reasons for a reconsideration of judicial salaries, which, it must be borne in mind, were fixed at a time when the cost of living was on a very different scale from that obtaining at the present moment. No doubt on paper a salary of £5000 has a comfortable, nay substantial, appearance, but, after the payment of super-tax and income tax thereout, the net balance is certainly not an extravagant amount on which to expect the maintenance of a position befitting the dignity of a member of the High Court Bench. In Scotland and Ireland the salaries are less—in Scotland the puisnes receive £3600 and in Ireland £3500—and in neither country can the cost of living be much less, if less at all, than in England at the present moment. Some slight consideration has recently been extended to the County Court Bench in the matter of allowances, and the country, which is justly proud of her judiciary, can hardly refuse the like consideration to the High Court Bench.

FORESHORE.—Probably every lawyer knows that the foreshore is the ground that lies between the ordinary high-water and low-water mark of the sea. But the etymology of the word seems to suggest something to the fore, or in front of, the shore. That is not so, however, as Lord Hale in his treatise *De Jure Maris* says: "The *shore* is that ground that is between the high-water and low-water mark; this doth *prima facie*, and of common right, belong to the King, both in the shore of the sea and the shore of the arms of the sea." It is a very small point, but possibly it may have raised a doubt in the minds of some practitioners. In connection with this subject it may be mentioned that the "coast" *prima facie*, means the land next above high-water mark, but it is a word of flexible meaning, and may include the sea near to the land. In the recent case of Esquimalt and Nanaimo Railway Company *v.* Treat (121 L. T. Rep. 657) it was held by the Judicial Committee of the Privy Council that, in a grant of land in Vancouver Island, together with the minerals thereunder, for the purpose of constructing a railway, the expression "coast line," used to describe the eastern boundary of the land,

* With credit to English legal periodicals.

was meant to describe the eastern boundary of the land at high-water mark, and did not include the foreshore, or foreshore rights. No doubt, like most expressions, it was construed with reference to the context, and all the circumstances of the case. Terms like "seashore" and "coast" should be used with caution.

DOCTORS AND PRIVILEGE.—Considerable prominence has been given to the recent ruling of Mr. Justice McCardie to the effect that no privilege is possessed by a medical man as to knowledge which he has acquired in a professional capacity, where his evidence is material to an issue before the court. No exception can be taken to the decision of the learned judge. Despite popular impressions to the contrary, medical men and clergymen are bound to disclose any information which, acting in their professional character, they have confidentially acquired. It is clear beyond doubt that confidential communications between persons are not privileged from disclosure, except those passing between a client and his legal advisers. Professional communications of a confidential character made by the client to his legal adviser with a view to advice or assistance even although not made with reference to pending or threatened legal proceedings, are privileged from disclosure. This privilege does not rest on the ground of confidence, but rather on a regard to the interests of justice, and to expediency. In such a case the privilege is that of the client and not of the legal adviser, and may be waived by the client. There are certain other matters as to which a witness is not compelled to depose in the witness-box, but they come rather outside the subject of "professional" privilege. On the question of the effect of this ruling upon the treatment schemes now provided, the suggestion of the *Times* that "the whole Government scheme for exterminating venereal disease must be reduced to a nullity if secrecy of treatment cannot be maintained with the assistance of the courts" is distinctly far-fetched. Under the Public Health Regulations 1916 information concerning any person treated under an approved scheme is to be regarded as confidential. It would be lamentable to enact that the fact of venereal disease, where material, would be absolutely unprovable by the medical man concerned in a civil or criminal court because the sufferer was being treated under an approved scheme. Of course the existing law has no such effect, and it is difficult to believe that any such statutory privilege would be created by the Legislature.

THE NEW OXFORD DICTIONARY.—In one of his books Lord Bolingbroke tells of an Oxford student who was overheard at his devotions thanking God for the makers of dictionaries, and that, be it noted, was at a time when these invaluable aids to learning were compilations of the most meager description, and long before the scientific thoroughness of the Oxford English Dictionary was even dreamt of. This great work, which progresses steadily towards completion, has finally refuted the popular notion that a dictionary is of necessity a dull, uninteresting book. With its wealth of quotations illustrating each of the varied uses of words it offers to the student an extraordinarily fascinating series of pages. How thorough is the workmanship displayed is again demonstrated by the latest instalment issued the other week, comprising words from "Stratus" to "Styx." To the one word "Strike" no fewer than twenty-nine columns are devoted, the word having acquired an extremely large number of meanings. Of these, that with which the public has recently become painfully familiar is given due prominence, and apparently for the first time the use of the word as meaning a refusal on the part of workmen to work until their grievances, real or alleged, have been redressed is traced to an eighteenth-century development of the nautical term "to strike a mast," a phrase which signified a lowering of the yards to prevent a ship proceeding to sea. While at the moment this sense of the word "strike" bulks most prominently in the public eye, the word has numerous significations drawn from legal observances. Thus we have it in the phrases "to strike a jury," "to strike hands"—i.e., a joining or clasping of the hands in token of a bargain having been completed—and in the Scottish expression, "to strike the fiars"—i.e., to fix by a jury the rate at which the stipends of the parochial clergy and other payments referable to the current value of agricultural produce are to be converted into money. The jury in such cases were entitled, in addition to hearing evidence, to act upon their own knowledge, the sole instance of this old right of juries which has survived to our own time. We have indicated only a very few of the explanations given of the word "strike," but they illustrate the thoroughness with which the editors of the dictionary have performed their work. The Oxford Dictionary is an indispensable item in every well-equipped lawyer's library.

THE FAMOUS LORD BRAXFIELD.—Of the old race of Scottish judges, the one whose personality continues to be most vividly realized is Lord Braxfield, for some years the holder of the office of Lord Justice-Clerk. The *locus classicus* regarding him and where he is depicted in bold outlines is, of course, Lord Cockburn's Memorials of his Own Time, a delightful book although perhaps to some extent open to the charge that has frequently been leveled at Macaulay's History of England, that in its pages only the Whigs are good. Cockburn was not quite so prejudiced as was Macaulay, although as a Whig his sympathies were strongly in favor of the party opposed to what was called the Dundas despotism. From the picture of Braxfield in Cockburn's pages R. L. Stevenson drew his portrait of Weir of Hermiston, the unfinished tale which the novelist left us, and which set people recalling the robust days of the Scottish judiciary. The combined effect of Cockburn's and Stevenson's work has certainly not been to enhance our admiration for Braxfield, and the prejudice thus created has set a present day writer to a gallant attempt at rehabilitation. That the famous Lord Justice-Clerk was a coarse-tongued man is abundantly shown, not by Cockburn alone, but by numerous stories that have come down to us on the authority of various writers. Cockburn, it has to be remembered, freely recognizes Braxfield's powerful intellect and knowledge of feudal law, qualities which raised him head and shoulders above the most of his colleagues on the Bench; but in no measured terms he impugns the Lord Justice-Clerk's conduct and language during the sedition trials which took place in Scotland towards the end of the eighteenth century. Cockburn says that Braxfield's conduct as a criminal judge was "a disgrace to the age"; Fox said much the same in the House of Commons; and Sir Samuel Romilly, referring to Braxfield's conduct, remarked to a friend, "I am not surprised that you have been shocked at the account you have read of Muir's trial; you would have been much more shocked if you had been present at it, as I was." Mr. Ormond, in his Lord Advocates of Scotland, mentions a significant fact showing Braxfield's attitude to the men who had been tried before him. He tells us that Mr. Secretary Dundas wrote to the Lord Justice-Clerk, stating that representations had been made to the Government against the legality of the sentences—these were ferocious enough in all conscience—and requesting the opinion of the judges on the subject. In transmitting the opinion of the court that the sentences were legal, Braxfield added a private note of his own, urging that the Royal clemency should not be extended to the condemned men. It is always the part of the candid reader to weigh well all that is to be urged in favor of anyone who stands arraigned at the bar of history, but such a

letter as that just mentioned makes it hard indeed to think kindly of Braxfield.

INJURED WORKMAN AN "ODD LOT" IN LABOR MARKET.—The graphic language which was used by Lord Justice Fletcher Moulton (as he then was) in the case of Cardiff Corporation *v.* Hall (104 L. T. Rep. 467; (1911) 1 K. B. 1009, at p. 1020) when describing a workman's condition who is so injured as to have become incapable of doing ordinary work is doubtless well known to all practitioners in workmen's compensation cases. The application of that description to the "workman" in the recent case of Ball *v.* T. Coulthard and Co., Limited—a girl under twenty-one years of age—by the learned judges of the Court of Appeal, Lords Justices Warrington and Atkin and Mr. Justice Eve, serves as a useful reminder in this connection. In some instances an employer may not only be constrained to show what work a workman suffering from partial incapacity for work is able to do, but also that suitable work can in fact be obtained by him. "If the accident," said Lord Justice Fletcher Moulton, "has left the workman so injured that he is capable of becoming an ordinary workman of average capacity in any well-known branch of the labor market—if, in other words, the capacities for work left to him fit him only for special uses, and do not, so to speak, make his powers of labor a merchantable article in some of the well-known lines of the labor market—I think it is incumbent on the employer to show that such special employment can in fact be obtained by him." His Lordship then went on to originate the felicitous expression which has grown to be so familiar in cases of this nature, "an odd lot in the labor market." He had recourse to it as an apposite definition of a workman whose partial incapacity for work has left him a mere nondescript in the labor market. The employer has then to show that someone may be found who can, and will, avail himself of the special residue of powers which have been left in the workman, and that it can actually be made productive of remuneration to him. The facts of the case of Ball *v.* T. Coulthard and Co., Limited (ubi sup.), demonstrated that the applicant there was unable to obtain any employment in any recognized sphere of occupation because of the "personal injury by accident arising out of and in the course of" her employment which she had sustained. With her left eye which had been operated upon for strabismus, and her right eye which had been affected by the entry therein of a steel fragment, small wonder that all efforts she made to procure employment should have proved fruitless. Frustrated as those efforts were by what amounted to total incapacity for work, an award for compensation to her by her employers was no less than was just and reasonable. As Lord Justice Atkin, after referring to Radcliffe *v.* Pacific Steam Navigation Company (102 L. T. Rep. 206; (1910) 1 K. B. 685), remarked concerning the applicant's position, hers was a fortiori case. That an injured workman can get no work by reason of slackness of trade is one thing. Nothing could be more inequitable than to render his late employer responsible for lack of employment not due to the accident, but to fluctuations of the labor market. That, however, is widely different from the case of a workman who finds that no one is willing to employ him on account of the disability under which he suffers through the personal injury that he has sustained. To quote some further forcible sentences of Lord Justice Fletcher Moulton, "liability to unemployment is a feature of all industrial labor, and the workman was subject to it before the accident as truly as he was afterwards." But those observations have no bearing whatever upon a state of affairs such as was revealed in the present case.

Obiter Dicta

WHAT'S THE USE?—In re Fuetl, 247 Fed. 829.

RACE PREJUDICE.—Upperman *v.* Coon, 173 Pac. 522.

ONCE UPON A TIME.—Matty *v.* Sampson, 64 N. Y. App. Div. 1.

INTERNATIONAL PROHIBITION.—Nations *v.* Lovejoy, 80 Miss. 401.

THE LAW'S DELAY.—In re Snow, 248 Fed. 295, was not decided until April 2nd.

WHERE WAS MR. TUTT?—In Tutt *v.* Fighting Wolf Min. Co., 209 S. W. 304, the plaintiff lost.

THE PROPER REMEDY.—"I. W. W.—See Army and Navy."—Cross-reference in 261 Fed. Advance Sheet No. 1.

DISTURBANCE OF A FERRY.—Charon *v.* Clark, 96 Pac. 1040, was an action to prevent the diversion of waters.

NO MORE BABIES FOR AWHILE.—According to the New York *Times* of February 10, Stork & Co. have gone into bankruptcy.

GOT TOO CLOSE?—In Louisville, etc., R. Co. *v.* Close, (Ky.) 209 S. W. 55, it appeared that the defendant in error was struck by one of the trains of the plaintiff in error at a public crossing.

O TEMPORA! O MORES!—In what state did the court recently refer to the purchase of "A substance called julep"? You win on the 48th guess—it was in Kentucky. See Thomas *v.* Com., 214 S. W. 929.

UNLESS INTENTIONAL.—"Mistakes, with corporations as with men, are often paid for in shortened lives. But error is not suicide."—Per Cardoza, J., in Assets Realization Co. *v.* Roth, 226 N. Y. 377.

A TRIUMPH FOR PROHIBITION.—No statistics on the decrease of crime furnish so convincing a testimonial for the "dry" laws as does the fact that the well known "Judge Lynch" of Texas has been compelled to seek a more gentle vocation.—See Judge Lynch International Book & Publishing Co. *v.* State, 208 S. W. 526. Will the colored brethren continue to patronize the judge at his new stand?

ROMAN HISTORY UP TO DATE.—Classical students are familiar with the legend that a crow once addressed to Julius Cæsar the words "Salve, Imperator." It was in allusion to this prophetic feat that Martial (Book 14, Epigram 74) addressed the bird as "Corve Salutator." It is not however so well known that the distinguished author of the Commentaries subsequently became involved in litigation with the first announcer of his imperial destiny. See Cæsar *v.* Krow, 176 Pac. 927.

PRETTY GOOD FOR A BRITISH JOURNAL!—According to a news item in the London *Law Times* for January 17, "The Town Clerk depute of Glasgow, died almost suddenly at his residence on Sunday last."

In the same issue, an article under the head of "Insurance Notes" begins as follows: "An interesting paper on 'The Selection of Lives' was recently read before the Faculty of Actuaries in Scotland, by Mr. Lewis P. Orr—interesting not only to those engaged in life insurance business, but to the general public which provides the lives with which the paper deals."

MORE WILSON.—Having read our squib in the January issue entitled "Wilson—That's All," a Canadian judge writes us as follows: "Being deeply interested in President Wilson's future I have consulted the Sibylline Books—alias our Law Reports—and see little hope for him. True he could down Hoover (Hoover *v.* Wilson, 24 A. R. 424), Reid (Reid *v.* Wilson, 9 P. R. 166) and the Young (Young *v.* Wilson, 21 Gr. 611), but he had no chance against Daniels (Wilson *v.* Daniels, 9 Gr. 491) or Johnson (Johnson *v.* Wilson, 28 U. C. C. P. 432) or Wood (Wilson *v.* Wood, 9 O. R. 687) and had not even a look-in when opposed by Crooks (Crooks *v.* Wilson, 8 U. C. Q. B. 114). So what's the use?"

To which the Office Boy replies: "But while a Crook may beat him, a good man has no show (Goodman *v.* Wilson, 54 Kan. 709) and even the 'First Lady' puts her foot down to no avail (Darling *v.* Wilson, 60 N. H. 59.)"

THE MOON ON THE PAGE.—In Bobbs-Merrill Co. *v.* Equitable Motion Pictures Corp., 232 Fed. 792, United States Judge Mayer had occasion to consider the question of infringement of copyright as between a novel and a photo-play. After remarking that "the plot of the novel is banal, as is that of the photo-play, and both can be recommended as soporifics," the learned judge proceeds to arouse us from a sound slumber by winding up his review of the novel in this fashion: "Gregory presumably thereafter becomes a model husband, Grace and Clinton leave Littleburg to be married and live in Chicago, and Fran, of course, marries Ashton, remarking with striking originality, after looking at the moon, at page 380, 'The world is good enough for me.'"

IN RE ANDERSON.—An esteemed correspondent, inspired by the list of "Wilson" titles recently appearing in this column, sends us a few Anderson titles which he claims are illustrative of the antagonistic proclivities of the head of the Anti-Saloon League in New York. He begins by saying that of course Anderson is agin' gin and whiskey, and drinks of all kinds and makes (Anderson *v.* Holland, 83 Ga. 330; Anderson *v.* Haig, 12 Pa. Co. Ct. Rep. 450; Anderson *v.* Trimble, 37 S. W. 71; Anderson *v.* Winer, 50 Fla. 177).

Strange to say he is equally opposed to goodly things (Anderson *v.* Church, 36 Hun [N. Y.] 637; Anderson *v.* Parsons, 4 Greenl. [Me.] 486; Anderson *v.* Saint, 46 Fed. 760; Anderson *v.* Solomon, 2 Mill Const. [S. Car.] 320; Anderson *v.* Thoroughgood, 5 Har. [Del.] 199.

He doesn't care for the foreign nobility (Anderson *v.* Duke, 28 Miss. 87; Anderson *v.* Earle, 9 S. Car. 460).

He is intolerant of children, their habits and pleasures (Anderson *v.* Young, 44 N. Car. 408; Anderson *v.* Yell, 15 Ark. 9; Anderson *v.* Doll, 27 Cal. 607; Anderson *v.* Story, 53 Neb. 259; Anderson *v.* Valentine, 15 La. Ann. 379).

His arch enemy, as is well known, is the Governor of New York (Anderson *v.* Smith, 2 Rich. Eq. [S. Car.] 285), but he is just as much, or as little, use for the President and certain members of his cabinet (Anderson *v.* Wilson, 13 Ark. 409; Anderson *v.* Baker, 1 Ga. 595; Anderson *v.* Lane, 38 Misc. [N. Y.] 731; Anderson *v.* Palmer, 28 Hun 244).

Nor does he revere many of our former Presidents (Anderson *v.* Adams, 44 Oregon 529; Anderson *v.* Jefferson, 25 Ohio St. 13; Anderson *v.* Monroe, 55 Fed. 405; Anderson *v.* Jackson, 69 Tex. 346; Anderson *v.* Van Buren, 11 Hun [N. Y.] 199; Anderson *v.* Taylor, 41 Ga. 10; Anderson *v.* Pierce, 62 Kan. 756; Anderson *v.* Buchanan, 8 Ind. 132; Anderson *v.* Lincoln, 5 How. [Miss.] 279; Anderson *v.* Grant, 114 Mich. 161; Anderson *v.* Hayes, 101 Wis. 519).

He seems to dislike our sole living ex-President (Anderson *v.* Taft, 20 R. I. 362).

He is not supporting any of our would-be Presidents (Anderson *v.* Hoover, 55 Ohio St. 696; Anderson *v.* Hughes, 5 Strob. [S. C.] 74; Anderson *v.* Johnson, 1 Blackf. [Ind.] 535; Anderson *v.* Poindexter, 6 Ohio St. 622; Anderson *v.* Wood, 80 Ill. 15).

He does not approve of men prominent in public affairs generally (Anderson *v.* Cannon, Cooke [Tenn.] 27; Anderson *v.* Hays, 99 Tenn. 542; Anderson *v.* Hitchcock, 2 Wend. [N. Y.] 299; Anderson *v.* Knox, 20 Ala. 156; Anderson *v.* Root, 8 S. & M. [Miss.] 362; Anderson *v.* Smoot, 2 Rich. Eq. [S. Car.] 285).

To sum it all up, he is antagonistic to everybody (Anderson *v.* People, 63 Ill. 53; Anderson *v.* State, 48 Ala. 665; Anderson *v.* United States, 82 Fed. 998), including himself (Anderson *v.* Anderson, 123 Cal. 445).

Correspondence

AN APPRECIATION.

To the Editor of LAW NOTES.

SIR: I am writing you to thank you for the October, 1919, issue of LAW NOTES. It has more interesting and valuable articles in it than I have seen in any law periodical for 40 years. I have practiced law in this community for that period. The editorial "The Foundations of Personal Liberty" is most excellent.

H. G. ZIMMERMAN.

Ligonier, Ind.

JUDICIAL NULLIFICATION.

To the Editor of LAW NOTES.

SIR: Your editorial paragraph at page 144 of the November-December issue of LAW NOTES, on the constitution of Canada, requires a comment.

First, there is plenty of uninformed criticism of our Constitutional system without its coming from a law publication. If "many American lawyers have on occasion expressed something of envy of the lack of restraint enjoyed by the legislatures of Canada," it was probably because they had not studied the Constitution of that country.

Referring to a recent case in which an act of a provincial legislature was held by the Privy Council to be unconstitutional, you remark of the provincial legislatures that "their immunity from judicial nullification is not as great as has been supposed." I take exception to your epithet "judicial nullification." If an act of a provincial legislature conflicts with the British North America Act of 1867, then it is null of itself and is not and cannot be nullified by judicial action.

Section 91 of the British North America Act sets out the authority of the Dominion Government, and Section 92 enumerates the subjects respecting which provincial government "may exclusively make laws," such as taxation within the province for provincial purposes. The Dominion Parliament may nevertheless interfere with property and civil rights within the province where to do so becomes necessary to the exercise of its exclusive powers; and where the Dominion Parliament and the Provincial

Legislature both act within their respective spheres and yet there is conflict, then the Dominion legislation prevails.

The "lack of restraint enjoyed by the legislatures of Canada" existed for some time owing to the timidity of the Governor General and council with respect to the exercise of the power to veto or disallow. A Canadian lawyer refers to a veto in May, 1918, of a provincial act affecting property rights as a reassertion of the veto power "which gives rise to the hope that the powers of provincial legislatures under our Constitution will not in future be permitted at any time by a fostering laxity to triumph in brazen confiscation."

Anybody who has a fondness for "the lack of restraint" upon legislative bodies would better get busy with his constitutional history. Unrestrained legislatures are no more to be desired than any other kind of autocrat. Indeed, the kingly autocrat has been easier to keep in proper place than the legislature.

The history of the Canadian Constitution is very much like that of ours in respect of the conflict of laws; and in all cases the courts of that country have checked up conflicts and usurpations precisely as our courts have done.

T. J. NORTON.

Chicago, Ill.

THE "PIEPOWDER" COURTS.

To the Editor of LAW NOTES.

SIR: The law by which the mediæval trader was governed has been called the private individual law of the middle ages, and by a 15th century chancellor was identified with the law of nature. The law merchant or Lex Mercatoria was a special body of legal usages and doctrines binding on the merchants of Europe in their relations as such merchants. It grew out of the conflicting practices of different localities which were gradually molded into a compact and scientific system. This system gradually grew up into an unwritten set of rules and regulations that were different from the Common Law and which had an international bearing. It was a customary law created by the merchant out of his own needs and according to his own views. In some cases it came under the influence of Statute law. It differed from the Common law in many respects and anticipated the modern commercial practices. It recognized the payment of earnest money and when this was once paid, each party was firmly bound to the trade. Promissory notes were legalized by the same law and these had wonderful influence on commercial practices. Its procedure was of a very just and summary character adapted to honest and busy men, who went about much. It had what was known as proof by tally and by evidence based on the examination of witnesses in open Court. Professional pleaders were allowed to come in and represent their clients. The Piepowder Courts were Courts in which this law was administered and were nearly as numerous as the Township Courts. These Courts contributed to the consolidation of the body of the mercantile law, which has greatly influenced modern jurisprudence.

The Piepowder Courts were generally set up at the Fairs, but were also held in different boroughs to provide quick justice to and for merchants and foreigners passing through, in matters relating to covenant, contract, trespasses and debts. The President of the Court was the mayor of the town or bailiff of the borough or the steward of the manor or villa as the case might be, depending on where the Court was located. With the President was associated a number of assessors who assisted in disposing of the case: and, in the case of alien merchants, half of the assessors were aliens who were present at the fair. The assessors were themselves merchants and they gave the verdict and in proper cases declared the law. There was ordinarily an appeal from their decree to the Supreme Courts. "The competence of the Court covered a great variety of pleas arising from debts, contracts, trespasses, breaches of the assizes of ale and bread and sometimes to pleas of land, but the pleas of the Crown were excepted. It dealt in the collection of tolls, in commercial litigation and in the maintenance of peace and order. Offenders were presented for assault, for opprobrious epithets, and for undue encroachment, for example, annoying the Beast Market with carts." I get the above interesting matter from "Readings in Industrial Society," by Dr. L. C. Marshall of the University of Chicago.

C. J. RAMAGE.

Saluda, S. C.

"Congress can exercise no power by virtue of any supposed inherent sovereignty in the general government. Indeed, it may be doubted whether the power can be correctly said to appertain to sovereignty in any proper sense as an attribute of an independent political community."—Per Field, J., dissenting in Legal Tender Case, 110 U. S. 467.

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Extradition of the Former Kaiser.

FROM the fact that the United States has consistently maintained the view that it is under no obligation to surrender a criminal seeking refuge within its borders, unless by a treaty it has bound itself to do so, the impression is more or less general that Holland is acting under the dictates of established law in refusing to surrender William Hohenzollern for trial by the allies. The European view, however, differs quite markedly from the policy of the United States. Mr. Wheaton in his Elements of International Law (Lawrence's ed. 1863), page 232, mentions Grotius, Heineccius, Burlamaqui, Vattel, Rutherford, Schmelzing and Kent, as holding "that according to the law and usage of nations, every sovereign State is obliged to refuse an asylum to individuals accused of crimes affecting the general peace and security of society, and whose extradition is demanded by the Government of that country within whose jurisdiction the crime has been committed." He also names Puffendorf, Voet, Martens, Kluber, Leyser, Lluit, Saalfield, Schmaltz, Mittermeyer and Heffter as maintaining that "the extradition of fugitives from justice is a matter of imperfect obligation only, and though it may be habitually practiced by certain States as the result of mutual comity and convenience, requires to be confirmed and regulated by special compact, in order to give it the force of an international law." Both lines of authority agree as to the existence of duty, differing only as to whether it is absolute or imperfect. For the views of Chancellor Kent in opposition to the prevailing American practice, see Matter of Washburn, 4 Johns. Ch. (N. Y.) 106. Moreover, the rule of sanctuary in its strictest form rests on the privilege of the state and not on the right of the fugitive, and a surrender as a matter of comity is always proper and in no way derogates from the dignity of the surrendering state. The surrender of Tweed by Spain to the United States without a treaty is an illustration. So President Lincoln, acting in the absence of a treaty, surrendered to Spain Arguelles, a Cuban officer charged with violation of the Spanish laws against the slave trade. Wharton Confl. L. § 835 note. Secretary of State Seward said in reference to that case that no nation "is bound to furnish asylum to dangerous criminals who are offenders against the human race." The rules referred to relate of course, primarily, to surrender on demand of the sovereign of the escaped criminal. But they would apply with full force to a demand by any state for the surrender of a pirate who is an enemy of the human kind, and a fortiori to the arch pirate of all time. By the best European authority therefore a duty of surrender devolves on Holland and by the strictest rule there exists a full discretionary power to surrender without impairment of national prestige. There are always persons who are willing to harbor an outlaw, especially if he happens to retain a share of the "swag." Such persons are treated by the law as accessories after the fact, and a prompt international application of the same principle would be both just and salutary.

A Black Eye for the League.

THE principal argument for a League of Nations is found in the fact that when, as in the instance discussed in the preceding paragraph, a nation refuses to perform an international duty there is no remedy except war, leaving no alternative but submission if the right involved is not worth the price of its enforcement. It being the prime purpose of a League of Nations to enforce such obligations, the most trenchant criticism leveled against any league thus far proposed is that its decisions are vox et praetoria nihil. The reception given to the request for the surrender of the late Kaiser indicates that such is the opinion entertained of the present league, and the fact that compliance was not enforced shows that the opinion was well founded. Had the Kaiser won the war and demanded from Holland the surrender of some allied leader, how many minutes would have been spent in quibbling? The man would have been surrendered in feverish haste lest a delayed compliance should meet Hindenburg at the gate. Every right-minded man hopes to see an international council take the place of the military despot as the ruler of Europe, but that hope will never be realized until the council is as efficient as the despot. Every man who has ever seen the settlement of a new country knows that the reign of law begins, not when courts are established, but when the sheriff becomes the most efficient citizen in the county. Bat Masterton brought the law to a lawless community; there was a judge there but his name is forgotten. So if international law comes to Europe it will be brought by Marshal Foch and not by note-writing councils. This is said in no spirit of laudation of force or praise of war. But in continents as in communities peace and law never come until the lawless know that government has the force and the will to compel compliance with its requirements.

The Vociferous Minority.

To the casual observer the United States seems to be perpetually on the verge of destruction. Some extreme movement seems always to be in complete control, its adherents appear to be an overwhelming majority, the country echoes with shrieks of triumph or despair. It may be that the forces of reaction seem to be entrenched in perpetual power or it may be that the spirit of revolution is fast breaking down the foundations of the State. Whether the victim is the "Trusts," the "Reds" or the "Demon Rum" the entire nation seems to be in full cry on its trail intent on its utter destruction. But in a few years it is seen that the froth and fury were all on the surface, that the great body of the people had no part in the excitement and in their own time proceeded to settle the question in a sane and sober way, taking whatever of good the noisy propaganda had brought to light, discarding its follies and putting its leaders into obscurity. That vox populi is in a broad sense the voice of Him who maketh the wrath of men to praise Him is shown by the fact that out of each of these "crusades" the good is taken and the folly left. Economic abuses were abolished as a result of the Populist movement. The free silver campaign of 1896 led to the correction of some faults in our currency system which had nothing to do with the "Crime of '73." If the existing radical agitation puts away the spirit of lawlessness so as to permit of a consideration of its grievances it will lead to some reforms. But honest capital has remained and will remain secure in all its just rights, despite the alarms and the clamor for its destruction. In like manner the saloon as it formerly existed will probably never be restored, but the sober common sense of the people will restore the right of the citizen to drink what he pleases, and the next decade will remember Anderson with "Sockless" Simpson—quaint types thrown up for a moment in the foam only to sink forever beneath the waters of oblivion. There is a dramatic impressiveness in the spectacle of a great monarch whose single voice determines the destinies of empire. But to the thoughtful observer there is an impressiveness yet greater in the slower, more hidden working of the spirit of democracy which constantly shapes for itself forms of greater freedom and enlightenment, quite oblivious of the noisy few, who, like Rostand's Chanticleer, think that their crowing causes the sun to rise.

The Steel Trust Decision.

The recent decision of the federal Supreme Court in favor of the so-called Steel Trust will doubtless have considerable industrial and commercial consequences, but it is quite without legal importance except as it attracts renewed attention to a condition of which most lawyers are already aware, viz. that there is no known or knowable rule of law as to what constitutes an unlawful combination in restraint of trade. Each case is decided by a divided court; no case affords any basis for a safe legal opinion as to the next. Behind all the elaborate phrases in which the situation is disguised is the bald fact that the legality of any combination of capital rests in the unfettered discretion of five out of nine judges of the Supreme Court. Waiving the question whether such a condition should exist in a government supposed to be by law, the business situation thus presented is intolerable. If a group of men wish to enter into a combination which they believe will cheapen or increase production, and are sincerely desirous of obeying the law, they can in no manner secure advice on which they may rest with security. No competent lawyer would venture to predict the result of a hearing in court, no public officer is empowered to pass on the legality of the project. The promoters must either abandon the plan or go ahead and take their chances of legal disaster. If it was desired to drive "big business" into an attitude of lawlessness, no better plan could be devised. If it is deemed advisable to regulate business combinations, it would be easy to commit the matter to a body similar to the Interstate Commerce Commission, with power to pass judgment on proposed combinations, approve them, with changes if necessary, and supervise generally the working of the combination, ordering such changes of method as may be found necessary to prevent the destruction of competition. In this manner not only would the law-abiding business man be protected in combinations of real public benefit, but the purpose of preventing unreasonable restraints on competition would be much better effectuated. We have gotten away from the day when a business of national importance could not be organized without a clamor being raised that it should be suppressed. During that period much was committed to the courts which should have been done by other agencies, and as a result the present state of the law has come about. The time is ripe for the establishment of a more enlightened system of regulation, and few items in the program of reconstruction are more vital.

Lawyers in the Legislature.

At last the hackneyed criticism of the preponderance of lawyers in the legislature has been worked out to a logical conclusion, and it is to be hoped that many who have voiced that criticism without looking to see where it led will now begin to retract. Mr. John Spargo, in his latest book, says: "We have in the present House of Representatives, for example, two hundred and sixty-six lawyers, more than a majority of the entire membership. No one is likely to claim that this in any manner represents the economic life of the country, or that these lawyers owe their place in Congress to any special knowledge of our industrial problems. The least useful and important of the professions, economically, dominates the House of Representatives because so many lawyers are 'good mixers' and glib talkers, and because the practice of law and activity in politics can be united in a way that is not possible in the case of any other profession. It is not difficult to imagine a system of government much more representative of the life and needs of the nation. Such a system, instead of being based upon the representation of geographically defined units, would be based upon units composed of occupational groups." This view has at least the merit of being consistent. If the worthiness of a representative is to be judged by his occupation rather than by the ability and fidelity with which he represents his constituency, representation based on geographical units must be abolished, because every such unit contains persons pursuing many trades and professions and cannot be justly represented by a member of any one. For it must be substituted a congress elected at large, the

membership to be apportioned among the several departments of industry according to the number of persons engaged in each. He who is not willing to go to that length should cease his cavil at the political prominence of lawyers, for it is scarcely deniable that no other class of men compare with the members of the bar in fitness and training to represent the varied interests of a community. The entire professional career of the lawyer is devoted to the advocacy of the interests of clients coming from every walk of life. The fact, if it be such, asserted by Mr. Spargo, that the lawyer is industrially insignificant gives him an impartiality which makes him the fitter representative. As for those whose antipathy to the lawyer-legislator may lead them to sympathy with the drastic measure by which alone he may be eliminated—the proposal of Mr. Spargo is identical in theory with the Soviet of the Russian Bolsheviki. Why not go over and see how it works?

Geographical vs. Industrial Representation.

FEW students of our political system will deny that Congress is far from a perfect legislative instrumentality. It is cumbersome and expensive, it is vocal out of all proportion to its efficiency, it is too subject to political influences and organized lobbies. But it is hard to see how the substitution of a system of industrial representation would change the matter much. Grant that all the preliminary problems may be solved, tickets put up containing a proportional representation of each industry, and the people restrained from "splitting the ticket" so as to disturb that proportion, what is accomplished? Instead of a representative from Troy, N. Y., you have a collar factory employee; instead of a representative from Bath, Me., a fisherman or a ship carpenter; instead of a representative from Anaconda, Mont., a copper mine owner, etc. Such is the geographical distribution of industries and the predominance of each in certain localities that under the present system no substantial interest is without a real representative. Nothing would be gained by making these representatives actual members of the industry in question and much would be lost, for while their votes might be intelligent on bills involving their own business they would be utterly ignorant as to bills involving unrelated industries. The broad viewpoint and range of information possessed by the lawyer is the principal asset of legislation and without it the affairs of a country so vast and of so varied industry could never be administered nationally. The industrial representation plan is part of a propaganda which aims at the abolition of capitalism and is impossible of support by any man who does not go that length, because of the manifest difficulty of making an apportionment of representation in any industry between capital and labor. Its acceptance by men whose aims stop short of revolution is due merely to their failure to look past the popular slogan "first kill all the lawyers." At first blush the idea of industrial representation seems analogous to the system frequently practiced with success in business establishments of a council of department heads. The analogy is without force however, for that system owes most of its success to the presence of an executive head with power to decide after the conflicting viewpoints of departments are presented. Reforms in legislative organization are desirable, but the solution does not lie along this line.

Uniform Federal Practice.

NO better illustration could be found of the futility of industrial representation in Congress to accomplish any useful purpose than is afforded by the fact that the most archaic legislation produced by Congress is that relating to practice in the courts. Legislation as to railroads, labor, and banking is progressive and well considered compared with that relating peculiarly to the profession of the majority of the legislators. The most recent instance is the indifference which has delayed the passage of the American Bar Association bill for uniform federal procedure. The measure is not even open to the objection that it is an experiment, since it merely extends to courts of law the system of government by rule which has long existed in federal courts of equity and admiralty. The only objection which seems to be offered is that the burden is imposed on lawyers of learning a new system of practice. The theory of the objectors seems to be that under the Conformity Act the lawyer knowing the practice of his own state follows it in both the state and the federal courts and so is subject to no risk of mistake or confusion. But it needs but slight familiarity with the reported decisions to know that it is only a theory. Hundreds of decisions have been rendered under the Conformity Act, and a great number of them hold the act to be inapplicable. Under the provision of the act that the federal practice shall conform "as near as may be" the federal judges have a discretion to reject any practice provision of the state statutes which in their judgment "would unwisely encumber the administration of justice." *Indianapolis, etc., R. Co.* v. *Horst,* 93 U. S. 291. That doctrine has been applied some twelve times by the federal Supreme Court and in numerous decisions of lower courts. It is always unsafe to follow the state practice without a careful examination of the federal decisions. For example, how many lawyers can answer off-hand whether a state act permitting the calling of an adverse party for cross-examination applies in a federal court. As late as 1917 counsel learned to his cost that it does not. *Pub. Co.* v. *Sloan,* 248 Fed. 251, 160 C. C. A. 329. Appellate procedure in federal courts is not affected by state statutes. *U. S.* v. *Jack,* 244 U. S. 397. Illustrations might be multiplied to show that the supposed uniformity is not only a delusion but a snare; that not only does federal practice require careful study but the general impression that it conforms to state practice has led many to omit that study. The desirability of avoiding study of law by lawyers is not the most weighty of arguments at its best. It is carried to its logical limit by those who want law (and lawyers) abolished and some sort of cadi justice substituted. But in this instance both the convenience of the profession and the better administration of justice seem to dictate the passage of the uniform practice bill.

Change of Name.

AT common law a man could change his name at will, and in but few American states has any statutory restriction been imposed on the right. A writer in the Canada Law Journal (January, 1920), writing from a province wherein the common law obtains, makes a forcible argument for restriction. He fails, however, to distinguish clearly between two entirely distinct things, the

taking of one or more assumed names as an aid to the concealment of identity and a permanent change of name by a person maintaining a fixed residence. The former is, as he says, the common practice of criminals, and is habitually resorted to by the promoters of sporadic business ventures which are criminal or on the verge of criminality. This practice is of course wholly vicious, is adopted in aid of an illegal enterprise and is frequently an important element in its success. But it is not altogether clear how it can be prevented. Change of name without prescribed formalities may be made a criminal offense, but nine times out of ten the project in aid of which the change is made is itself criminal, and the adding of one more penalty will avail nothing; certainly it will not deter the burglar or "con man" with a long record of felonies behind him from taking a new alias at the scene of each new crime. Nothing short of the establishment of a complete system of personal identification records and passports such as obtains in some parts of Europe would check this class of name changing. While such a system might be in many ways advantageous, as for example in putting some check on the criminal tramp, nothing is more certain than that it cannot be adopted or enforced at the present time.

Concealment of Alienage.

The other class of name changing, a more or less public change without present concealment of identity, may of course be easily regulated if reason therefor exists. The most frequent occasion for such changes of name at the present time is to permit a concealment of race or nationality. In the article heretofore referred to is quoted the report of a committee of the New York Genealogical and Biographical Society which states the case very well: "The ease with which this change can be accomplished enables a large number of modern immigrants to change their unmistakably foreign patronymics for those more euphonious and familiar to the American ear. This change might not be objectionable if in exchange for their old surname they were compelled to assume a new one distinctly suggestive of their blood and ancestry. Such, however, is not by any means their custom. After a short sojourn in this land they experience the disadvantage of their own surnames, occasioned by the difficulty of spelling of, unpronounceability of and often business prejudice against their surnames, and at once proceed to change the same, and in so doing adopt surnames characteristically suggestive of blood and nationality entirely different from their own. Their choice generally results in the selection of Anglo-Saxon patronymics. This is a custom prevalent among the lower classes of Hebrew immigrants, and has resulted in many of the best known and respected Anglo-Saxon patronymics being now used by Hebrews (or others) whose inherited surnames they have for reasons of their own found to be of disadvantage to them in this land. If the laws of a State are to continue to permit this free change of name, the new name permitted to be chosen should be (unless some reason better than those noted above is set forth in the application) one distinctly suggestive of the blood and original nationality of the applicant. Under the operation of State laws, a great many in the past four years have availed themselves of this ease of change to disguise their German blood and nationality by the adoption of surnames less suggestive of their origin. While we can fully sympathize with their desire in the matter, we maintain that a surname or patronymic is an unavoidable blood inheritance, and unless, in the eyes of the law, some very strong reason is given for its change, it should remain a permanent possession of the inheritor." It may be said that such changes as referred to in the report are a step toward Americanization. The Hun, who has made some study of "benevolent assimilation," was insistent on the Germanizing of the names of all residents in Alsace and Lorraine, and more than one "Franz" returned to his baptismal "François" when the army of liberation entered. But the Hun is notorious for his disregard of sentiment, and there is a sentimental consideration which should not be disregarded. The United States is not so young but that it has many names which are a source of just pride to their rightful possessors. Have they no right to protect those names from appropriation, and if they have not is it a matter of public indifference that American family traditions are thus being destroyed?

Conditions Against Negro Occupancy.

Since it has been established by the federal Supreme Court that an ordinance establishing racial zones in residential districts is invalid, it has been attempted in some instances to accomplish the same result by restrictive covenants. Two recent California cases have passed on the question (*Title Guar. etc. Co.* v. *Abbott,* 183 Pac. 470 and *Los Angeles Inv. Co.* v. *Gary,* 186 Pac. 596). The decisions agree that the 14th Amendment is not applicable, that provision relating to governmental action only. It is also held in both cases that a condition subsequent that the property shall not be sold or leased to a person not of Caucasian birth is void under a statute of California to the effect that "conditions restraining alienation when repugnant to the interest created, are void." But in the Gary case the court sustains a condition that the premises shall not be "occupied" by a person not of Caucasian birth. The court said: "It is not a restraint upon the alienation, but upon the use of the property. There is no prohibition by statute of such restraints imposed by way of condition nor was there any at common law. . . . The instances in which conditions restricting the use of property conveyed have been enforced are exceedingly numerous and the conditions enforced of almost every conceivable variety. Conditions so extreme as to restrain the use to a single specified purpose are not uncommon, and so far as we are aware have been uniformly enforced, except in certain special cases where for particular reasons not existing here and not affecting the generally enforceable character of such conditions the particular condition was held invalid. . . . In connection with this discussion it may be well to add that what we have said applies only to restraints on use imposed by way of condition and not to those sought to be imposed by covenant merely. The distinction between conditions and covenants is a decided one and the principles applicable quite different." There seems to be no room for question of the soundness of the holding either as to the general validity of the condition or as to the nonapplicability of the 14th Amendment, and the practice thus sanctioned will go far toward permitting a solution of the serious practical question created by

the annulment of the zoning ordinances. The question of the ideal relation between races or of our duty to our black, brown or yellow brothers is quite beside the question, and must be dealt with by nonlegal agencies. The practical fact is that as public sentiment now exists the advent of an appreciable negro or Chinese population in a residence district is followed by a Caucasian exodus and the loss of about half the value of the property. In this process ill feeling is excited and race riots are engendered. Equality of legal right and economic opportunity are the due of every race to which American citizenship is granted, but that equality will be promoted rather than harmed by such residential segregation as local sentiment demands.

Legal Protection of "Slogan."

MODERN advertising has developed the so-called "slogan" or catch phrase, which while ordinarily bearing no direct reference to the article advertised becomes associated with it in the popular mind. The device depends on the readiness with which the mind responds to suggestion and eventually (why not now?) accepts as fact that which it hears repeatedly suggested without either contradiction or argument that will arouse the mind to contradiction. Once established in the public mind, such a phrase is of considerable commercial value, and there is a natural desire to protect the right to its exclusive use. Accordingly, while there has been little or no litigation on the subject, it is said in a recent article in Printers' Ink (Jan. 22, 1920), that a considerable number of "slogans" have been offered for registration in the Patent Office. To be entitled to registration the phrase must be a trademark. The author of the article referred to, Mr. Charles R. Allen, says: "When a slogan is presented before the officials of the Patent Office, the first and foremost question asked is, 'Is the slogan used as a trademark,' that is, displayed in a conspicuous place upon the label so as to catch the eye of the purchaser? In other words, the slogan must be so positioned as to be readily recognized as a substitute for the name of the producer taking the form of a commercial signature." In addition, there are several rules relating to trademarks generally which are peculiarly applicable to phrases of this character. Thus section 5 of the Trademark Act, as amended in 1913 (9 Fed. Stat. Ann. 2d ed. 753), provides that no trademark shall be registered which consists "merely in words or devices which are descriptive of the goods with which they are based or of the character or quality of such goods." So general phrases of laudation open to the world of salesmen are incapable of appropriation. Mr. Allen summarizes the types to which registration has been granted as follows: "(1) Where the slogan is a play on known words, for instance 'The House of a Thousand Candies' or 'Our Waist is your Gain,' and used in a trademark sense, namely, used alone and in a conspicuous place. (2) When it does not directly describe a physical characteristic of the product to which it is attached, but merely suggests a property of goods, for instance, 'A Clean Tooth Never Decays' or 'Built Like a Bridge.' (3) When it involves a trademark of long standing—as the term 'Polly Prim' in the following rhyme: 'When Things Look Dim Use Polly Prim.' (4) Where the device is not merely a collection of correctly spelled dictionary words, for instance, 'Mak-Ur-Own as applied to index cards." He points out, however, that the views of varying examiners have deprived the application of these rules of all consistency. While the article quoted deals only with registration it must not be forgotten that much wider protection is afforded by the law against unfair competition. It would seem, therefore, that a slogan once identified in the public mind with a particular product would be protected on general equitable grounds, though it is of so descriptive a character as to be denied registration. In applying the wholesome rule that no man shall be permitted to palm off his goods as those of another, the courts rightfully refuse to be deterred by the technical rules which govern the action of federal officers in granting a monopoly.

The "Shimmie" as "Exhibit A."

IT is reported that a suit for slander has recently been brought in New York city against a clergyman who became personal in his denunciation of "that form, manner or style of dancing called and known as the shimmie," as the conventional pleader would put it. Counsel for the defendant now declares his intention of asking that the dance be performed, exhibited, interpreted, or whatever may be the correct term, in court, in support of a plea of justification. New Yorkers had better not count too much on seeing this free exhibition of art, for it is not probable that the court will look with favor on the project. In the first place the proposed "evidence" cannot in the nature of things be accurate. Any dance may be rendered so as to be vulgar, or so as to be free from vulgarity. The point at which dancing passes from the poetry of motion to the free verse of the same is difficult of ascertainment, however much of contrast the extremes afford. The rendition of a dance by a couple carefully selected for vulgarity (the clerical defendant will doubtless entrust this task to his lawyer) will differ markedly in its effect on the jury from the same dance as ordinarily performed, and yet no witness could point out convincingly the differences of detail which produced that result. Moreover, if the dance in question is in fact indecent and depraving, is the court justified in compelling the jury to witness the spectacle; in exposing to temptation the innocent youth of the clerk and the bailiff? On the whole, it is likely that the trial judge will conclude that it is just such questions as this which a jury is pre-eminently fitted to decide, and will decline to introduce a jazz band as an adjunct of "speedy" justice.

IN THE GRAND STAND

IN his long ago student days the writer read with pleasure and profit a little book whose name and authorship have escaped his recollection but whose contents remain fresh in his memory. It dealt with the wedding journey of an English lawyer, who discoursed to his bride as they came down from the altar on the status and disabilities of a feme covert, explained at length the law of common carriers as the train bore them away, and found in their first stopping place a theme for a careful exposition of the rights and liabilities of inn-

keepers. It was rather hard on the bride, but it illustrates, albeit in exaggerated form, the natural proclivity of lawyers to think of the current events of life in terms of legal liability and to recall their analogy to the facts of reported cases.

But, being a Briton, the hero of this charming brochure did not take his bride to a baseball game, and it is this omission which it is the present purpose to supply. Let us then imagine the happy couple at the Polo Grounds, in costly seats directly behind the home plate. His remarks, like those of many another spouse, are in the nature of a monologue.

"The issue involved in this game, my dear, was lucidly explained by Justice Johnson in a Missouri case. (*Crane* v. *Kansas City Baseball, etc., Co.,* 168 Mo. App. 301, 153 S. W. 1076.) He said: 'The object of the batter is to "make a hit," and to do so he must strike a pitched ball and send it to some point inside the "foul lines." The object of the pitcher is to prevent the batter from making a safe hit and such object is aided by a foul hit which cannot help and may count against the batter.' Of course an ignorant man would say that the acquiring of runs was the matter of ultimate concern, but it is the crowning glory of the law that if the prescribed procedure is rigidly followed the ultimate result is regarded as being of no importance.

"The purpose of this obscuring wire netting was well stated by the same jurist: 'Foul hits, therefore, are common incidents of every game, and balls thus hit go into the foul territory in every direction and, of course, may go into the grand stand and bleachers. To guard nearby spectators against injury from such balls the grandstand seats are protected by intervening wire netting of very loose mesh.'

"It seems to be the duty of the management to provide such screens, at least in front of the seats where the greatest danger of foul balls exists. 'In view of the facts that the general public is invited to attend these games, that hard balls are thrown and batted with great force and swiftness, and that such balls often go in the direction of the spectators, we think the duty of defendants towards their patrons included that of providing seats protected by screening from wildly thrown or foul balls for the use of patrons who desired such protection.' (*Crane* v. *Kansas City, etc., Co., supra.*) 'We think it sufficiently appears from the complaint that the danger of injury to spectators is incident to a game of baseball; that it is necessary for those who manage such public amusements to protect against these dangers by screens.' (*Wells* v. *Minneapolis Baseball, etc., Assoc.,* 122 Minn. 327, 142 N. W. 706, Ann. Cas. 1914D 922, 46 L. R. A. (N. S.) 606.)

" 'Baseball is not free from danger to those witnessing the game.' (*Wells* v. *Minneapolis Baseball Asso., supra.*) 'One of the natural risks encountered by spectators of a professional baseball game is that of being struck by a fouled ball, and it goes without saying that defendant was not required by law and did not undertake to insure the patrons of the screened-in portions of its grand stand immunity against injury from such source, but being in the business of providing a public entertainment for profit, defendant was bound to exercise reasonable care to protect its patrons against such injuries.' (*Edling* v. *Kansas City Baseball, etc., Co.,* 181 Mo. App. 327, 168 S. W. 908.) In that case the court went into the statistics as to foul balls, saying: 'About 700 balls are pitched during a game and in the preliminary practice of the two clubs, and an average of ten per cent of such balls are fouled by the batters in every possible direction.'

"There is no duty, however, to place a screen in front of all seats. 'The perils are not so imminent that due care on the part of the management requires all the spectators to be screened in. In fact a large part of those who attend prefer to sit where no screen obscures the view. The defendant has a right to cater to their desires. We believe that, as to all who, with full knowledge of the danger from thrown or batted balls, attend a baseball game, the management cannot be held negligent when it provides a choice between a screened-in and an open seat, the screen being reasonably sufficient as to extent and substance.' (*Wells* v. *Minneapolis Baseball Asso., supra.*) But in *Kavafian* v. *Seattle Baseball Club,* (Wash.) 177 Pac. 776, it was apparently considered that a screen covering only thirty feet each way from the center of the stand was insufficient, the court being oblivious of the fact that bush leagues have a hard time to make enough to pay salaries.

"But while the duty to screen a reasonable portion of the stand has thus been asserted by every court which has passed on the question, by one of those apparent contradictions which show the real profundity of the law it seems that the only way in which the management can become liable is to put up a screen. If a screen is put up, and a ball gets through a hole, a spectator injured thereby may recover. (*Edling* v. *Kansas City Baseball, etc., Co., supra.*) He is not bound to see the hole or to catch the ball. 'The uncertainty in the direction, speed and force of a batted ball is one of the interesting and often exciting features of the game and frequently it is difficult for even the trained eye to follow the course of the ball.' But in a Michigan case (*Blakeley* v. *White Star Line,* 154 Mich. 635, 118 N. W. 482, 129 A. S. R. 496, 19 L. R. A. (N. S.) 772), involving an injury on an unscreened field, the court said: 'It is knowledge common to all that in these games hard balls are thrown and batted with great swiftness; that they are liable to be muffed or batted or thrown outside the lines of the diamond, and visitors standing in position that may be reached by such balls have voluntarily placed themselves there with knowledge of the situation, and may be held to assume the risk. They can watch the ball, and usually avoid being struck.'

"And if a screen is provided the risk of injury is clearly assumed by a spectator who sits outside the protected zone. 'So in the present case plaintiff, doubtless for the purpose of avoiding the annoyance of the slight obstruction to vision offered by the netting, voluntarily chose an unprotected seat and thereby assumed the ordinary risks of such position. And if it could not be said that he assumed the risk still he should not be allowed to recover since his own contributory negligence is apparent and undisputable. One invited to a place who is offered a choice of two positions, one of which is less safe than the other, cannot be said to be in the exercise of reasonable care if, with full knowledge of the risks and dangers, he chooses the more dangerous place.' (*Crane* v. *Kansas City, etc., Baseball Co., supra.*) So in a Washington case (*Kavafian* v. *Seattle Baseball Assoc.,* 181 Pac. 679), the evidence showed that a man entered the grand stand during the progress of a baseball game; that

he was familiar with the manner in which baseball games are conducted, having been a frequent spectator thereof; that the grand stand had a screen in front of a portion of it, back of the home plate, and that in this screened portion there were a great number of vacant seats, any of which he was entitled to take under his admission ticket, notwithstanding which he voluntarily took a seat outside of the screened area. The court said: 'Having gone there to see a baseball game, it must be true that before many minutes had elapsed he became conscious of the fact that between him and the balls no screen existed, if he was not aware of that fact at the very moment of taking his seat. Conscious of the fact that balls are very often hit "foul" and that wild throws sometimes result in the ball falling among the spectators, and conscious of the fact that there was no protection between the balls and himself, he continued to occupy a seat in that unscreened portion until he received his injury. It matters not whether one designates his act in this regard contributory negligence or views it as in the nature of assumption of risk, the result is the same. The place in which he could have taken a seat would have fully protected him against the ordinary and usual hazards incident to witnessing the game in question, but he chose to sit elsewhere and substitute for that safety the compensating facility of vision. If there was a chance of danger the respondent voluntarily took it. Having purchased a ticket which offered him a choice of two positions, he with full knowledge of the risk of injury chose the more dangerous position.'

"The Minnesota court, however, has been gallant enough to recognize an exception in favor of the ladies. (*Wells* v. *Minneapolis Baseball Assoc., supra.*) In that case the fair plaintiff thriftily attended on a 'ladies' day' when her sex were admitted free and took a seat outside the screen. Judge Holt said: 'Only those who have been struck with a baseball realize its hardness, swiftness, and dangerous force. Women and others not acquainted with the game are invited and do attend. It would not be either a safe or reasonable rule to hold that, in these games to which the general public is invited, no duty rests upon the management to protect from the dangers incident thereto other than by a proper screening of part of the seats.' It was accordingly held that a duty of warning existed and that a sign reading, 'The management will not be responsible for injuries received from thrown or batted balls,' was not sufficient 'to impart notice of the danger incident to the game.'

"It would seem probable that a person taking a seat in the bleachers (a term of unknown origin, but lucidly defined by the inveterate fan who wrote the opinion in the Crane case) assumes the risk of injury, since by paying a small additional sum (twenty-five cents in Kansas City) he could have obtained a protected seat, but the question has never been determined. There is another question which it is hoped that some friend of the national game will soon raise, viz. whether the rule of assumption applies to a person arriving too late to secure a seat behind the screen. The reasoning of the cases, which with the exception of the Blakeley case are based on voluntary choice, certainly does not apply.

"When they're 'all up for the lucky seventh' there is always a chance that the grand stand may collapse, but if it does the liability of the management is clear. There is some doubt, however, about the liability of the owner where the ball park is managed by a lessee. The owner has been held liable where he had notice of defects (*Kane* v. *Lauer,* 52 Pa. Super. Ct. 467; *Lusk* v. *Peck,* 132 App. Div. 426, affirmed 199 N. Y. 546), but in the absence of such notice has been held not to be liable. (*Cunningham* v. *Rogers,* 225 Pa. St. 132, 73 Atl. 1094.) Of course there have been a number of cases involving the collapse of grand stands at horse races and football games, but you know careful lawyers never cite a case unless it is in point. I have written a number of letters to law-book publishers criticising them for carelessness in this respect.

"Now the game is over and you must watch your step, for it seems that the risk of injury from the jostling of the crowd is assumed by the spectators at a ball game, though if the injury is caused by some defect in the grand stand the defect and not the crowd will be deemed the proximate cause." (*Bole* v. *Pittsburg Athletic Co.,* 205 Fed. 468, 123 C. C. A. 536, (N. S.) 46 L. R. A. 602.)

"But who won the game?" queried the fair bride, getting a word in edgewise for the first time.

"The Giants, of course," responded the legal luminary. "And they're going to win the pennant, too."

W. A. S.

LIABILITY OF NONPARTISAN ASSOCIATION UNDER CORRUPT PRACTICES ACT.

IN these days when every fad and "ism" has its organization pledged to foster on the public its particular brand of cure-all, trained in the science of politics as known to-day, and frequently possessed of an unlimited amount of the great persuader, which it freely uses, it is of interest to know just how far such an organization is amenable to the statutes which have been enacted to prevent fraud in elections and to check the unlimited expenditure of money, the concerted use of which is admittedly one of the most dangerous agencies in corrupting the elector and debauching the election. There are few decisions covering this particular sinner against the right of suffrage and the purity of the ballot, but fortunately in the few cases that have arisen the courts have spoken in no uncertain terms, as will be pointed out later. It is not the purpose of this article to condemn all associations that have for their object the promotion of some particular policy or measure, for, like the trusts, there are good associations and bad associations, but whether good or bad they are not above the law, and if included within its scope should be made to comply with it, if they do not voluntarily do so.

Since the time when honor, financial gain and power were first placed at the bestowal of the public, the competition for its favors has been keen, and such is the weakness of human nature that many have stooped to means far from compatible with that honor which they sought in order to obtain it. It may be trite, but it is nevertheless true, that it is as essential to the successful working of this government that the great organisms of its executive and legislative branches should be the free choice of the people as that the original form of it should be so; and the first principle of the right of suffrage is that it should be guarded, protected and secured against force and against fraud. In a republican form of gov-

ernment such as ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptation to control these elections by fraud and corruption is a constant danger, and it is to curb this predatory impulse that the so-called Corrupt Practices Acts have been passed.

It may be said that there are three means of participation in the government so far as its representative nature is concerned, namely: by the exercise of the right of suffrage; by persuasion or coercion of the individual possessing that right; and by furnishing the means by which the individual may be persuaded or coerced. With the first of these it is apparent that an association or organization is not concerned, but to prevent undue influence by the second and third means, not only the United States but nearly all of the individual states have enacted laws prescribing limitations on the exercise of influence over the voter at elections. These statutes, beginning with the English Act of 1854 as amended in 1868 and 1883, down to and embracing our American acts, invariably limit or regulate the use of money as a means of influencing an election. Thus it is generally recognized that one of the most potent means of corrupting the ballot is by the use of money. In no line of endeavor is the slang phrase "money talks" more appropriate. Like all other instances where the proper use of a thing is legal and harmless, the evil consisting in its abuse, the difficulty of keeping men within bounds is multiplied manifold. Could we forbid its use altogether the desired end might easily be obtained. That, however, is the remedy of the shirker of responsibility, the mentally indolent, or the fanatical reformer who can see only the accomplishment of his own pet scheme and not see the injustice done to others that are making a legitimate use of a means lawful in itself. Fortunately our legislative bodies have been actuated by "the rule of reason" and those using money for legitimate expenses in influencing votes need fear no harmful results.

In order to prevent the improper use of money in elections these Acts generally provide that those using money in elections shall make a return to the proper authorities, showing the amount expended and the purposes for which it was used, which return shall be subject to inspection by the public. In some instances the amount which may be expended is limited, and in some, particular classes are prohibited absolutely from contributing or expending money to influence an election. That these statutes are constitutional there seems to be no doubt. As was said in Ex parte Yarborough, 110 U. S. 651, 4 S. Ct. 152, 28 U. S. (L. ed.) 274: "If the government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other." Neither do they violate the constitutional prohibition against encroachment on the freedom of speech and of the press. *U. S.* v. *U. S. Brewers' Assoc.*, 239 Fed. 163. Nor do they deprive anyone of property without due process of law. *People* v. *Gansey*, 191 Mich. 357, 158 N. W. 195, Ann. Cas. 1918E 165. Nor is such a statute open to the objection that it unduly and unreasonably restrains the political activities of the people, and "that it is one of those fool enactments that occasionally get through the legislature." *People* v. *Gansey, supra.*

Statutes regulating the expenditure of money in elections should receive a liberal construction in order to effectuate the intention of the legislature. In construing such a statute requiring the treasurers of political committees to keep and render an account of receipts and disbursements, the court in Matter of McLennan, 65 Misc. 644, 122 N. Y. S. 409, affirmed 142 App. Div. 926, 127 N. Y. S. 1131, said: "The object of this statute is clearly to compel publicity with regard to campaign expenses; to prevent by such publicity the improper use of campaign funds; and, in case of improper expenditure, to render easy the prosecution of the offender. With this end in view, it should receive a fair and liberal construction. The object sought to be obtained is important, and it should not be defeated by any narrow or technical ruling. At the same time, if such a thing is possible, the construction should be reasonable, so as not to prevent or unduly embarrass the conduct of political campaigns under our present system." Following this line of reasoning it has been held that associations or organizations formed for the purpose of promoting or opposing a particular measure or principle come within the meaning of a statute requiring "political committees to make return of their expenditures." Matter of Woodbury, 174 App. Div. 569, 160 N. Y. S. 902, *affirmed* 220 N. Y. 675, 116 N. E. 1084. In that case it appeared that an association formed for the purpose of defeating an amendment to the constitution relating to taxation, spent money in the distribution of literature to that end, and refused to make any return showing the amounts, nature and purpose of such expenditures on the ground that it was not within the provisions of the New York Corrupt Practices Act, which provides as follows:

"The treasurer of every political committee which, or any officer, member or agent of which, in connection with any election receives, expends or disburses any money or its equivalent or incurs any liability to pay money or its equivalent shall, within twenty days after such election, file a statement setting forth all the receipts, expenditures, disbursements and liabilities of the committee, and of every officer, member and other person in its behalf. In each case it shall include the amount received, the name of the person or committee from whom received, the date of its receipt, the amount of every expenditure or disbursement, the name of the person or committee to whom it was made, and the date thereof; and unless such expenditure or disbursement shall have been made to another political committee, it shall state clearly the purpose of such expenditure or disbursement." (Sec. 546 Election Law, McKinney's Consol. Laws, Book 17, p. 426.) Denying this contention the court said: "Section 540 of the Election Law has defined the words 'political committee,' and has left nothing for inference as to their meaning. The expression is not limited to political committees as such. If we read the definition there given into section 546 of the Election Law, it is plain that, where three or more persons co-operate to bring about the election or defeat of a candidate or a proposition at an election, and make any expenditures of money in so doing, they must make a report of their receipts and disburse-

ments. The only exception to the rule is that it shall not apply 'to or in any respect of any committee or organization for the discussion or advancement of political questions or principles without connection with any election.' The caption of the act, 'Corrupt Practices,' indicates its purpose. It was intended to do away with the improper use of money with reference to elections, by requiring publicity as to receipts and disbursements. The statute should have a liberal and fair interpretation in order to carry out its obvious intent. Concededly the defendant circulated literature seeking to defeat a proposition pending at the election for the amendment of the Constitution. It not only circulated its general literature, but referred to the election and asked the voters receiving the literature to attend at the polls and vote against the proposition. Clearly the expenditure for that purpose cannot be considered as 'without connection with any election.' The expenditures were made directly in connection with the election. It is not claimed that the appellant is required to report as to its general receipts and disbursements, which are made in the prosecution of its ordinary affairs; but it must report, and, in the investigation of its expense, inquiry may be made with reference to, any receipts and expenditures which entered into the campaign carried on by it to defeat the proposition." This decision would seem to settle beyond cavil, at least in New York, that voluntary associations and organizations are included within the meaning of the Corrupt Practices Act. The New York Act (§ 550, Election Law, McKinney's Consol. Laws, Book 17, p. 428) further provides that in case of a violation of the law, "the supreme court or any justice thereof, may compel by order in proceedings for contempt, such person or committee to file a sufficient statement or account, or otherwise comply with the provisions of this article." However, there must be some basis for the action of the court. As was said in Matter of McLennan, supra: "There must be a petition setting forth the facts said to be wrongful, either directly or upon information and belief; or in some way facts and circumstances must come to its attention which seem to show a violation of the statute. It is not enough for a party to say: 'There may have been a violation of the statute. We don't know. We would like to have the court investigate and lay the facts before us.' As will be seen, the statute gives to every one the power to examine minutely every expenditure made. If any one of them is illegal, the attention of the court should be called to it." And by section 560 of the act a willful failure to file the required statement is punishable by a fine of not more than one thousand dollars, or imprisonment for not more than one year or both.

The danger of the use of money in elections by powerful organizations has been recognized by Congress, and corporations and national banks are specifically forbidden to make contributions to the election funds of candidates for Congress. 35 Stat. L. 1104, 7 Fed. Stat. Ann. (2d ed.) 641. It is further provided that the treasurer of any political committee shall make returns to the clerk of the House of Representatives of all receipts and expenditures in connection with the election of congressmen. Act June 25, 1910, ch. 392, 36 Stat. 822, 3 Fed. Stat. Ann. (2d ed.) 120. A political committee is defined by section one of this act as follows: "The term 'political committee' under the provisions of this Act shall include the national committees of all political parties and the national congressional campaign committees of all political parties and all committees, associations, or organizations which shall in two or more States influence the result or attempt to influence the result of an election at which Representatives in Congress are to be elected." This provision is similar to that of the New York Act construed and applied in Matter of Woodbury, supra, and undoubtedly would include similar associations; and a like provision is found in the Michigan Corrupt Practices Act.

That it was intended to include voluntary associations among those aimed at in these Acts is evident from the wording of other kindred acts. For instance the New York Legislative Law (§ 66, McKinney's Consol. Laws, Book 31, p. 41) provides that "every person retained or employed for compensation as counsel or agent by any person, firm, corporation or association to promote or oppose directly or indirectly the passage of bills or resolutions by either house or to promote or oppose executive approval of such bills or resolutions, shall, in each and every year, before any service is entered upon in promoting or opposing such legislation, file in the office of the secretary of state a writing subscribed by such counsel or agent stating the name or names of the person or persons, firm or firms, corporation or corporations, association or associations, by whom or on whose behalf he is retained or employed, together with a brief description of the legislation in reference to which such service is to be rendered." It is further provided by this section that "it shall be the duty of every person, firm, corporation or association within two months after the adjournment of the legislature to file in the office of the secretary of state an itemized statement verified by the oath of such person, or in case of a firm of a member thereof, or in case of a domestic corporation or association of an officer thereof, or in case of a foreign corporation or association of an officer or agent thereof, showing in detail all expenses paid, incurred or promised directly or indirectly in connection with legislation pending at the last previous session, with the names of the payees and the amount paid to each, including all disbursements paid, incurred or promised to counsel or agents, and also specifying the nature of said legislation and the interest of the person, firm, corporation or association therein."

While it is true that most of the provisions of the various Corrupt Practices Acts relate to the conduct of candidates and political committees, these acts have been construed to regulate and control all elections and election expenses, wherever the electors are called upon to decide any measure or measures that may be before the people to be acted upon. *State* v. *Fairbanks*, (Ind.) 115 N. E. 769; *People* v. *Gansley*, 191 Mich. 357, 158 N. W. 195, Ann. Cas. 1918E 165. As was said in the latter case: "In our opinion the voting upon a proposed constitutional amendment, or upon the question of local prohibition, is as much an election as is the voting for candidates for office. The supposed abuse to be corrected is as apparent in one case as the other. The fundamental principle involved in construing a measure of this kind is to carry out the legislative intent. To ascertain that intent, we should consider, not only the remedy expressed, but the evil sought to be reached. That partisan zeal and spirit are as intense when canvassing and voting upon

the question of local prohibition of the liquor traffic, as when canvassing and voting for candidates for office, is too evident to need discussion. The legislature probably deemed such reasons sufficient. The expression, 'measure before the people,' in section 16, and the definition of 'political committee,' in section 19, aid us in reaching the conclusion that the act was intended to apply, and does apply, to elections other than those at which only candidates for public office are to be chosen. It is contended, however, that the matter of canvassing, discussing, and voting on local option cannot be regarded as acting with reference to 'a political party or principle or measure,' and counsel say: 'The local option forces in any county are not political parties, and to vote for or against county prohibition is not to vote for a political principle or measure.' We think this too narrow a view of the question. When the word 'political' is used as it is in this act, even if held to qualify the words 'principle or measure,' it is a narrow construction to hold that it applies to one or more of the recognized political parties only. The word has a much broader meaning, and often refers to matters of public policy."

The desire of a candidate for office is no less keen than the zeal of an organization, pledged to the advocacy of one principle, to write its theories on the statute books. In fact many acts which the individual would balk at are committed by the mass without compunction, apparently on the theory that a division of the wrong among the many lessens or obliterates it. More sinister in its aspect is the use of money by the association than by the individual and the more reason that it should be brought within the law requiring publication of its expenditures and made to comply therewith. Though the evil in both cases is of the same kind, it is obvious that because of its greater resources in these days of the vast growth of wealth in our country, the power for wrongdoing is immeasurably greater in the organization than in the individual. To allow such associations to collect and spend in secret unlimited sums in influencing an election strikes at the very foundation of our representative form of government. That the concerted use of money is one of the most dangerous agencies in corrupting the elector and debauching the election is generally recognized, and those organized to promote what they believe to be for the betterment of their fellow-men should be the first to comply with a law looking to the safeguarding of such fundamental right, and their refusal to do so voluntarily cannot but arouse a suspicion that all is not as it should be. It is common knowledge that the mere fact that a large sum of money has been spent to influence an election is of itself suspicious, and to many even a badge of fraud, and it seems inconceivable that any association or organization should voluntarily put itself before the public in such a light by refusing to comply with the law or by attempting to avoid its provisions by taking advantage of some technicality, unless this natural assumption was well founded.

MINOR BRONAUGH.

"The Fourteenth Amendment is not a pedagogical requirement of the impracticable."—Per Mr. Justice Holmes in Dominion Hotel *v.* Arizona (1919) 249 U. S. 265, 268, reaffirming as "an almost prescience of the contention now" made, in Perley *v.* North Carolina (1919) 249 U. S. 510, 514, per Mr. Justice McKenna.

EJUSDEM GENERIS RULE

THE rule—or doctrine, as it is often called—of *ejusdem generis* is not a rule of law at all, nor is it even embodied in any epigrammatic maxim, but is simply a working rule of construction embodying a particular application of two maxims which are themselves rules of construction—namely, *Verba generalia restringuntur ad habilitatem rei vel personae* and *Noscitur a sociis.* In plain English, in construing documents you must always have regard to the context of any word, and, if general words are used, you may restrict their meaning so as to make them apply to the subject-matter of the document; as a consequence of these rules, a general word or expression following particular words or expressions must often be, if that appears to be the intention gathered from other parts of the document, restricted in meaning so as to refer to things of the same kind—*ejusdem generis*—as are referred to by the particular words or expressions. This seems a reasonably accurate way of stating the *ejusdem generis* doctrine as acted upon at the present day. The rule is certainly not a principle of law, nor even to be applied without reference to the context. To say, as is said in an American case, that "the doctrine of *ejusdem generis* is as rock-ribbed in the law of this state (Missouri) as any principle ever announced" (Ex parte Neet, 1900, 80 Am. St. Rep. 638, 641) is going much further than English, and probably most American lawyers would assent to.

The doctrine, in fact, amounts to little more than a presumption to be acted on in construing documents of every kind. It is more often called in aid of the interpretation of statutes than of other documents, but is also frequently relied on in regard to deeds of conveyance, wills, and powers of attorney. It is under the doctrine of *ejusdem generis* that the general words in a deed or will, following an enumeration of particular things or a description of a particular thing, often are so restricted as to have practically no meaning at all, the practice having arisen of throwing in these general words in order to guard against accidental omissions in the particular enumeration or description. In many penal statutes the doctrine has been relied on for restricting general words within a narrow compass, but here this restriction seems to have been induced (possibly unconsciously) by the application of the broad principle which always construes penal statutes strictly, and by a judicial disinclination to create new offenses unless absolutely compelled by the most explicit language of the Legislature.

The modern tendency of the courts is not to regard the doctrine of *ejusdem generis* as important, but in all cases to look for indications elsewhere in the document of an intention to use general words in the restricted sense, if the doctrine is to be applied. In the absence any such indication, the doctrine is not treated as a mere rule of thumb, though no doubt it was so treated formerly. It was said by Lord Loreburn, when Lord Chancellor, that "it is impossible to lay down any exhaustive rules for the application of the doctrine of *ejusdem generis,*" but "there may be great danger in loosely applying it": (Larsen *v.* Sylvester, 99 L. T. Rep. 94; (1908) A. C. 295). In this case it was held by the House of Lords that the insertion of the words "of what kind soever" in a charter-party was intended to, and did, exclude the doctrine of *ejusdem generis.* Anderson *v.* Anderson, in the Court of Appeal (72 L. T. Rep. 313; (1895) 1 Q. B. 749), illustrates the modern tendency referred to in relation to a voluntary deed of settlement. The deed contained a gift of a house with its "furniture, plate," etc., and "other goods, chattels, and effects" on the premises. The words last quoted were held

to include horses and carriages, and the *ejusdem generis* doctrine was held not to apply. Lord Esher, M.R. said: "The doctrine of *ejusdem generis* is not one to be at all extended." Lord Justice Lopes thought the doctrine "a good servant, but a bad master." The effect of not applying the doctrine in this case was to uphold the gift of everything in the house to the donee. In a later case where the doctrine was applied, the effect of its application was to prevent the forfeiture by a tenant of machinery placed on demised premises (Lambourne *v.* McLennan, 88 L. T. Rep. 748; (1903) 2 Ch. 268). Here the Court of Appeal held that the general words in a covenant to deliver up at the end of the term everything on the premises should be applied only to articles possessing the characteristic of irremovability, and they also thought the covenant should be construed in this way apart from the doctrine of *ejusdem generis*.

It is sometimes said that such and such a case is an "exception" to the *ejusdem generis* rule. This seems an incorrect way of looking at the matter, and in such cases it should rather be said that on the construction of the document the generality of the words in question could not be restricted. Ivison *v.* Gassiot (1853, 3 D. M. & G. 958) is an illustration of this. A debtor assigned all his stock-in-trade, etc., and "effects whatsoever and wheresoever" to his creditors, "except the wearing apparel" of the assignor. The question was whether his contingent interest in the residue of a testator's estate passed by the deed. It was held that it did pass. Lord Justice Knight Bruce said, referring to the absence of any "restrictive context": "I have looked in vain for such a context, and, not finding it, I must hold that the words ought to be understood . . . as including this property." Lord Justice Turner said the effect of the exception of the wearing apparel was "that all the assignor's property, with that exception, was intended to pass." The mention of the exception, in fact, strengthened the literal meaning of the general words, according to the maxim *Exceptio firmat regulam in casibus non exceptis*—or The exception proves the rule.

The application of the doctrine of *ejusdem generis* to the construction of statutes has been raised in the courts quite recently with regard to more than one statute—the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 and the Customs Consolidation Act 1876. Neither of these is a penal Act, but both may be classed as remedial, and it seems possible that, in regard to the restriction of general words under the doctrine of *ejusdem generis*, there may be a distinction between remedial and penal Acts. In the case of a remedial Act the natural tendency of the judiciary is to make the scope of the statute as wide as reasonably may be, and so give an extensive meaning to general words. The natural tendency in the case of a penal Act is just the contrary—to restrict the scope of the statute and give a narrow meaning to general words, so that punishment may not be inflicted unless the Act alleged to be penal is in the plainest terms declared by the Legislature to be so.

A good example of a penal statute—outside ordinary criminal statutes—is the Sunday Observance Act 1677. The persons to whom sect. 1 applies are 'tradesman, artificer, workman, labourer, or other person whatsoever." A barber has been held not to be an "other person" *ejusdem generis* with "tradesman," etc., and so not within the scope of the section (Palmer *v.* Snow, 82 L. T. Rep. 199; (1900) 1 Q. B. 725). The Customs Consolidation Act 1876 affords, in sect. 43, an illustration of a non-penal enactment as to which it is not yet settled whether the *ejusdem generis* doctrine applies or not. The section runs: "The importation of arms, ammunition, gunpowder, or any other goods may be prohibited by proclamation or Order in Council." The King's Bench Division in Ireland thought the doctrine did not apply, and that the enactment covered goods of other kinds besides arms, though this was not the actual point raised for decision: (Hunter *v.* Coleman, 1914, 2 I. R. 372). Mr. Justice Sankey has recently decided that the section does not apply to goods other than arms and things *ejusdem generis* with arms, etc. (Attorney-General *v.* Brown, post, p. 24), so that the English and Irish courts are at variance on this point. But Mr. Justice Sankey's decision is under appeal, and no more can now be said about it. Whatever the meaning of sect. 43 may eventually be held to be, it is quite certain that the *ejusdem generis* doctrine will play very little part in arriving at that meaning, and that there will be no question of the bald construction of the words of the section apart from a voluminous context and lengthy history.

The Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 has been mentioned as illustrating the *ejusdem generis* doctrine. The question arose under sect. 1 (3), by which an order for recovery of possession of houses of a certain class cannot be made except on certain specified grounds, "or on some other ground which may be deemed satisfactory by the court," and in Stovin *v.* Fairbrass (121 L. T. Rep. 172; (1919) W. N. 216) the Court of Appeal was divided as to the proper construction of the general words "on some other ground," etc. Lords Justices Bankes and Atkin held that the general words must be taken to be limited by the preceding enumeration of specified grounds on which an order might be made, so that a corresponding limit was thus placed on the discretion of the court. Lord Justice Scrutton dissented and thought the general words should be construed without being limited by reference to the preceding words, and that no limit was placed on the discretion of the court. This is in effect saying that the majority thought the *ejusdem generis* rule did apply, and that the dissentient judge thought it did not. But the expression *ejusdem generis* does not occur in the reported judgments, and all express mention of the doctrine seems to have been carefully avoided. Lord Justice Bankes said there was "an insuperable difficulty in defining the limitation to be placed on these general words," thus almost echoing in substance the observation of Lord Loreburn in Larsen *v.* Sylvester (sup.) as to the impossibility of laying down exhaustive rules for the application of the *ejusdem generis* doctrine.

The Increase of Rent, etc., Act 1915 has now been amended by the Increase of Rent, etc. (Amendment), Act 1919 (assented to on the 23rd Dec. last), and sect. 1 (3) is replaced by other provisions leaving no discretion to the court on "other grounds," but this does not, of course, affect the value of the judgments in Stovin *v.* Fairbrass for the present purpose. These judgments justify the statement that the *ejusdem generis* doctrine as an actual rule of construction is of much diminished importance at the present day. It might, in fact, well be allowed to fall into disuse as a separate rule, being merely an illustration of the maxims *Verba generalia restringuntur*, etc., and *Noscitur a sociis*, already quoted. As Stovin *v.* Fairbrass shows, the doctrine itself is not abrogated and can be applied without being referred to as a substantive rule. In Larsen *v.* Sylvester (sup.) Lord Robertson observes that "both in law and also as matter of literary criticism it is perfectly sound."—*Law Times.*

"It is always necessary to strengthen opinion not with authority alone, but with the two great guides, authority and reason. If precedents alone are followed slavishly and without discrimination, our law would soon degenerate into a dead science, instead of being as it is a vital principle governing the affairs of men in their dealings with one another."—Per Benedict, J., in Sultan *v.* Star Co., 106 Misc. 55.

Cases of Interest

Ignorance of Rights as Affecting Ratification after Majority of Contract Made During Infancy.—In Rubin *v.* Strandberg, 288 Ill. 64, 122 N. E. 808, reported and annotated in 5 A. L. R. 133, it was held that ignorance of his legal right to disaffirm at the time a minor who has attained full age makes a payment on a contract made during minority does not prevent the payment from being a ratification of the contract. The court said: "There was a failure of the proof to sustain the allegations of the answer and cross bill of defendant that he was induced to enter into the contract by fraud and misrepresentation, and his right to disaffirm the contract rested alone upon whether he had ratified it after becoming of age. A minor may disaffirm a contract made by him during minority, within a reasonable time after attaining his majority, and he may by acts recognizing the contract after becoming of age ratify it. There can be no doubt that the acts of the defendant after attaining his majority, in making the monthly payments and causing the contract to be recorded, were a ratification of the contract, unless the law is, as contended by defendant, that it was essential, in order to constitute said acts a ratification, that he knew at the time he performed the acts that the law authorized him to disaffirm the contract. . . . In our opinion defendant's acts after becoming of age must be regarded as done in the light of knowledge of his legal right to disaffirm; that he was presumed to know the law, and cannot be heard to say that he was ignorant of his legal right in that respect and performed the alleged acts of ratification in ignorance of that right. Upon this particular question the authorities are not altogether in accord, but in our opinion the more logical reasoning sustains that proposition. Wharton on Contracts (volume 1, § 57), in discussing the question, says: 'Hence the better opinion is that a ratification made by a person of sound mind on arriving at his majority will be held valid, if untainted with fraud or undue influence, though the party making it was not at the time aware that it bound him in law.'"

Right of Officer to Search Dwelling House for Person Charged with Crime.—In Monette *v.* Toney, 119 Miss. 846, 81 So. 593, it was held that in order to make the arrest of a person charged with crime, a police officer has the authority to enter and search any dwelling house when he acts on probable cause and reasonable belief that the person whom he seeks is then in such dwelling house. Said the court: "We fully appreciate the inhibition of the Constitution with reference to unreasonable search and seizure and fully realize that the protection afforded by the Constitution is to be respected and held sacred in all proper cases; but we do not think the constitutional prohibition can be successfully invoked in the case before us. The right to make arrests at any time or place exists by statute in this state. In order to make the arrest of a person charged with crime, an officer has authority to enter and search any dwelling house, when he acts upon probable cause and reasonable belief that the party whom he seeks to arrest is then in such dwelling house. Such officer, in seeking to arrest one charged with crime, whose arrest he is legally authorized to make, may enter and search the dwelling house of the accused, or the dwelling house of any other person, when acting in good faith upon reasonable belief that the accused is in the house, and this is true whether the owner or possessor dwelling in the house consents or not; and when search by an officer is made in a reasonably necessary manner under these circumstances for the purpose only of apprehending the person whose arrest he seeks, the officer violates no right or law and is not liable for damages, and is not required to have a search warrant under our statute. The constitutional provision against unreasonable seizure and search never intended that the execution of criminal process in the apprehension of persons convicted or charged with crime should be thereby delayed or hindered. Such reasonable search in the due enforcement of the criminal laws of the land is not an invasion of the personal security of the citizen. Petty officers who commit acts in excess of their lawful authority are amenable to the law in such cases, but the arrest of harbored criminals is not to be hindered under the claim of personal security against unreasonable search."

Steam Whistle as Nuisance.—The use of a steam whistle by a manufacturing establishment is not, it seems, a nuisance per se, but one causing a horse to run away by the negligent use of a steam whistle is answerable for the resulting injuries. It was so held in Daugherty *v.* Southern Cotton Oil Co., (Ark.) 211 S. W. 179, reported and annotated in 4 A. L. R. 1341, wherein the court said: "The use of a steam whistle in a manufacturing establishment or gin is not a nuisance per se, but it may be used so as to become such. 1 Thomp. Neg. ¶ 1261. In the application of this principle it has been frequently held that, although it is lawful for a manufacturing establishment to maintain a steam whistle, that whistle must be used with ordinary care and due regard for the rights of others, and if, by the negligent use thereof, horses are frightened and caused to run away and inflict injury, the owner of the establishment is liable for the resultant damages. On the other hand, it may be said that the traveling public is entitled to make free use of the streets of the city, and that an adjoining property owner has no right to so use his property as unreasonably to interfere with the public enjoyment of this right; still the doctrine is settled that it is not negligence per se to own and operate, near a public highway or street, a gin or other industrial plant in the necessary and reasonable operation of which loud noises are produced. Under modern conditions, the operation of gins near a public highway or street not only subserves the convenience of the public, but is a matter of necessity. The use of the steam whistle in giving signals, and for other necessary purposes in connection with operation of the plant, becomes wrongful only when its use is attended with negligence. It is true that the horse became frightened at the sound of the steam whistle and ran away, throwing the occupants of the buggy with great violence on a concrete sidewalk, and that he was a gentle and well-broken horse; but it will not do to say that, under these circumstances, appellee was guilty of negligence. If we should hold that, because it was possible that a gentle and well-broken horse should become frightened at the noise of a steam whistle of the kind ordinarily in use when used in an ordinary manner, the effect of such holding would tend to prevent gins, and other plants using steam, from establishing and operating their plants in such places, and thereby greatly retard the progress and development of the country. In the present case, so far as the record discloses, the whistle was blown in the ordinary way for a useful purpose in the conduct of appellee's business. Under the facts disclosed in the record, the blowing of the whistle was one of the usual noises which attend the operation of a gin and to which persons traveling public highways and streets must submit."

Liability of Seller of Canned Goods for Injury to Consumer Caused by Foreign Substance Therein.—In Ward *v.* Great Atlantic and Pacific Tea Co., 231 Mass. 90, 120 N. E.

225, reported and annotated in 5 A. L. R. 242, it was held that a retail grocer was liable in damages to a purchaser of a can of beans who was injured while eating of the beans by a pebble found therein. The court said: "The transaction between the plaintiff and the defendant as to the can of beans necessarily involved a purchase of food to be eaten. That need not be stated in precise words. It was an underlying and essential condition of the contract, implied without expression. It arose from the nature of the goods, the size of the purchase, and the terms of the label. It is provided by the Sales Act (Stat. 1908, chap. 237), § 15 (1): 'Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill and judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose.' That provision governs the relations of the parties in the case at bar. . . . It is not expressly stated in the agreed facts that the defendant selected the can for delivery to the plaintiff, or that the latter relied upon the skill and judgment of the defendant in selecting the can for delivery. But that he did so rely seems an almost irresistible inference from the facts stated. The cans in the defendant's stock were all alike in label, and in general appearance. The cans were sealed. Their contents could not, in the nature of things, be open to inspection before the sale. There could be no intelligent selection, based upon any observation by the purchaser. There is no room for the exercise of individual sagacity in picking out a particular can. The customer at a retail store is ordinarily bound to rely upon the skill and experience of the seller in determining the kind of canned goods which he will purchase, unless he demands goods of a definite brand or tradename. The situation is quite different from the choice of a fowl or a piece of meat from a larger stock, all open to inspection, where there is opportunity for the exercise of an independent judgment by both the buyer and the seller, and where, therefore, the fact as to the one who makes the selection is of significance. The case at bar must be treated on the footing, as matter of necessary inference arising from the relation of the parties, so far as that is material in view of the other facts, that the plaintiff relied upon the knowledge and trade wisdom of the defendant in purchasing the can of beans. In the absence of an express statement to the contrary, this must be regarded as a necessary inference from the relation of parties. There appears to us to be no sound reason for ingrafting an exception on the general rule, because the subject of the sale is canned goods, not open to the immediate inspection of the dealer, who is not the manufacturer, any more than of the buyer. It doubtless still remains true that the dealer is in a better position to know and ascertain the reliability and responsibility of the manufacturer than is the retail purchaser."

FORFEITURE OF AUTOMOBILE USED BY EMPLOYEE WITHOUT AUTHORITY TO TRANSPORT LIQUOR IN VIOLATION OF LAW.—In United States *v.* Mincey, 254 Fed. 287, reported and annotated in 5 A. L. R. 211, the United States Circuit Court of Appeals for the Fifth Circuit held that where an automobile was intrusted to an employee to be used in transacting business for his employer and was used without the knowledge or consent of the employer to transport and conceal intoxicating liquor on which the federal tax had not been paid, it was subject to forfeiture under the federal statute (U. S. Rev. Stat. § 3450; 4 Fed. Stat. Ann. [2d ed.] 311) providing as follows: "Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels, proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, . . . respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited." The court said: "Nothing in the terms of this statute indicates an intention to make the right to a forfeiture dependent upon the property being owned by the person guilty of a specified unlawful use of it, or upon the fact that the owner of the property shared in the guilt of the unlawful user of it. It has been authoritatively decided that, under similar statutes, property may be forfeited for misconduct not participated in by the owner of it. Dobbins's Distillery *v.* United States, 96 U. S. 395, 24 L. ed. 637; United States *v.* Stowell, 133 U. S. 1, 33 L. ed. 555, 10 Sup. Ct. Rep. 244. In each of the cases cited the court sustained a judgment forfeiting property for an unlawful use of it by a party other than the owner, to whom the owner had intrusted possession of it for an entirely lawful purpose. It is not a novelty to subject property used for an unlawful purpose to forfeiture, though the owner of it was not a participant in the wrongful conduct, and no criminality is imputed to him. In the opinion rendered in the first-cited case, it was said: 'Cases often arise where the property of the owner is forfeited on account of the fraud, neglect, or misconduct of those intrusted with its possession, care, and custody, even when the owner is otherwise without fault.' We understand it to be settled that, under statutes like the one in question, property is subject to forfeiture, though the owner did not share in the guilt of the user of it, to whom the owner had intrusted possession and control. The Frolic, (D. C.) 148 Fed. 921; United States *v.* 1 Black Horse, (D. C.) 129 Fed. 167; United States *v.* 220 Patented Machines, (D. C.) 99 Fed. 559. Whether the automobile would have been subject to forfeiture if the person who made use of it for the purpose of committing a fraud on the public revenue had acquired possession of it without the knowledge or consent of the owner is a question not presented by the facts of the case. On the facts disclosed, the nonparticipation of the owner in the unlawful use of his property was not a bar to forfeiture sought."

CONSTRUCTION OF CONDITION IN LIFE INSURANCE POLICY RELATING TO MILITARY SERVICE.—In Kelly *v.* Fidelity Mutual Life Ins. Co. (Wis.) 172 N. W. 152, reported and annotated in 4 A. L. R. 845, the question involved was the construction of the following condition in a life insurance policy: "If the insured shall, within two years from date of this policy, engage in any military or naval service, or in any work as a civilian in any capacity whatsoever in connection with actual warfare, and shall die within two years of the date of this policy as a result, directly or indirectly, of engaging in such service or work, the liability of the company under this policy shall be limited to the return of the premiums paid, without interest." It appeared that the insured enlisted in the military forces of the United States and was transferred to France. While stationed at a point more than 100 miles from the zone of actual warfare and a like distance from any territory occupied or invaded by the enemy, and while, as a part of his military duties, being engaged in supervising the construction and operation of sawmills, he was accidentally killed while riding a motorcycle. Holding that the liability of the insurer was not limited to the return of the premiums paid on the policy, the court said: "It is clear that the

insurer did not intend by the language used to except from the policy death of the insured while in the military or naval service. The language used is not apt to express such an intention. The policy does not say that recovery shall be limited to the return of premiums paid if death shall occur while the insured is engaged in the service or work described, but the limitation applies only to death which occurs 'as a result, directly or indirectly, of engaging in such service.' While it is true that at the time the policy was written this country was not engaged in war, nevertheless the World War was then being carried on, and no doubt the clause was inserted by reason of the fact that persons insured might thereafter become engaged in military service. The limitation applies not only to the military or naval service of the United States, but to that of any country. We think it is clear that the language was used for the purpose of limiting the liability to the return of the premium in cases where death resulted, directly or indirectly, from some cause peculiar to the military service, and one not common to military service and civilian life. The deceased came to his death by reason of an accident while riding a motorcycle, under circumstances which were not in any way peculiar to the military service. Civilians are killed almost daily under similar circumstances. The hazards attendant upon riding a motorcycle under the facts set out in this case were no greater because the insured was engaged in the military service of the United States than if he were performing a like act as a civilian and apart from the military service. In other words, his death resulted from circumstances which are common to military and civil life. If this is not the meaning of the clause, it is difficult, if not practically impossible, to ascribe any meaning to it, unless it be held that the fact that the deceased engaged in the military service operated as a limitation upon the liability of the insurer. Such a construction cannot be placed upon the clause for the reasons stated."

Validity of Statute Prohibiting Teaching in Foreign Language.—In Nebraska District, etc., *v.* McKelvie, 175 N. W. 531, the Nebraska Supreme Court upheld as against all constitutional objections the Nebraska statute enacted in 1919 and providing as follows: "No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language. . . . Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides." In the course of an interesting opinion, the court said: "Previous to 1919 there was no provision in the statute expressly specifying the branches of study to be taught in the common schools. The operation of the selective draft law (Act May 18, 1917, c. 15, 40 Stat. 76; 9 Fed. Stat. Ann. [2d. ed.] 1136) disclosed a condition in the body politic which theretofore had been appreciated to some extent, but the evil consequences of which had not been fully comprehended. It is a matter of general public information, of which the court is entitled to take judicial knowledge, that it was disclosed that thousands of men born in this country of foreign language speaking parents and educated in schools taught in a foreign language were unable to read, write, or speak the language of their country, or understand words of command given in English. It is also demonstrated that there were local foci of alien enemy sentiment, and that, where such instances occurred, the education given by private or parochial schools in that community was usually found to be that which had been given mainly in a foreign language. The purpose of the new legislation was to remedy this very apparent need, and by amendment to the school laws make it compulsory that every child in the state should receive its fundamental and primary education in the English language. In other states the same conditions existed, and steps have been taken to correct the evil. In 1919 the Legislatures of Iowa, Kansas, Maine, Arkansas, Indiana, Washington, Wisconsin, and New Hampshire passed measures more or less drastic with regard to compulsory education in English, and the prohibition of the use of foreign language in elementary schools. . . . It is clear that the purpose of the Legislature was to abolish the teaching of foreign languages in elementary schools, when such schools are used for imparting the instruction required in the public schools, or using such languages as the medium of instruction; to provide that the standard of education prescribed for the elementary public schools should apply to all other schools; that the ordinary time and attention devoted to such instruction should not be diverted to other subjects, except as specified in the act; and that the same character of education should be had by all children, whether of foreign born parents or of native citizens. The ultimate object and end of the state in thus assuming control of the education of its pupils is the upbuilding of an intelligent American citizenship, familiar with the principles and ideals upon which this government was founded, to imbue the alien child with the tradition of our past, to give him the knowledge of the lives of Washington, Franklin, Adams, Lincoln, and other men who lived in accordance with such ideals and to teach him love for his country, and hatred of dictatorship, whether by autocrats, by the proletariat, or by any man, or class of men. Philosophers long ago pointed out that the safety of a democracy, or republic, rests upon the intelligence and virtue of its citizens. 'The safety of the people is the supreme law.' The concept that the state is everything, and the individual merely one of its component parts, is repugnant to the ideals of democracy, individual independence, and liberty expressed in the Declaration of Rights, and afterwards established and carried out in the American Constitution. The state should control the education of its citizens far enough to see that it is given in the language of their country, and to insure that they understand the nature of the government under which they live, and are competent to take part in it. Further than this, education should be left to the fullest freedom of the individual."

News of the Profession

The Milwaukee Bar Association was addressed by General Samuel T. Ansell, former judge advocate general, in February.

Wisconsin Lawyers who have died recently include James Cavanaugh, for forty years a lawyer in Kenosha.

Wisconsin Prosecuting Attorney Joins Law Firm.—Roman A. Heilman, district attorney of Dane county, Wisconsin, has become a member of the firm of Gilbert & Ela of Madison.

Texas Deaths.—Colonel William L. Crawford of Dallas, Texas, died February 17. He was born in Estell, Kentucky.

New Assistant Attorney General in Arkansas.—J. Burton Webster has succeeded Robert C. Knox as assistant attorney general of Arkansas.

Demise of Well-Known San Francisco Lawyer.—Thomas M. O'Connor, a brilliant trial lawyer of San Francisco, is dead. He was forty years of age.

THE KANSAS CITY BAR ASSOCIATION was recently addressed by W. L. Huggins, presiding judge of the newly formed Kansas Industrial court.

DEATHS IN ALABAMA.—W. C. Jones of Camden, Alabama, is dead. He was once a state senator. John T. Ashcroft of Florence is also dead.

MISSOURI LAWYER CHANGES RESIDENCE.—Roy D. Williams of Boonville, Missouri, chairman of the State Tax Commission, has entered a law firm in Kansas City.

DEATH OF VERMONT LAWYER.—The death of Hugh Henry of Chester is reported. He was at one time a judge of probate for the district of Windsor.

NEW WOMEN LAWYERS IN LOS ANGELES.—Eight young women of Los Angeles have been added to the roster of attorneys of that city as the result of a recent bar examination.

PROMINENT KANSAS ATTORNEY DEAD.—Judge Daniel H. Brown of Council Grove, aged 71, died in February. He was born in Wayne County, Pennsylvania.

THE CHICAGO BAR ASSOCIATION was recently addressed by Governor Henry J. Allen of Kansas, who discussed remedies for industrial troubles and unrest.

DEATH OF GEORGIA JURIST ON FEDERAL BENCH.—United States Judge William T. Newman of the Northern district of Georgia is dead at the age of 76. He served on the federal bench for 37 years.

NEW PENNSYLVANIA JUDGE.—Governor Sproul has appointed William E. Hirt of Erie to be a judge in Erie county to succeed the late Judge E. L. Whittelsey.

WELL-KNOWN NEBRASKA ATTORNEY DEAD.—George H. Hunt of Bridgeport, Nebraska, died at Long Beach, California, recently. He was a candidate for judge of the supreme court two years ago.

BIG HORN BASIN BAR ASSOCIATION.—This association, made up of four counties of Montana, has elected Charles H. Harkins of Worland president.

MASSACHUSETTS LAWYER DEAD.—Charles J. Martell of Boston, one of the board of governors of the City Club, is dead. Another death reported is that of Patrick H. Sheehan of Holyoke.

ALABAMA JUDICIAL CHANGES.—Judge W. P. Stacy of Alabama has resigned as judge of the eighth judicial district, and Governor Beckett has appointed in his stead E. H. Cranmer of Brunswick.

MAINE JUDICIAL APPOINTMENT.—Governor Milliken of Maine has appointed Ralph W. Crockett of Lewiston judge of the Lewiston Municipal Court. Judge Crockett is a former county attorney of Androscoggin county.

DEATH OF MARYLAND LAWYER.—T. A. Poffenberger, 59 years old, former associate justice of the fourth Judicial Circuit, and prominent Hagerstown lawyer, is dead. Another death announced is that of William A. Brashears of Cumberland, former judge of the Allegany County Orphans' Court.

NEW DISTRICT JUDGE IN OKLAHOMA.—The recently established district court in Ottawa county will have as its first judge S. C. Fullerton who received the appointment from Governor Robertson. He will serve till 1923.

IOWA DEATH LIST.—Iowa lawyers who have died recently include C. C. Hamilton of Keota, Judge Nathaniel French of Davenport, born in Andover, Massachusetts, and once a law partner of Robert G. Ingersoll in Peoria, and A. B. Halloday of Des Moines.

MISSOURI LAWYERS WHO HAVE DIED RECENTLY.—Dewitt Clinton Allen of Liberty, Missouri, died recently at the age of 84; Judge Houston W. Johnson of Montgomery City is another lawyer who has recently died. Another death is that of Thomas W. Walker of St. Joseph.

DEATHS AMONG COLORADO LAWYERS.—Harold D. Thompson of Denver, Colorado, died recently. He was born in Iowa and was in the first graduating class of the University of Colorado. Another death reported is that of Edwin H. Peevy of Denver, formerly of Portland, Oregon.

LABETTE COUNTY, KANSAS, BAR ASSOCIATION.—The members of the Labette County, Kansas, Bar Association held their annual meeting and banquet recently. Justice J. S. West of the Supreme Court, one of the speakers, had the toast "The Twentieth Century Lawyer." The association retained its present officers for the coming year, the president being Judge Nelson Case.

NEW YORK DEATHS.—The Supreme Court for the first district of New York, which is comprised within New York city, has lost two justices by death, namely, Justices Dugro and Philbin. Other deaths include Floyd J. Adams, Brooklyn; George A. Davis, Lancaster; James M. Seaman, Freeport; Andrew E. Colvin, Brooklyn, and Rollin Tracy, New York city.

DEATHS AMONG PENNSYLVANIA LAWYERS include Alexander Farnham, aged 86, of Wilkesbarre, dean of the Luzerne County bar; John H. Brown, aged 72, of Johnstown; Frank F. Brightly of Philadelphia, author of Brightly's Digest; Charles E. Pancoast of Philadelphia; James Scarlet of Danville; George M. Harton of Pittsburgh; W. J. Wagenknight of Philadelphia, and Benjamin C. Kready of Lancaster.

ILLINOIS LAWYERS WHOSE DEATHS HAVE BEEN ANNOUNCED.—Herman Frank of Chicago died February 14. He had practiced law in that city for twenty-five years and specialized in bankruptcy. He was born in New York and was graduated from Columbia Law School. Other deaths are Frank T. Brown, patent lawyer, aged 35, born in Louisville, Kentucky; William A. Meese of Moline; R. S. Marsh, Harrisburg; Ambrose Risdon, Chicago, and Charles C. Williams, Chicago.

DEATHS AMONG OHIO LAWYERS.—Cecil D. Hine, one of the most prominent lawyers in northern Ohio, died late in February at Pasadena, California. He was a former law partner of Justice John H. Clarke of the United States Supreme Court. Other deaths include Judge William D. McKenny of Dayton; William H. Marshall of Dayton; Frederick W. Huston of Cleveland; Floyd E. Stine of Medina, and Alva K. Overturf of Columbus.

CHICAGO LAWYERS EXPRESS DESIRE FOR CHANGES IN JUDICIAL SYSTEM.—Election of judges and simplification of the present complicated court system to two courts of limited jurisdiction were recommended by a plurality of the 2000 lawyers of Cook county, Illinois, who expressed themselves in the postcard canvass conducted by a special committee of Circuit Court judges. One thousand and fifty-seven attorneys favored election of judges, as opposed to 940 for their appointment, and 1452 advocated changing the present court system, with circuit, superior, county, probate, criminal and municipal tribunals largely exercising conflicting jurisdiction, to a two-court arrangement with limited jurisdiction.

WOMEN LAWYERS MEET IN CHICAGO.—A distinguished group of women lawyers from all over the nation assembled at Chicago in February for a conference on "Unification of Laws Concerning Women." The session was presided over by Mrs.

Catharine Waugh McCullock at the Hotel La Salle. Mrs. Charles H. Brooks, of Wichita, national chairman of the League of Women Voters, extended greetings. Among the speakers were Miss Josephine Stevenson, of California, whose subject was "Marriage and Divorce"; Miss Mary D. Tyler, of North Carolina, who discussed "The Control of the Wife's Wages"; Miss Jessie C. Buchanan of New Jersey and Mrs. Cora L. Keeley of the District of Columbia, who spoke on "The Legal Status of the Illegitimate."

English Notes*

THE ADMISSION OF WOMEN TO THE BAR.—The passing of the Sex Disqualification (Removal) Act has been accompanied by several applications from women to enter the Inns of Court, with the exception of the Inner Temple. It now remains to be seen at which of them women will first be called to the Bar. In the meantime it deserves note that the Middle Temple some months ago afforded facilities to a young French lady to read in the library in the furtherance of her studies to become an avocat at the Bar of Paris. The prejudices against women in the Temple and in connection with legal matters are likely to be dissipated as there is opportunity for an appreciation of their ability in law and administration. At the beginning of the year was recorded in the *Law Times* (vol. 146, p. 178) the appointment of Mrs. Hugh Campbell as clerk to the Society of Comparative Legislation. Speaking recently at a meeting of the Royal Colonial Institute in connection with the twenty-fifth anniversary, the hon. secretary, Mr. C. E. A. Bodwell, was able to report that in all respects the year has been one of unrivaled progress, so that the society now holds a stronger position than at any previous period in its history. The admission of women to the Bar is also being extended in other parts of the Empire. Miss Emelyne McKenzie, who is the first woman to enter the legal profession in Nova Scotia, recently held her first brief and won her case.

CO-OPERATION BETWEEN LAW LIBRARIES.—Among the subjects dealt with at a recent meeting of the American Association of Law Libraries, says the *Law Times*, was that of "inter-library loans," and, in the course of an extremely interesting discussion thereon, it is gratifying to notice the extent to which in the United States the practice prevails of mutual lending between law libraries. One speaker pointed out, however, that at the back of the idea of inter-library loans was something very much bigger to which the law libraries would probably have to come—namely, systematic co-operation in the purchase of books, each library acquiring the treatises in common use, but arranging among themselves which library should purchase certain expensive and foreign books not so frequently in demand. Some kind of similar co-operation or co-ordination among libraries in this country has been suggested and is much to be desired. No doubt, by the courtesy of the various librarians of the Inns of Court, Bar, and Law Society libraries, a member of the Profession can always be sure of being allowed to consult a book in one or other of these collections, but we look forward wistfully to the days when London will possess one great central law library worthy of the capital of the British Empire. Another not unfamiliar point raised at the same meeting in America was the right of officials to take out books and keep them as long as they like; we say the point is not unfamiliar, for every *habitué* of any of the Inns of Court libraries has now and again experienced a sense of keen disappointment when, desirous of consulting a particular volume, he finds that a Bencher has borrowed it. Charles Greenstreet Addison, in the preface to the first edition of his treatise on Contracts, had a shrewd hit at the then Benchers of the Inner Temple for their delinquencies in this respect when he said that their "zeal in the promotion of legal education may be doubled since they will continue the objectionable practice of removing volumes of reports and law treatises from the library to their own private chambers and there detaining them for days and weeks."

RAILWAYS AND NEGLIGENCE.—Cold comfort will travelers on the Metropolitan Railway derive from the decision of the Divisional Court—Justices Bray and Bailhache—in the recent case of Delaney *v.* Metropolitan Railway Company. As most of them have probably had brought most unpleasantly to their notice, "hustling," as it is so appropriately styled, is fast becoming an institution which they could well have dispensed with. Speeding up the departure of trains from the stations, so that not a single second may be lost which can by any possibility be saved, is what is only to be anticipated in this age of bustle and hurry. The sacrifice of safety to haste is the fetish of modern times. "It is common knowledge," Mr. Justice Bray went so far as to say, "that on the Underground Railway trains start suddenly, and, in my opinion, passengers should be prepared for this." In other words, they have to take the risk of being injured by the sudden start of a train into which they have entered or are about to do so. And they are to be without remedy in the event of an accident happening through the alacrity with which it is considered needful to deal nowadays with the passenger traffic. It may be essential so to deal with it, the traveling population being so vast in London and other large cities. But it does not make that any better for those who thereby sustain injury. The modest expectation—such as was expressed in the present case—that passengers are entitled to have some warning signal given to them before a train is started was completedly negatived by the learned judges. "Could it be said," remarked Mr. Justice Bray, "that there was in law any obligation on the defendants not to start their train without giving warning?" It was conceded by Mr. Justice Bailhache that in the case of trains on lines other than the underground it is a common practice to give warning. But his Lordship went on to add that on the underground lines, when a passenger saw a train in a station, which was not a terminus, he must be taken to know that it would start very quickly. That no warning could have been given in the present case which would have told the plaintiff anything more than he knew is likely enough. He had succeeded in entering the carriage, and doubtless the onus rightly lay upon him to protect himself when once within its doors. Whether the circumstance that the sudden closing of the sliding door with which the carriage was provided, caused by the momentum of the train in starting, ought to have been regarded as making a difference is perhaps open to uncertainty. But be that as it may, the decision on the question of warning is what is somewhat perturbing.

DISCOVERY OF NAME OF INFORMANT IN LIBEL OR SLANDER.—In Edmondson *v.* Birch and Co., Limited (93 L. T. Rep. 462; (1905) 2 K. B. 523), which was a libel action in which the defense of privilege was set up, the plaintiff sought to administer to the defendants an interrogatory inquiring what information the defendants received which induced them to make the statement complained of, and from whom the information was derived. The Court of Appeal, on the correspondence between

* With credit to English legal periodicals.

the parties, was of opinion that the interrogatory as framed was not put bona fide for the purposes of the pending action but in order to enable the plaintiff to bring an action against a person or persons from whom the information was derived, and they held that that part of the interrogatory which asked from whom the information was derived must be disallowed. The line between Edmondson *v.* Birch and Co., Limited, and the recent case of Chapman *v.* Leach is perhaps, at any rate at first sight, a little fine. In the latter case a plaintiff wished to administer a similar interrogatory. There had been correspondence in which the plaintiff's solicitors wrote to the defendant asking him to retract and apologize, saying: "At the same time we must ask you to give us the name of your informant and furnish us with such evidence as will enable us to bring an action against him. If you do that, our client will be satisfied so far as you are concerned; but if you are not prepared to comply with our request in every particular, please furnish us with the name of a solicitor who will accept service." In reply the defendant admitted that he had been misinformed and apologized. The solicitors again wrote refusing to accept the apology, and saying that they had offered "to let you off, provided you gave us the name of your informant and assisted us in reaching him by your evidence." In this case the Court of Appeal allowed the interrogatory, taking it, for the purposes of the appeal, as if it had been an interrogatory asking the name of the informant, though, as Lord Justice Bankes pointed out, the interrogatory administered was a very different interrogatory from the one which directly asks the name of the informant. The distinction between Edmondson *v.* Birch and Co., Limited, (sup.) and Chapman *v.* Leach (sup.) appears to be this, that if the plaintiff asks the defendant for the name of the informant, not for the purposes of the action against the defendant, but in order to sue another person as well, or for any purpose that is not bona fide, the interrogatory will not be allowed; but if the plaintiff is determined to scotch the slander and re-establish his reputation by suing somebody, and thinks that the real offender is the informant, and gives the defendant the alternative of either being proceeded against himself or disclosing the name of the informant and assisting the plaintiff against the informant with his evidence, then the interrogatory is bona fide, unobjectionable, and should be allowed.

SEDUCTION.—In the recent Irish case of Flynn *v.* Connell, now fully reported in (1919) 2 I. R. 427, an interesting extension is given to the principle of Speight *v.* Oliviera (2 Starkie, 493), where Chief Justice Abbott ruled that where "A. with intent to seduce the servant and daughter of B., hires her as his servant, and by this means obtains possession of her person, B. may maintain an action against A. for such seduction." In the Irish case Mr. Justice Gibson considers at some length the decision in Speight *v.* Oliviera, as to which he pointed out that "the centenary of which, decided in 1819, is celebrated in this action," and comes to the conclusion that it applied to the facts before him, which were, as found by the jury, that the defendant hired the girl with the object of seduction and also as domestic servant. As Mr. Justice Gibson said in the course of his extremely interesting, although somewhat rhetorical, judgment, abounding in flights which are rarely found in judicial utterances, the objection that the hiring was with the double object of seduction and as a domestic servant did not avail the defendant, inasmuch as "the defendant's side of the contract here and in Speight *v.* Oliviera were vitiated in origin and void from the immoral design. He could never rely on it as having any legal force whatever. It was incapable of ratification." Mr. Justice Gibson's colleague, Mr. Justice Pim, did not share the view that the decision in Speight *v.* Oliviera applied, but he gave no reasons and he did not formally disagree with the judgment proposed. To this report of Speight *v.* Oliviera Starkie appended the following note: "Although the courts, with an honourable zeal, lend every legitimate aid within their reach to give such reparation as pecuniary damages can bestow for injuries of this nature, it is still to be lamented that instances not unfrequently occur where such injuries still remain without redress. The claim to damages in such cases, which is founded upon principles of strictest justice, the enforcement of which is absolutely essential to cure licentiousness and preserve the morals of society, ought not to depend upon a mere fiction, over which the courts possess no control. It is a reproach to the law of England that the right to damages should not be necessarily consequent upon the injury. Surely it is worthy the attention of the Legislature to find a remedy for an evil of such magnitude." A century has elapsed since the penning of the learned reporter's note, but the Legislature continues unmoved. In several of the American States, we believe, considerable inroads have been made on the English common law doctrine, while in Scottish law the injured woman has always been able herself to maintain an action.

SUNDAY OBSERVANCE.—An announcement of the magistrates of Flint, North Wales, that they intend to stop Sunday football in the borough, brings to mind the fact that the founders of the English Reformation, after abolishing most of the festivals kept before that time, had made little if any change as to the mode of the observance of those they retained. Sundays and holidays stood much on the same footing as days on which no work, except for good cause, was to be performed, the service of the Church was to be attended, and any lawful amusement might be indulged in. The more earnest party, while they slighted the Church festivals as of human appointment, prescribed a strict observance of the Lord's Day. But it was not till 1595 that they began to place it very nearly on the footing of the Jewish Sabbath interdicting not only the slightest action of worldly business, but even every sort of pastime or recreation. Those who opposed them on the High Church side pretended that, the commandment having been confined to the Hebrews, the modern observance of Sunday was a mere ecclesiastical institution no more venerable than other festivals or the season of Lent. James I published a declaration permitting all lawful recreations on Sunday after Divine service, such as dancing and archery. It was only through the influence of Archbishop Abbot that the order that this declaration should be read in the churches was not enforced. The Puritans brought in Bills to secure Sabbath observance. A circumstance that occurred in 1621 shows the intensity of this feeling. A Bill having been brought in "for the better observance of the Sabbath, usually called Sunday," a Mr. Shepherd, sneering at the Puritans, remarked that, as Saturday was dies Sabbati, this might be entitled a Bill for the observance of Sunday, commonly called Saturday. The criticism was followed by a reprimand, which was received by Mr. Shepherd on his knees, and his expulsion from the House of Commons. The rigid Sabbatarianism of the middle classes of the eighteenth century profoundly affected the course of public affairs. To give an illustration. At the time of the institution of the Militia in 1757 it was proposed by the Government that the new force should be exercised on Sundays. It was important, on account of the war, that it should be speedily disciplined, and the Ministers were anxious to interfere as little as possible with the private affairs of its members. The proposal, however, created such indignation that it was speedily abandoned. The usual practice of the summon-

ing of Parliament to meet on a Tuesday owes its origin to the doctrine of a strict observance of the Sunday. In 1809, Monday having been proposed for the meeting, Mr. Wilberforce protested that it would involve traveling on Sunday, and the day was accordingly changed. In August, 1883, the House of Commons assembled at a quarter past twelve on the Saturday and sat until twenty minutes past two on the Sunday morning. The following notice appeared in the *Times* a few days after: "The sitting of the House of Commons last Sunday morning has been discussed at a meeting of the Presbytery of Perth and Aberdeen Original Seceders at Cupar Angus. It was unanimously resolved to send a memorial to Mr. Gladstone protesting against the late violation of the Sabbath day by the House of Commons encroaching upon the hours of that day for the dispatch of Parliamentary business."

Substituted Agreement by Way of Accord and Satisfaction.—The quaint definition in Termes de la Ley of accord and satisfaction as "an agreement betweene two at the least to satisfie an offence that the one hath made to the other" brings very clearly to mind the precise nature of that operation. And in Blake's case (6 Rep. 44) the statement that "generally in all actions where damages only are to be recovered, arbitrament, or accord with satisfaction, is a good plea" makes even plainer what kind of offence is contemplated. There can be no discharge of a contract after breach except by alleging an accord and satisfaction. And the law as to the plea of accord and satisfaction of a breach of an agreement was much discussed in the argument that took place in Morris *v.* Baron & Co. (118 L. T. Rep. 34; (1918) A. C. L., at p. 35), as was said by Lord Atkinson in the course of the opinion in that case which he delivered in the House of Lords. The intimation was added by the learned Lord that if it can be shown that what a creditor accepts in satisfaction is merely his debtor's promise and not the performance of that promise, the original cause of action is discharged from the date when the promise is made. That put the learned judges of the Court of Appeal upon their inquiry in the recent case of Elton Cop Dyeing Company Limited *v.* Robert Broadbent and Son Limited to ascertain whether the plaintiffs did or did not accept the promise of the defendants contained in the substituted agreement, and which was alleged as accord and satisfaction, in satisfaction of their cause of action. In that event, the substituted agreement would be all that there was to be relied upon. For "the original cause of action" would have disappeared, having been "discharged from the date when the promise was made." What had, therefore, to be considered was whether the promise, as distinct from the actual performance thereof, was accepted by the plaintiffs in satisfaction of their original cause of action. Had the plaintiffs, when they entered into the substituted agreement, entered into an agreement which was only to abandon their claim for damages conditionally upon the full performance of the substituted agreement, or had they agreed to accept certain terms in satisfaction of that claim? The judgments which were delivered by Lords Justices Warrington and Atkin while dealing with that question are highly instructive as to the distinction which must always be drawn between an acceptance of the promise itself and an acceptance only of the performance thereof. But whether the new promise only, as distinct from the actual performance thereof, is to be taken in satisfaction and discharge of the existing cause of action depends upon the true construction which ought to be placed on the substituted agreement. That document may be looked at for the purpose of ascertaining whether or not it has been accepted in satisfaction. The statement by Mr. Justice Erle to that effect in Flockton *v.* Hall (14 Q. B. 386; 16 Ibid. 1039) was preferred to the contrary pronouncement by Mr. Justice Coleridge in the same case. His Lordship there remarked that he did not think that the court could "look into the agreement itself for the purpose of collecting from it the additional fact that it has been accepted in satisfaction; the acceptance must be shown independently." That dictum must now be regarded as overruled by the present decision.

Obiter Dicta

Hard Going.—Blizzard *v.* Walker, 32 Ind. 437.

Boys' Play.—Bubb *v.* Bubb, 201 Pa. 212, 50 Atl. 759.

A Successor to Anderson?—Ives *v.* Candy, 48 Fed. 718.

School Taxes.—Board of Education *v.* Purse, 101 Ga. 422.

Too Late!—In Tardy *v.* Creasy, 81 Va. 553, the plaintiff's bill was dismissed on demurrer.

De Minimis Non Curat Lex.—In Penny *v.* Little, 3 Scam. (Ill.) 301, the plaintiff was promptly thrown out of court.

Haw-Haw!—It was once said that a coach and four could be driven through any act of Parliament. But an ox team cannot be driven through the Harrison Anti-narcotic act. See Gee Woe *v.* U. S. 428.

A Model Opinion.—"It is difficult to deal with a proposition of this kind except by saying that it is not true. . . . This assignment of error is overruled."—Per Mr. Justice Moody in Hunter *v.* Pittsburgh, 207 U. S. 177.

Why Not Suicide?—

"Ford Automobile.
"As 'motor vehicle,' see Homicide, 5."

From Ann. Cas. Digest 1916C-1918B.

The "Nerve" of the Law.—"It requires some nerve to assert a claim under such a contract," said Robinson, J., in Dwight Farm, etc., Co. *v.* Johnson (N. Dak.) 173 N. W. 752. Well, how many lawsuits would there be, Judge, if lawyers should lose their principal asset?

Is the Anti-Saloon League a Corporation?—"The rapid absorption of the business of the country of every character by legally authorized corporations, while productive of much good to the public, is beginning also to develop many evils." Per Mr. Justice Miller in Barton *v.* Barbour, 104 U. S. 126.

Any One But the Socialist!—"Every one admits that the state of Ohio needs more taxes. General High Cost of Living settled that. Every one admits that the other fellow shall pay more taxes. The question is, Who is to be the 'other fellow'?"—Per Wanamaker, J., in State *v.* Fulton (Ohio), 124 N. E. 178.

Judicial Notice of High Life.—"The mere fact that girls were seen in said house wearing at night thin, low-necked, short dresses certainly is not, in this age in which such apparel is commonly worn in the highest circles of society, equivalent to a 'scarlet letter.'"—Per Armstrong, J., in Francis *v.* State, (Okla.) 185 Pac. 126.

Treading on Dangerous Grounds.—In U. S. *v.* Metropolitan Lbr. Co., 254 Fed. 335, a proceeding for violation of a railroad embargo order of the Director General of Railroads, Haight, J., held that the indictment was not defective in failing to allege that the President assented thereto, saying that Congress intended that the President should "act through agents."

V. P. L.—Which one of our readers can define for us the crime of "V. P. L."? The Alabama Court of Appeals does not know what it is and for that reason has reversed the conviction of Lawyer Poore for committing it. (See Poore *v.* State, 82 So. 627.) Incidentally the court made a poor pun in suggesting that the abbreviation might signify "very poor lawyer."

THE CACOPHONIES OF THE BURRO.—Here in the East where LAW NOTES has its home, little is known of the "burro." But if the following description is even nearly accurate, living in the East has its compensations: "We know of no heaven-sent maxim to invent a silencer for this brute, that one beholding him, neck outstretched and jaws distended wide, could persuade himself that he but heard from the depths of the beast's crimson-coated cavern

> '. . . a sound so fine there's nothing lives
> 'Twixt it and silence.'

We fear that until nature evolves the whispering burro or man invents some harmless but effective mule-muffler, we shall oft 'in the dead and vast middle of the night,' even in such corrals as appellant's, kept 'in a cleanly, wholesome, and sanitary manner,' hear the loud, discordant bray of this sociable but shrill-toned friend of man, filling the air 'with barbarous dissonance,' and drowning even that shout that

> '. . . tore Hell's concave, and beyond
> Frighted the reign of Chaos and old Night.' "

—Per Finlayson, P. J., in Boyd *v.* Sierra Madre (Cal.) 183 Pac. 232.

EVERY DOG HAS HIS DAY.—Many a dog has found his way into this column in days gone by, but we don't remember ever to have seen an Airedale or a Pomeranian among the lot. Well, here they both are, the principal actors in a tale which will move some of our readers to tears, excite more of them to laughter, and provoke most of them to argument as to the respective merits of the two breeds. As for ourselves, we have a fixed opinion that it served the owner of one of the dogs just right. Which one do we mean? Read the following story as extracted from the case of Roos *v.* Loeser, (Cal.) 183 Pac. 204, and judge for yourselves:

"This an action for damages alleged to have been sustained by plaintiff by reason of the killing of her dog, of the variety known as Pomeranian, by an Airedale belonging to the defendant. A jury trial was had, and judgment went for the plaintiff in the sum of $500. Defendant made a motion for a new trial, which was denied, and he now appeals from the judgment. . . . From the evidence it appears that on said day the Pomeranian, attended by two maids, was pursuing the even tenor of his way upon the street, 'tarrying' now and then and occupied with matters entirely his own, when the Airedale, an arrogant bully, domineering and dogmatic, being beyond the reach of the sound of his master's voice and having evaded the vigilance of his keeper (for the maids and the man were vigilant), dashed upon the scene, and with destruction in his heart and mayhem in his teeth pounced upon the Pomeranian with the result already regretfully recorded; the plaintiff's dog had had its day. It crossed to that shore from which none, not even a good dog, ever returns. Leaving this painful subject and turning to the considerations elaborately discussed in the briefs of able counsel, we remark that there was a time in the history of the law when, as is said in one of the early cases, 'dog law' was as hard to define as 'dog Latin.' As Blackstone puts it, dogs were the subject of property to a very limited and qualified degree; they had no intrinsic value, and were regarded as being kept only through the whim or caprice of their owner. They were not the subject of larceny. 2 Blackstone's Comm. 393. But that day has passed, and dogs now have a well-established status before the law. Considerable sums of money are invested in dogs, and they are the subject of extensive trade. Aside from their pecuniary value their worth is recognized by writers and jurists. Cuvier has asserted that the dog was perhaps necessary for the establishment of civil society, and that a little reflection will convince one that barbarous nations owe much of their subsequently acquired civilization to the dog. From the building of the pyramids to the present day, from the frozen poles to the torrid zone, wherever man has wandered, there has been his dog. In the case of State *v.* Harriman, 75 Me. 562, 46 Am. Rep. 423, he is eulogized in the following language: 'He is the friend and companion of his master, accompanying him on his walks; his servant, aiding him in his hunting; the playmate of his children, an inmate of his home, protecting it against all assailants.' In his well-known tribute to the dog United States Senator Vest characterizes him as 'the one absolutely unselfish friend a man may have in this selfish world, the one that never deserts him, never fails him, the one that never proves ungrateful or treacherous.' See also Sabin *v.* Smith, 26 Cal. App. 676, 679, 147 Pac. 1180. The Pomeranian was small, weighing about 4½ pounds, but history discloses that the small dog, perhaps oftener than his bigger brother, has rendered modest but heroic service, and by his fidelity has influenced the course of history. As already indicated, the law now recognizes that dogs have pecuniary value, and constitute property of their owners, as much so as horses and cattle or other domestic animals. . . . The plaintiff's dog was the proud possessor of the kennel name Encliffe-Masterpiece; his pedigree and reputation entitled him to be regarded in dog circles as possessing the bluest of blood; in short, in canine society he belonged to the inner circle of the 400. In West and East he had won the first prize in every bench show at which he had been exhibited. He was middle-aged and in good health. Experts testifying placed his monetary value at $1000. . . . It is urged by the appellant that the court erred in refusing to instruct the jury, as requested, that the plaintiff was guilty of contributory negligence arising from the fact that her dog was upon the public streets without being licensed—unlike the defendant's Airedale, whose master had ornamented his favorite with a tag entitling him to roam the city's streets secure from interference by the poundkeeper or his myrmidons. The appellant's contention in this respect would be well grounded if the plaintiff's omission to comply with the ordinance requiring dogs to be licensed had contributed to the incident resulting in the Pomeranian's untimely end. But for aught that appears the absence of a tag from the collar of plaintiff's dog was unnoticed by the Airedale, and was not the matter that aroused his ire or induced him to make the attack. His was the canine point of view, and not that of the license collector. . . . Judgment affirmed."

Correspondence

THE EIGHTEENTH AMENDMENT.

To the Editor of LAW NOTES.

SIR: I have read with interest and no little admiration the article "Is There an Eighteenth Amendment?" by Justin DuPratt White, reprinted in your February issue from Cornell Law Quarterly.

The greater part of Mr. White's argument is by no means new, and so far as it concerns the *expediency* of such changes

in our Constitution there is great force in his contentions. When, however, he comes to consider the *validity* of the amendment, he realizes that the matter is apparently *transit in rem judicatum* by virtue of earlier amendments, but, instead of ignoring this fact, as most writers on the subject sharing his views have done, he meets it boldly and attempts to destroy it by argument. It is to the boldness of his plan, rather than to its success, that I yield my admiration.

No one, I think, will disagree with Mr. White in what he says with regard to the first twelve amendments and the 16th and 17th. It is by the 13th and 15th Amendments, and the first section of the 14th that he is checkmated.

The argument by which Mr. White seeks to distinguish the 18th Amendment in character from these three former amendments is (appropriately enough) three-fold, and may be briefly summarized as follows—though possibly the gentleman will not be able to recognize his own arguments when reduced to this form—namely:

1. That these three amendments were aimed at slavery, and that slavery always was wrong, and, in a manner of speaking naturally and inherently unlawful, was "overlooked rather than recognized" by the Constitution, and would probably have been prohibited by the States themselves eventually, and that the amendments "did not require from the States the surrender of any power which any free government should ever employ."

2. That by the Constitution itself Congress was empowered to prohibit the slave-trade after 1808.

3. That the matters embodied in these amendments were decreed by the issue of the Civil War, and that the courts were powerless against that decree.

As to the first of these arguments, it is true of only the 13th Amendment, which effectually abolished slavery. But if it were true in whole, there are many persons who would apply much the same language to the liquor industry. Is it Mr. White's position that the United States, by amendment to the Constitution, may encroach upon the powers reserved to the States, but only when it is *morally right* to do so? And who is to determine the question of rightness?

It occurs to me that the concluding paragraph of Mr. White's article is a very satisfactory petard wherewith to hoist him. "It is unfortunate (he says) that the test has come in connection with a matter that is regarded by some as a moral issue. Expediency is always an insidious argument and any diverting thoughts tend to cloud the true significance of a situation such as this."

As to the second point, it seems unnecessary to say that a power to prohibit the *slave trade* and a power to prohibit *slavery* are quite as distinct as are the power to regulate commerce with foreign nations and among the several States and with the Indian tribes, conferred by the Constitution upon Congress, and the power to regulate the domestic commerce of a State.

The third proposition is untrue, and if it were true it would not support Mr. White's contention. The abolition of slavery was undoubtedly the *result* of the war, but the war did not legally accomplish the abolition of slavery. If it be granted that the emancipation proclamation would have continued in force perpetually in those States which had formed the Confederacy, it still remains that that proclamation never was in force in slave-holding States that had not seceded. What was it that abolished slavery in Missouri, Kentucky and Maryland? And is it true that these amendments would have been invalid except for the war, and that the war rendered the courts "powerless" to declare them invalid? The courts of the vanquished may have been powerless against them, but did this impotence extend to the Supreme Court of the victor?

In all the numerous decisions of that Court involving these three amendments, the Civil War has never been cited as authority, but the rulings of the Court have always been based upon the amendments themselves. In the Civil Rights Cases, decided less than twenty years after the surrender, the Supreme Court was not powerless to declare the civil rights bill invalid, but fifty years later, when the "Grandfather Clause" came before that court in Guinn *v.* United States, though the army that had promulgated the decree against which Mr. White says that the courts were powerless had been disbanded for fifty years, the Court did not hold the 15th Amendment invalid. Nor has the Supreme Court hesitated to apply those clauses of the 14th Amendment relating to due process of law and the equal protection of the laws to events which bear no relation to "the stern scene at Appomattox," except that they occurred in the same world.

The 13th and 18th Amendments are of precisely the same nature. Both grant to Congress a portion of the police power originally reserved to the States. The 15th Amendment is a far more serious invasion of the powers of the States than either of the others, since it forbids the States to declare freely who shall vote for their own officers. The validity of these former amendments may have been permitted to go by default, but can it consistently be held that the 13th, 14th and 15th Amendments are valid, and that the 18th Amendment, which is of the same ilk, "does not exist"?

Orlando, Fla. V. S. Starbuck.

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The "One Big Union."

THE venerable and ever delightful Chauncey M. Depew in a recent after dinner address advocated the formation of a union by the "great middle class" for the defense of the right to be treated "fairly, squarely, rightly, justly and righteously." The reasons why the proposed union cannot be formed and why if it was formed it would be wholly without efficiency are so palpable as to lead to the reflection that after dinner speeches are not what they were before the 18th Amendment. There is, however, one consideration which is worthy of mention, because it is applicable not only to this "union" but to many others now formed. There is "one big Union" formed for the purpose of securing justice, protection and fair play for every individual, and we are all members of it. It is the United States of America. In it, as in the lesser unions, every man has a vote and no man's plan is rejected except by the decision of the majority of his fellows. To deal with local affairs there are local unions called states, counties, towns, etc., organized on the same plan. There is nothing within the power of government that cannot be gained through these unions by anyone who can convince a majority of his fellow members. True, these unions do not give entire satisfaction to every member—what union does? But in the national Union as in the labor union the man who tries to disrupt the organization is a "sorehead" who is working against his own interest as well as that of his fellows. If the "great middle class" will give to the Union to which they now belong the same loyalty, the same active interest and the same willingness to accept the possibilities of the moment that the laborer gives to his craft organization it will need no privately organized unions to insure justice to all. There is room for "one big Union" and only one, the Union whose label is the Stars and Stripes and whose charter is the Constitution.

"Nullification" of the Eighteenth Amendment.

WHATEVER view the members of the bar may hold individually as to the merits of national prohibition, they cannot fail to regard with mingled amusement and contempt the proposition so frequently put forth that the advocates of the enactment of liberal enforcement bills by the states are seeking to "nullify the Constitution" and occupy a position comparable to that of the secessionists. As one distinguished citizen of Kansas put the proposition, "the Constitution is the Constitution and nullification is nullification." This is probably as good an argument as any; certainly anything more specific will involve its author in hopeless confusion. If there is any "nullification" in the matter it is to be found in the action of those who seek to deprive the states of the power which the Constitution expressly gives them; to convert what by its terms is a "concurrent" power into an exclusive federal power. Just what is meant by the phrase "concurrent power," a term new to the Constitution, is of course somewhat uncertain. At the time the 18th Amendment passed for submission it was explained on the floor of Congress that the purpose and effect of the wording was that federal regulations should not be effective in any state until the state by affirmative legislative act put them into force. As has several times been pointed out in LAW NOTES this is the natural meaning of the words. But whatever may be the meaning, there is a grant of a "power" which involves of necessity a discretion in those on whom it is conferred. Of the contention that the grant of a power creates a mandatory duty to adopt without question the decision of the possessor of a "concurrent" power it can be said only that alcohol at its worst never created so complete a confusion as to the meaning of words.

Campaign Expenses.

THE conviction of Newberry and the complaints which have been made publicly as to the expenditure of large sums by certain candidates for the Presidential nomination have served to bring before the public the question of the regulation of what may be termed legitimate campaign expenses, i.e. those which involve no suggestion of bribery or other improper influence on voters. In one sense such expenditures are simply advertising by the candidate. Our entire election system is based on the idea that the voters know enough about the candidates for whom they are voting to exercise an intelligent choice, and it would seem that to give them such information is not only legitimate but commendable. A candidate for a state or national office cannot meet every voter; he must rely on agents and the circulation of literature. It would seem therefore absurd that what a man may

with the utmost propriety do for himself in the village where he lives he may not hire another to do for him in a distant city. There is, however, an argument for restriction, based on considerations of policy, that where the expenditures are great and are derived from the contributions of others, the candidate thereby puts himself under obligations to the contributor which may affect his official action. Likewise, large expenditures by one candidate place rivals at a disadvantage unless they can obtain the support of persons of wealth, which is not a healthy limitation to attach to candidacy for public office. The British corrupt practices act after which the American acts were patterned goes to the extent of forbidding any expenditure in municipal elections. Under that provision an officer has been deprived of his seat for inserting a paid advertisement in a newspaper. *In re Droitwich Borough,* 71 J. P. 236, 23 T. L. R. 372. It would seem, however, that the matter is not one calling for regulation, since any great abuse of the privilege of self-advertisement will certainly defeat its own purpose and make certain the defeat of the candidate. There is, however, one provision of the English act which could profitably be adopted—that which requires all campaign expenditures to be made through an election agent for whose acts the candidate is responsible. A large legitimate campaign fund disbursed by a number of persons affords temptation to illegitimate practices, and the surest way to prevent these is to hold the candidate strictly liable without regard to actual knowledge. Thus in *Birkbeck* v. *Bullard,* 54 L. T. 625, an officer was unseated for a single act of bribery by his election agent.

Actions Arising from Federal Control of Railroads.

THE soundness of most of the provisions of the act of Congress by which the railroads were returned to private ownership depends on considerations of financial policy rather than of law. But the provisions relating to actions arising out of the federal control seem to be well considered and clearly formulated. In this particular at least nothing in the government's control of the railroads became it like the leaving thereof. The act of February 28, 1920, provides in substance (section 206) that the President shall designate an agent for the purpose of suits authorized by the act and that on any cause of action arising during the period of federal control suit may be brought against him within two years, specific provision being made as to the service of process. Actions pending at the termination of federal control may be continued, substituting the designated agent for the Director General. Final judgments rendered in suits so brought "shall be promptly paid" by the United States out of a fund created for that purpose and for the purpose of making certain authorized government loans to the carriers. These provisions seem on their face to be entirely adequate to meet the situation. They avoid the serious constitutional question which would arise from an attempt to impose liability on the carriers. They provide for a determination of liability by the ordinary course of judicial procedure without any reservation of special privilege to the government. If the injunction to pay "promptly" is not taken in a Pickwickian sense by the treasury department, persons having litigable claims arising from the federal administration of the railroads should be at no further disadvantage.

Regulation of Prices.

SO universal are the complaints of prices as now existing and so general the belief that the condition is due in large part to profiteering by merchants that some legislation on the subject is inevitable. The English experience along this line is therefore of considerable interest. In a recent issue of *Law Times* (London) it was said:

"That the profiteering legislation of last year has proved a hopeless failure is clear beyond a doubt. The comparatively few cases that have been dealt with have been against retailers, who in most instances have merely passed on the increased price from their wholesalers. The true offenders are still untouched, and huge profits continue to be extracted from the pockets of the helpless public. It is for Parliament to insist upon legislation that will enable those really responsible to be discovered, however highly placed, and will impose not money penalties, which are useless, but the punishment of imprisonment. Recent disclosures show that legislation upon the lines of the Sherman anti-trust laws is imperatively necessary. The time has passed for the establishment of commissions of inquiry and local committees. It should be open for any person to institute a prosecution, and the trial should be by a judge and jury in open court."

All of which is about as might be expected, though why our esteemed contemporary wants a law like the Sherman Anti-trust act is hardly to be understood by any one who has read the decisions under that act. It is to be noted however that the demand of the *Law Times* is for more and more drastic legislation, but with no explanation as to why it will work better than the old. The fact is that there are just two methods of price regulation, the competitive and the socialistic. The moment one is abandoned there is no logical stopping place short of the other. Individuals may differ as to the conclusion to be drawn from that fact, but it is one that should be fairly faced before experiments in regulation are begun. Regulation of prices has a very grateful sound to the consumer, but the fact remains that price regulation, if not carried to the point where it destroys production, amounts simply to putting industry on a "cost plus" basis. The experience of the last few years should be sufficient to show everyone just how economical that basis is. Special measures of regulation may be proper to tide over some emergency, but a policy of price fixing should not be adopted without much more of intelligent consideration than has yet been given to the subject or it may operate injuriously on the very persons whom it is intended to protect.

The New York Rent Laws

IT has long been an accepted aphorism that "hard cases make bad law" and perhaps it is applicable to statute law as well as case law. The case presented by the housing situation in New York was certainly a hard one, involving much of greed on one side and much of hardship on the other. The conduct of many landowners was such as to arouse the indignation of any fair minded person. Some of the measures adopted amount merely to the withdrawal of special privilege which the law has given to lessors. There is no reason, for example, why a summary remedy to obtain possession should be continued in force if it appears to be used unfairly. But so much of the New York legislation as gives a judicial review of the

fairness of rent increases involves a principle which if carried out will revolutionize our entire industrial system. It involves an assertion of power to compel a man to contract with respect to his property on terms which are satisfactory to a public officer. Once its existence is admitted, there are no limits to the power, no class of contracts which cannot be drawn within its scope. Standing as it does alone it seems impossible that it should continue to work well. Much more reason existed for the regulation of railroad rates, yet it was found in the end that the carriers were driven to the verge of bankruptcy by a law which regulated their demands on shippers but afforded no protection from unreasonable demands of their employees. Landlords in some instances make exorbitant demands; in an equal number of instances exorbitant demands are made on them—no man who has ever dealt with janitor, plumber or coal dealer will gainsay that. These worthies in turn can with some measure of justice point to the exactions made on them by grocer, and clothing merchant, and so on ad infinitum. The point now urged is that it is not only unfair but economically unsound to interpose regulation at a single point in this system of demands and leave the others unregulated. The unsoundness of the theory is emphasized by the fact that regulation will in practice be imposed only when demanded by some element of political importance. Granting to the utmost the charge against the landlords, they are a combination of greedy property owners, dealing on the one hand with their tenants and on the other with sundry greedy combinations of laborers. A law which subjects to public supervision the dealings with the tenants while affording no protection against the exactions of labor goes either too far or not far enough.

Inviting Socialism.

THE fact remains, whether we like it or not, that the national tendency is to tolerate every abuse till it grows too bad for toleration and then meet it with some drastic remedy. The man who asserts loudly the right to do what he will with his own and then proceeds to do that which produces hardship on a considerable number of others is inviting the day when no man can call anything his own. The slave owner had a right, recognized by the Constitution and sanctified by Scripture. He abused it and it was swept away, though it required four years of civil war to accomplish the task. We have but recently seen vested property amounting to many millions destroyed by the liquor laws. The right to property in land at its very best stands on no higher foundation than once did property in slaves or wine. A court of last resort has but recently laid down the doctrine that "neither ownership nor property rights nor possession will be permitted to hinder the operation of laws enacted for the public welfare. Man possesses no right under the laws or constitutions, state or federal, which is not subservient to the public welfare." (*Barbour* v. *State,* 146 Ga. 667, 92 S. E. 70). There is no danger whatever that on some first of May the "workers" will forcibly overthrow the government and put into effect a communistic state with some long haired enthusiast from Russia as dictator. There is however considerable danger that abuses of the present system will be remedied by such measures as will inevitably draw after them the entire socialistic scheme. The situation is very similar to that of a few years ago when men looked at the paltry handful of votes cast by the Prohibition party and scoffed at the idea that it would ever carry a national election. The remedy is not of course to be found in the disregard of abuses. If our system of government is sound in principle, a cure consistent therewith can be found for every abuse of the system. But such a cure can never be found by the present method of waiting till a condition grows so flagrant that political expediency requires action and then rushing through some ill considered emergency measure. The scholar in politics has been the subject of many and perhaps well deserved jests, but, when a question involving any serious question of social economy comes up, the politician in scholarship is at least equally laughable. It may be that the individualistic system has broken down under the weight of great combinations of property and labor, and the growing complexity of the social organization. It may be that it is merely the abuses of that system which give ground for complaint. This at least is certain, that unless the exponents of the latter hypothesis correct the abuses, the support of the unthinking mass will eventually go to the quick solution of destruction rather than to the slow process of cure.

E Pur Si Muovo.

IN these words Galileo is said to have reasserted his belief that the world moved around the sun, and one who has come to doubt that amid all the clamor of conflicting voices and the seeming triumph of forces of reaction, the world does move toward broader liberty and more enlightened policy may find reason for a reassertion of his faith in progress in the fact that Massachusetts has just put into effect a law legalizing amateur sports on Sunday. The Sunday laws are the last relic of the puritanical reaction which has cast its dark shadow down the centuries, and it is more than fitting that the Bay State where that gloomy era most strongly colored the law should be among the first to cast away this surviving fragment of the belief that pleasure is per se evil. Coming as it does at a time when a small but noisy element is trying to bring about a revival of puritanism, this sign of liberal sentiment is the more hopeful. Impulses or epochs come again and again in cyclic procession; in this sense history repeats itself. But that humanity really makes progress is shown by the differing way in which different generations deal with the same situation. Since the beginning of time Kings have arisen who dreamed of world empire and brought the dream into being on a foundation of enslaved peoples. William Hohenzollern dreamed the same dream, but the advance of humanity had brought an era when the world rose in arms against his unholy ambition. So, from the ancient Pharisees down to the Puritan fathers who came to America "to worship God in their way and make everybody else do the same," there have been from time to time religious zealots who sought to force the conscience of the world into their narrow sectarian mould. Much that has happened recently has given ground for the fear that the United States was on the verge of another era of the same kind of tyranny. But the action taken on Sunday sports in New York and Massachusetts shows that, at least in those parts of the country which have longest enjoyed the blessing of American liberty, the efforts of phariseeism, like those of its twin tyrant Bolshevism, will fail.

Libel by Work of Fiction.

IN another column of this issue is abstracted the decision of the New York Court of Appeals as to the liability of Bobbs-Merrill Co. as the publishers of a novel wherein a New York city judge, with but slight change of name, was depicted in a most unattractive manner in one of the scenes of the story. A judgment for the plaintiff was reversed but the liability was upheld. It appears that the novelist was actuated by actual malice, and there was some evidence that a representative of the publisher had notice thereof, but this is discussed by the court only with reference to the question of punitive damages. The court said: "Defendant's first separate defense is that it published a supposedly fictitious narrative in good faith; did not know plaintiff, and had no intent to injure him. This is not a complete defense. Even the Massachusetts rule as laid down in *Smith* v. *Ashley,* 11 Met. (Mass.) 367, 45 Am. Dec. 216, holding the writer alone responsible in such a case, has been discredited by later decisions in that jurisdiction. *Hanson* v. *Globe Newspaper Co.* 159 Mass. 293, 295, 34 N. E. 462, 20 L. R. A. 856. The appellant is chargeable with the publication of the libelous matter if it was spoken 'of and concerning' him, even though it was unaware of his existence, or that it was written 'of and concerning' any existing person. Apart from the question of express malice, proof that the chapter actually referred to plaintiff would sustain his cause of action." As applied to a publisher acting in absolute good faith the rule seems to be a harsh one. The situation is somewhat different from that of a newspaper publisher passed on in the Massachusetts case cited. Newspaper "stories" purport to relate to actual persons and to be true, and everyone knows that if there is an untrue statement someone will be damnified. A novel, on the other hand, purports to be purely a creature of the imagination, dealing with fictitious persons and fictitious events. The names, occupations and doings of these fictitious characters must by coincidence often duplicate those of actual persons, but no attention is ordinarily paid to this by the reader. The assumption always is that the whole thing is a story and it requires some extraneous suggestion to arouse a suspicion that any reference to an individual is intended. By reason of these facts, the detection by the publisher of any covert defamation is practically out of the question. The structure of a novel is more or less hackneyed. There must be a villain, male or female, whose mission is to thwart the hero in love or business. His or her nefarious activities must bear some resemblance to those of real life to give the story any merit. It is certainly putting a heavy burden on the publisher if he must at his peril ascertain whether there is any person in any part of the United States to whom this supposedly fictitious wickedness can be attached by proper innuendo. Libel of an individual is not a result which is to be anticipated from the publication of a work of fiction, and liability should not, therefore, be predicated on the mere fact of publication but should result only from negligence or malice.

Municipal Judges.

IN connection with the general effort to bring justice in cases involving small amounts within the reach of every citizen the experiment has been tried in several jurisdictions of creating courts with lay judges in which the intervention of counsel is not permitted. Decisions may be obtained in such courts, but to say that justice can thus be administered is to assert that the law, instead of being a science of justice, is a mere arbitrary mass of fictions which gives no aid in arriving at the justice of a particular case. The true ideal of justice in small causes was well stated in a recent address by Mr. John Alan Hamilton of the Buffalo, N. Y., bar, in a recent address on "Justice and the Poor." He said: "The arrest and sentence as a vagrant in the old Buffalo Police Court, of an obscure young adventurer named Jack London, is said to have given to socialism the services of a pen more potent for good or evil than the fortune of a Carnegie or of a Frick. When we clear from our eyes the mists of tradition, will not the fact become clear that all our courts are potentially of equal importance to the state, and that, at least in centers of congested population, all of our courts should be placed upon a footing of equal dignity and of equal exigency? In the neglect of our lower courts, in the contemptuous belittling of their importance, in the supine indifference of the public to the character and the caliber of the men who offer themselves as candidates for these magistracies, there exists a discrimination against the poor that is far more threatening, because it is more fundamental and less obvious, than any mere flaw in our procedure. A man can but lose what he has. If a court has a jurisdiction equal to a man's entire capital, it can ruin him just as effectively under the name Justice's Court, or Municipal Court, as it could under the name Supreme Court." Referring to the ideal of one great court with all its judges of equal standing, which shall handle the whole civil and criminal business of a city, he concluded: "If it is to be, it will come in spite of all resistance, and we may prepare again to assimilate the wisdom of the late Mr. Harriman's reported saying, that he cared nothing for the cost of an improvement if it earned sufficient dividends. Perhaps such a court might earn sufficient dividends of justice and good-will to justify its cost." Opposition to such a system there is sure to be, if only on the score of cost, but few lawyers who have realized the evils of the conventional city court, and yet fewer who have seen the operation of a modern court such as that of Chicago, or, according to Mr. Hamilton's statement, that of Buffalo, will fail to agree that the dividends justify the investment.

Inheritance in Dual Capacity.

ACCORDING to a press report an interesting case on the right of inheritance has arisen in Missouri. A widow with an infant son came to live with her father and the child was adopted by his grandfather in such form as to give him an unquestioned right of inheritance. But, grandfather and mother having both died intestate, the child claims not only his share as a son but also to take by representation the share of his mother; in other words he claims the right to inherit both as child and as grandchild. After the wont of newspaper accounts the report concludes that "the question, according to the law books, has never been raised before," and as is usual the journalist does the law books an injustice. The precise situation thus presented has been passed on in at least three cases, the right to inherit in both capacities being sustained in *Wagner* v. *Warner,* 50 Iowa 532, and denied in *Delano* v.

Bruerton, 148 Mass. 619, and *Morgan* v. *Reel,* 213 Pa. St. 81. The Pennsylvania case turned on a statute providing that the adopted child should inherit "only as one of" the children of the adopting parent. The Iowa and Massachusetts cases however represent a diametrical conflict of view, the former placing its decision on the ground that the adoption while giving certain rights did not take away any rights existing or to accrue except as the statute expressly provided. The Massachusetts court read an exception into the statute, saying: "When the Legislature provided that no person should, by being adopted, lose his right to inherit from his natural parents or kindred, we do not think it understood or intended that 'kindred' should include the adopting parent." Whether the insertion of such a limitaton is within the scope of legitimate construction may be open to question, but the Massachusetts rule clearly attains the more equitable result.

FEDERAL PROHIBITION OF NONINTOXICATING LIQUOR

IT is well settled that the states have the power, in connection with a prohibition of the sale of intoxicants, to prohibit the sale of all malt or spirituous liquors without regard to their actual capacity to intoxicate. It has likewise been decided by the federal supreme court, four justices dissenting, that Congress in the exercise of the war power has like authority. *Ruppert* v. *Caffey,* 251 U. S. 264, 40 S. Ct. 141. The question however remains whether Congress has under the 18th Amendment the power to enact such a prohibition. It is of course a commonplace that the federal government has no police power, but is a government of delegated powers. To such a government is applicable with peculiar force the rule, which has several times been applied to limit the broader legislative power of the states, that a constitutional grant of the power to prohibit a particular thing precludes a prohibition of other analogous or related things. Thus in *State* v. *Gilman,* 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847, it was held that a constitutional provision that "laws may be passed regulating or prohibiting the sale of intoxicating liquor" deprived the legislature of its inherent police power to prohibit the keeping of such liquors in possession. The court said: "By granting an express authority to the legislature to regulate or prohibit the sale, there is an implied inhibition to the exercise of any authority in respect to that subject which is not embraced in the grant. This rule is simply an application of the old maxim, expressio unius est exclusio alterius, which Lord Bacon concisely explains by saying: 'As exception strengthens the force of a law in cases not expected, so enumeration weakens it in cases not enumerated.'" The case of *State* v. *Sixo,* 77 W. Va. 243, 87 S. E. 267, which was said in *Marasso* v. *Van Pelt,* (Fla.) 81 So. 529, to modify the rule of the Gilman case, placed its decision explicitly on the ground that the constitution had since been amended, and aside from that fact does not touch the principle involved in the Gilman case. The same principle was applied in *Com.* v. *Campbell,* 133 Ky. 50, 19 Ann. Cas. 159, 117 S. W. 383, 24 L. R. A. (N. S.) 172, wherein a constitutional provision that the legislature might by general law provide for ascertaining the will of the people of any locality as to whether intoxicating liquor should be sold therein was held to imply a prohibition against a legislation not referring to sales but forbidding the having in possession of liquor for personal use.

To the same effect is a line of Texas cases construing a constitutional provision that the legislature shall enact a law whereby the voters in any county, etc., may determine whether the "sale" of intoxicating liquor shall be prohibited. This grant implies, it has been held, a prohibition against legislation forbidding a "gift" of liquor (*Holley* v. *State,* 14 Tex. App. 505; *Stallworth* v. *State,* 16 Tex. App. 345; *Steele* v. *State,* 19 Tex. App. 428) or an "exchange" of liquor (*Ninenger* v. *State,* 25 Tex. App. 449, 8 S. W. 480) or the keeping of liquor in possession (*Ex p. Brown,* 38 Tex. Crim. 295, 42 S. W. 554, 70 A. S. R. 743) or the sale in localities which have not adopted prohibition of liquor to be shipped into counties which are "dry" by local option (*Keller* v. *State,* (Tex. Crim.) 87 S. W. 669, 1 L. R. A. (N. S.) 489). In *Keller* v. *State* the rule was tersely stated by the court as follows: "The provision of the Constitution in regard to local option only authorizes the people of a county, a justice precinct, city, or town, etc., to prohibit the 'sale' of the intoxicants 'within the prescribed limits' or given territory, because this is the extent of the constitutional authority. The inclusion of this matter is the exclusion of all others."

No power can be attributed to Congress unless the grant can be found in the Constitution. The grant is of power with respect to "intoxicating" liquor. By what juggling with words can that be construed into a grant of power as to its direct antithesis, non-intoxicating liquor? Nor does it help the case to say that the grant of a power carries by implication all that is essential to make the power effective. That doctrine, while well established, has its limits. The chain of causation which leads up to any act is endless; break any link and the act will not occur. Does the grant of power to prohibit the act imply power to prohibit every act which may, however remotely, contribute? Granted an express grant of power to Congress to prohibit and punish murder—is there implied a power to prohibit the manufacture of knives with which murder may be committed and of automobiles in which murderers may make their escape? The power to prohibit the sale of intoxicants does not give a power to prohibit the growing of hops or rye, though such a measure might be easier to enforce than one directed against secret stills. It does not give power to prohibit the digging of cellars, though they may afford hiding places for illicit booze. It does not give power to prohibit the serving of coffee in restaurants, though intoxicants have in the past been disguised by being served in coffee cups. Neither does it give power to prohibit the sale of nonintoxicating malt beverages merely because such a sale may occasionally serve as a veil for the sale of beverages which are intoxicating. As to all these things the Constitution, in the words of the Texas court in the Holley case, "has spoken in words as plain as language could well make it. It may be the language of silence, but it is a language nevertheless which flows naturally and by irresistible implication from its spoken words."

The contrary view was upheld in *Marasso* v. *Van Pelt,* (Fla.) 81 So. 529, holding that a constitutional provision that the "manufacture, sale, barter or exchange" of in-

toxicating liquors "are hereby forever prohibited" did not invalidate a statute making it unlawful to have liquor in possession for personal use. The argument of the court was stated as follows: "The principle of the rule contained in the maxim 'Expressio unius est exclusio alterius' can properly be applied only to effectuate the intent of the law making power. It should never be applied to defeat the manifest purpose and intent of a provision of law. Article 19 as amended is an exercise of the police power of the state by the people themselves, prohibiting 'the manufacture, sale, barter or exchange of all alcoholic or intoxicating liquors and beverages, whether spirituous, vinous or malt . . . except alcohol for medical, scientific or mechanical purposes, and wine for sacramental purposes,' and it commands the legislative duties to regulate by law such limited sales of alcohol and wine as are permitted and to 'enact suitable laws for the enforcement of the provisions of this article.' As it expressly commands the enactment of suitable laws to enforce its provisions, obviously the article has not 'exhausted the police powers of the state' in the premises. An express command to exercise one power does not by implication abrogate other police powers, particularly when the exercise of the other powers accords with the one commanded." It is enough for the purposes of the present discussion to point out that this argument is not applicable to the power of Congress, since it is based on the idea of a pre-existing police power to pass the measure under consideration, which is held not to be "abrogated" by the Constitution, while Congress admittedly has no such pre-existing power but must find its authority, if at all, in the words of the 18th Amendment itself. It may be noted however that the discussion of the majority of the Florida court evoked a masterly dissenting opinion by Chief Justice Browne, concurred in by Justice Taylor, which should be read by every person who is interested in the extent to which American conceptions of constitutional right have been invaded by modern sumptuary legislation. In the course of that dissent the view that the power to make regulations of the kind under discussion may be found in the second section of the 18th Amendment was convincingly answered by the Chief Justice, who said with respect to a similar clause attached to the Florida prohibition amendment: "I attach no weight to the fact that article 19 contains a clause that 'the Legislature shall enact suitable laws for the enforcement of the provisions of this article.' That is a mere iteration of a power inherent in the Legislature to enforce by suitable laws any provision of the Constitution. This power is inherent in the Legislature, and needs no express grant for its exercise. Section 2 of article 19 therefore gave the Legislature no power that it did not already possess, and it cannot be invoked for such purpose."

The principal reliance of persons seeking to uphold a federal prohibition of the sale of nonintoxicating liquors will doubtless be on the language of the Supreme Court in *Ruppert* v. *Caffey,* 251 U. S. 264, 40 S. Ct. 141. In that case the court used arguendo language tending strongly to support the existence of such a power in aid of a prohibition directed against intoxicants. Mr. Justice Brandeis said: "May the plaintiff show as a basis for relief that the beer manufactured by it with alcoholic content not greater than 2.75 per centum in weight and 3.4 per centum in volume is not in fact intoxicating? The government insists that the fact alleged is immaterial since the passage of the Volstead Act by which the prohibition of the manufacture and sale is extended to all beer and other malt liquor containing as much as one-half of 1 per centum of alcohol by volume. If the war power of Congress to effectively prohibit the manufacture and sale of intoxicating liquors in order to promote the nation's efficiency in men, munitions and supplies is as full and complete as the police power of the states to effectively enforce such prohibition in order to promote the health, safety and morals of the community, it is clear that this provision of the Volstead Act is valid and has rendered immaterial the question whether plaintiff's beer is intoxicating. For the legislation of and decisions of the highest courts of nearly all of the states establish that it is deemed impossible to effectively enforce either prohibitory laws or other laws merely regulating the manufacture and sale of intoxicating liquors, if liability or inclusion within the law is made to depend upon the issuable fact whether or not a particular liquor made or sold as a beverage is intoxicating. In other words, it clearly appears that a liquor law, to be capable of effective enforcement, must, in the opinion of the legislatures and courts of the several states, be made to apply either to all liquors of the species enumerated, like beer, ale or wine, regardless of the presence or degree of alcoholic content; or if a more general description is used, such as distilled, rectified, spirituous, fermented, malt, or brewed liquors, to all liquors within that general description regardless of alcoholic content; or to such of these liquors as contain a named percentage of alcohol; and often several such standards are combined, so that certain specific and generic liquors are altogether forbidden and such other liquors as contain a given percentage of alcohol. . . . It is therefore clear both that Congress might reasonably have considered some legislative definition of intoxicating liquor to be essential to effective enforcement of prohibtion and also that the definition provided by the Volstead Act was not an arbitrary one."

This language must, however, be read in the light of the fact that the court was passing on the authority of Congress under the war power, the most sweeping of all the congressional powers, a power on which in actual practice no limitation has ever been imposed. It is broadly the power to do whatever Congress may deem needful or expedient to the successful prosecution of war. The power to prohibit the sale of nonintoxicating liquor is indeed said by the court to be implied, but the implication is not from a grant of power to prohibit the sale of intoxicating liquors but from the grant of power to make war. From that grant the power to prohibit the sale of flannel shirts is implied as fully as the power to prohibit the sale of intoxicating drinks. In the grant nothing specific is expressed and therefore the maxim expressio unius, etc., can have no possible application. The situation is precisely the same as in the state decisions which have been cited. In each it was conceded that under the state police power the statute under consideration could have been sustained, but the holding was that an express grant carried with it an implied prohibition to go beyond its terms. Under the general war power, as under the general police power, there are implied powers which cannot be derived from a specific and limited grant like that of the 18th Amendment.

The question is therefore an open one so far as con-

cerns the court which must pass finally on the power of Congress, and the weight of authority and it is believed of reason is against the existence of the power.

W. A. S.

LIABILITY OF WIRE LINES FOR DAMAGES DURING GOVERNMENT CONTROL

THE question whether there is any redress for one who was damaged as a result of the operation of the wire lines while under governmental control has recently been presented to a number of courts. Unlike the legislation with regard to the railroads, neither the joint resolution under which the wire control was assumed nor the act returning their properties to the companies, contains any express provision covering this subject.

The only clause contained in the joint resolution of July 16, 1918, which could have any bearing upon this question is the provision "that nothing in this Act shall be construed to amend, repeal, impair or affect existing laws or powers of the states in relation to taxation *or the lawful police regulations of the several states,* except wherein such laws, powers, or regulations may affect the transmission of Government communications or the issue of stocks and bonds by such system or systems." (Fed. St. Ann. 1918 Supp. p. 834.)

There is nothing in the act returning the properties that affects the matter. During the consideration of the bill, Senator Sheppard offered the following amendment:

"And provided further, that actions on claims for loss and damage on account of the acts or omissions of the agents and employees engaged in the operation of such systems occurring during the period of control of the same under the joint resolution approved July 16th, 1918, may be maintained in courts of competent jurisdiction, and in any such action no defense shall be made thereto that any such telegraph, telephone, marine cable or radio system or systems was an instrumentality or agency of the Federal Government, and any judgment therein rendered shall be charged to the operating expenses of such systems during such period of government control, and compensation made therefor as provided in such joint resolution:

"*Provided,* that no process mesne or final, shall be levied against the property of any such system or systems to satisfy any such judgment."

(*Congressional Record,* June 10, 1919, p. 962.)

In this the House refused to concur; the Senate receded and it did not become a part of the act.

In the absence of any express statutory provision settling the question, several theories for enforcing liability have been urged. Inasmuch as police regulations of the several states have been left unimpaired and unaffected it has been insisted that those state statutes which require prompt transmission and delivery of telegraphic and telephonic messages are still in full force and are adequate to meet the situation. In the cases involving the power of the Postmaster General to fix intrastate rates it had been argued that this proviso with reference to the police power of the states was broad enough to include the rate making power. Chief Justice White referring to this contention, made in the case of *Dakota Cent. Telephone Co.* v. *South Dakota,* 250 U. S. 163, 39 S. Ct. 507, said:

"It was conceded those 'police powers' were susceptible of two significations, a comprehensive one embracing in substance the whole field of state authority and the other a narrower one including only state power to deal with the health, safety and morals of the people."

The Supreme Court of the United States in that case held that there was not by this proviso reserved to the states any police power sufficient to enable them to regulate or prevent the Postmaster General from fixing intrastate rates. It would seem, however, that this holding would not necessarily negative the idea that those state statutes which require the prompt transmission and delivery of messages may properly be considered as embraced within that narrower definition of the police power as having to do "with the health, safety and morals of the people." The Supreme Court of Arkansas, however, in the recent case of *Western Union Tel. Co.* v. *Davis* (decided February 23, 1920, and not yet reported) construed an Arkansas statute which declares that telegraph companies doing business in the state "shall be liable in damages for mental anguish or suffering, even in the absence of bodily injury or pecuniary loss for negligence in receiving, transmitting or delivering messages" (Kirby's Digest, sec. 7947), and held that it was not a police regulation. There was a judgment for the plaintiff in the trial court and "learned counsel for appellee," said the Supreme Court of Arkansas, "defend the judgment below under authority of the proviso in the federal statute which preserves the authority to the states in the exercise of 'lawful police regulations.' The argument is that the liability imposed on telegraph companies for damages by way of mental anguish resulting from negligence in the transmission of messages is in the nature of a police regulation, the liability for which is preserved in the federal statute."

"This contention overlooks, however, the decision of the Supreme Court of the United States in the recent case of *Dakota Cent. Telephone Co.* v. *South Dakota,* 250 U. S. 163, 39 S. Ct. R. 507, which interprets the language of the joint resolution of Congress and gives a definition of the police power of the state in a restricted sense, limiting it to that phase of the power which deals with 'health, safety and morals,' and not in the comprehensive sense which embraces the substance of the whole field of state authority." In the case which the court was deciding a recovery had been had for mental suffering alone and it may be that the court merely intended to deny to the statute the character of a police regulation because it gave a right of action for mental suffering alone and thus did not touch "health, safety or morals." It would at any rate seem clear that there is nothing in the decision of the Supreme Court of the United States to negative the idea that a statute requiring the prompt transmission of messages is a police regulation when under it an action is brought for physical suffering.

But even if these statutes do remain in force and unimpaired they do not touch the heart of the matter and do not necessarily afford a remedy against the corporation owning the wire line. The most formidable barrier to a recovery remains yet to be overcome. This is the insistence that when the Government assumed control the property of the corporations passed entirely beyond their

control and into the absolute control of the Government; that those who had previously been their employees *eo instante* ceased to be their employees; that, therefore, any subsequent negligence of these employees was the negligence not of their former employer, the corporation, but of their then employer, the Government. It was this insistence that Senator Underwood was illustrating when he replied to Senator Sheppard:

"Mr. President, if the Senator will allow me, I desire to say that after the Government took possession of this property any resulting damages growing out of the possession of the property would be against the Government and not against the owners of the property. If the Government were to take the Senator's automobile for a war emergency and the man who was driving the car ran over somebody and injured him, the Senator would not be liable because it was his car, but the Government would be liable because it was its act."

(*Cong. Record,* June 10th, 1920, p. 962.)

In answer to this it has been suggested that it was the intention of Congress as embodied in the joint resolution and of the President as expressed in his proclamation issued in pursuance thereof to permit the companies to continue to transact some private business and that, therefore, they should be held liable. Judge Foster of the United States District Court of Louisiana adopted this view in the case of *Witherspoon* v. *Postal Tel., etc., Co.* 257 Fed. 758, and said:

"The Postal Telegraph lines were take over by the President, under authority of the joint resolution of Congress of July 16, 1918, by his proclamation of July 22, 1918. The proclamation directs that the supervision, possession, control, and operation of the telegraph and telephone systems shall be exercised by and through the Postmaster General, and that the said Postmaster General may perform his duties through the *owners,* managers, board of directors, receivers, officers and employes of said telegraph and telephone systems. The proclamation further provides that the 'employes of the various telegraph and telephone systems shall continue the operation thereof in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners or managers as the case may be.'

"Neither in the joint resolution nor the proclamation of the President is there a provision similar to section 10 of the Act of March 21, 1918, c. 25, 40 Stat. 456 (Fed. Stat. Ann. 1918, Supp. 762), taking over the railroad systems of the country. It seems to me, however, that it was the intention of Congress, in authorizing the President to take over the lines, that the companies should go ahead with private business the same as theretofore. This would contemplate the institution and defense of suits. If the company is allowed to take and send private messages, there should be some method of holding it liable for damages occasioned through negligence, notwithstanding the Postmaster General had the direction and control of the company. See *Postal Tel. & Cable Co.* v. *Call,* 255 Fed. 850.

"The joint resolution provides for just compensation to the companies and the method of settling disputes as to same between them and the government. If the companies are held for damages occasioned while under government control, compensation will certainly extend to reimbursement. In the meantime litigants should not be delayed in liquidating their claims. Therefore I think it proper that the plaintiff in this case should be allowed to establish his liability against the company, if there is any. Delay in the trial of the case may result in hardship to either side."

This opinion was delivered in overruling an exception to the complaint that no cause of action was shown. The case has not yet been finally determined on the merits in the trial court. Judge Foster's opinion was delivered prior to the decision of the Supreme Court of the United States in the South Dakota case. Chief Justice White in that case defined the extent of the control of the Government:

"We are of opinion that authority was conferred as to all the enumerated elements, and that there was hence a right in the President to take complete possession and control to enable the full operation of the lines embraced in the authority. The contemporaneous federal steps taken to give effect to the resolution, the proclamation of the President, the action of the Postmaster General and the authority of the President, the contracts made with the telephone companies in pursuance of authority to fix their compensation, all establish the accuracy of this view since they all make it clear that it was assumed that power to take full control was conferred and that it was exerted so as to embrace the entire business and the right to the entire revenues to arise from the Act of the United States in carrying it out."

It is suggested, however, that there is a theory upon which the corporations owning the property can be held liable. That theory is that the Government was really engaged in the telephone and telegraph business through the media of the corporate entities of the various corporations. This theory contemplates not merely the taking over of the various properties by the Government to the exclusion of the corporations, but the rendering of service through the medium of the corporation. There is ample authority for the view that when the United States conducts a business by establishing or retaining a corporate entity for this purpose, the corporation may be held liable regardless of the fact that it is owned and controlled by the Government. The most widely known instance of the application of this principle is in the case of the Panama Railroad Company. This corporation is absolutely controlled by the Government through stock ownership and is also operated by it. Yet it is held liable to suit to the same extent as any other railroad corporation. The Circuit Court of Appeals of the Fifth Circuit in so holding recently pointed out in *Panama R. Co.* v. *Curran,* 256 Fed. 768, 168 C. C. A. 114, that the true test is whether the corporate existence is preserved.

In the case of the wire companies there are indications that the Government is rendering service through the corporate entities. The proclamation of the President provides:

"Said Postmaster General may perform the duties hereby and hereunder imposed upon him, so long and to such extent and in such manner as he shall determine, through the *owners,* managers, boards of directors, receivers, officers, and employees of said telegraph and telephone systems."

That both the companies and the Government were of opinion that this construction might be placed upon the situation would seem to be indicated by that provision of the contract entered into between them by which the United States agrees to save the "company harmless from all judgments or decrees that may be recovered or issued

against, and all fines and penalties that may be imposed upon it by reason of any cause of action arising out of federal control, or of anything done or omitted in the possession, operation, use or control of its properties during the period of Government control." Such a provision is unnecessary, if the corporation merely surrendered its property, but extremely wise, if under the contract the corporation was in fact conducting the business for the Government.

The view here outlined has apparently not been urged upon any of the courts which have considered this question. The Supreme Court of Arkansas in *Western Union Telegraph Company* v. *Davis, supra,* after holding the statute there considered not to be a police regulation, relieves the company from liability upon the ground that the negligence was that of the Government and not that of the company. The Court of Civil Appeals of Texas reached the same conclusion based upon the same reasoning in the case of *Wallace* v. *Western Union Telegraph Co.* (decided January 29, 1920, but not yet reported). The Supreme Court of Alabama has also considered the question in *Rachel Canidate* v. *Western Union Tel. Co.* (decided January 15th, 1920, not yet reported). While that court arrives at the same result as did the Arkansas and Texas courts, yet implicit in its opinion is a recognition of the fact that the corporation itself was functioning on behalf of the Government. Mr. Justice McClellan in describing the situation says:

"The control and possession of all wire lines taken by the United States Government, through its official agencies and under validly vested discretionary authority unrevisable by the judicial departments, state and federal, was a complete control and exclusive possession; *thus relegating to the category of mere agents of the United States the function* of the wire companies, etc.

"The complete control and the exclusive possession of this as well as all other wire lines within the resolution of Congress, as affected through the proclamation of the President, having passed to the United States, the defendant (appellee) was not and could not have been engaged in the business described in the complaint except, and that only, under the derivative authority, a mere agency, imposed upon the telegraph company by the paramount governmental processes set forth in the plea, to the end that whatever service the physical properties and the company's personnel might render in the transmission of intelligence by wire should be and was a public governmental service or function, to or in respect of the discharge of which—within the realm of the company's legitimate activity under the complete control and exclusive possession of the government—neither the company, as such, nor the person so serving in the operation of any of the functions of the company so dominated, were subject to individual corporate or personal liability to third persons for a breach of a contract or for a tort (the breach of a public duty) predicated alone of a contract for the transmission of intelligence by wire."

While this language seems to recognize that the corporation has not merely delivered its personnel and property to the government but is itself functioning on behalf of the Government, yet it assumes that which is certainly debatable, that in so doing the corporation is engaged in performing a strictly governmental function and is thus immune from suit. The reasoning which would lead to the adoption of this view is found in *Ballaine* v. *Alaska Northern R. Co.,* 259 Fed. 183, while the contrary idea is set out and sustained by *Panama R. Co.* v. *Curran, supra,* and *Salas v. U. S.,* 234 Fed. 842, 148 C. C. A. 440.

In Congress it was suggested that, if the companies were not suable on causes of action arising during the period of governmental control, relief might be had against the Government itself in the Court of Claims. However, in addition to the inconvenience and expense incident to a resort to that tribunal, it is at least doubtful whether under present statutes that court has jurisdiction of such claims as usually arise as a result of the operation of wire systems.

Should it be finally held either that the companies did not participate in the operation of the lines during the period of government control or that their participation was the exercise of a governmental function to such an extent that a suit against them would in effect be a suit against the United States, then hundreds of persons having just claims aggregating thousands of dollars will be without a remedy and there will be a serious hiatus in the law. Justice requires the immediate enactment of legislation which will eliminate even the possibility of such a result.

WALTER P. ARMSTRONG.

TERMINATION OF WAR

As the termination of a war has far-reaching legal consequences, it is important to fix its precise date, both according to the rules of international law, which regulate the relations of State to State, and according to English law, by which the rights and duties of those individuals are governed who resort to our courts.

According to international law, there is no difficulty in the case of those belligerents in the recent war which ratify the treaties of peace. The German, Austrian, and Bulgarian treaties expressly provide that from the coming into force of each of them the state of war will terminate; and the Hungarian and Turkish treaties will doubtless contain a similar provision. Therefore it only remains to determine the date upon which each of these treaties comes into force. This date is to be fixed, according to the terms of the treaties themselves, by reference to the first proces-verbal of the deposit of ratifications (a minute or memorandum in diplomatic form) drawn up when each treaty has been ratified by the Central Power concerned on the one hand, and by three of the five principal Allied and Associated Powers on the other. The date of that proces-verbal is the date upon which the state of war comes to an end, as between that Central Power and those of the Allied and Associated Powers which have ratified the treaty on or before the date. But a state of war continues between that Central Power and each Allied or Associated Power until it ratifies the treaty, or until, if ratification is indefinitely postponed, the war is terminated under the general rules of international law by what is called simple cessation of hostilities. For example, the war between Germany and the British Empire, France, Italy, Japan, and a number of other Allied Powers came to an end on the 10th Jan. 1920, but continues for each of the Allied or Associated Powers until the date upon which it deposits its ratification at Paris, or, if it is an extra-European Power, gives notice of ratification. Difficulties which have arisen in this connection are due solely to a misunderstanding of the language of treaties, and the usual diplomatic procedure. Ratification

means, not the constitutional act of executing the instrument of ratification, but the deposit or exchange of ratifications between the States concerned. That Powers whose seat of government is outside Europe should be permitted to effect ratification by notice is a variation from the general practice, the convenience of which is obvious. When ratifications are exchanged or deposited, it is customary for the ceremony to be recorded in a protocol or a proces-verbal, which is not, as has been suggested, a public announcement.

Real difficulties do, however, arise in the case of a belligerent which does not sign, or does not ratify, a treaty of peace. Thus China did not sign the Treaty of Versailles, but issued a "Presidential mandate" stating that war between China and Germany was at an end (see *Times*, Sept. 15, 1919); and those who oppose ratification of this treaty by the United States suggest that war between the United States and Germany should be ended by some other means. Text-books on international law do not generally recognize methods of ending a war other than subjugation, treaty, and simple cessation of hostilities, and it may be that a unilateral declaration that a war has come to an end (quite apart from the constitutional questions which may be involved) amounts, under the law of nations, to no more than evidence that cessation of hostilities has in fact taken place. In this case it would be impossible to regard it as fixing the exact date of the termination of a state of war.

The termination of the war between Great Britain and the Central Powers, according to English law, is governed by the Termination of the Present War (Definition) Act 1918 (8 & 9 Geo. V, c. 59). This Act provides a means for fixing by Order in Council both the date of the termination of the war as a whole, and also the date of the termination of war between Great Britain and any particular State. An order, published in the *London Gazette* of the 10th Feb. 1920 fixed the 10th Jan. 1920 as the statutory date for the termination of the war with Germany; and it is probable that other orders will be made as each treaty comes into force. But the war as a whole will not legally come to an end until a date, to be declared also by Order in Council, which is to be, as nearly as may be, the date of the exchanges or deposit of ratifications of the last treaty of peace. This seems likely to be the treaty with Turkey; and, as it has not yet been submitted to the Turkish plenipotentiaries, the statutory termination of the war may still be long deferred.

The date so fixed is the date which, under the Act, is to be read into "any provision in any contract, deed, or other instrument referring, expressly or impliedly, and in whatever form of words" to the war or to the recent hostilities, except where the context requires otherwise. Consequently the principal point to be determined in each particular case is whether or not the context requires the substitution of some other date than the statutory date of the termination of the war. If, for example, the context makes it clear that the instrument in question refers to the termination of the war between Great Britain and Germany, that date, as fixed by Order in Council, must be substituted for the statutory date of the termination of the war as a whole. But if the document which is to be construed refers to "the signature of peace with Germany," a more difficult question arises, which requires judicial interpretation. If the words in the instrument are the "declaration of peace with Germany," arguments founded on the proclamation by the King read on the 2nd July 1919 (wherein His Majesty declared his will and pleasure that upon the exchange of the ratifications thereof the said Treaty of Peace be observed inviolably) lead to the same date—the 10th Jan. 1920—which has been declared under the Act to be the date of the end of the war with Germany.—*Law Times.*

Cases of Interest

Imprisonment as Effecting Abandonment of Homestead.—It seems that the imprisonment of the owner of a homestead does not constitute an abandonment thereof and that a conveyance by him of the premises during his detention in jail is valid. It was so held in Millett *v.* Pearson, (Minn.) 173 N. W. 411, reported and annotated in 5 A. L. R. 256, wherein the court said: "As a general rule of law persons under legal disability or restraint, or persons in want of freedom, are incapable of losing or gaining a residence by acts performed by them under the control of others. There must be an exercise of volition by persons free from restraint and capable of acting for themselves, in order to acquire or lose a residence. A person imprisoned under operation of law does not thereby change his residence. Freeport *v.* Stephenson County, 41 Ill. 495; Clark *v.* Robinson, 88 Ill. 498; Barton *v.* Barton, 74 Ga. 761; Grant *v.* Dalliber, 11 Conn. 234. There was no proof of any act on the part of Ostapchuk, subsequent to the death of his wife, from which a presumption can be drawn that he intended an abandonment of his homestead. His absence therefrom while under detention in the county jail raises no such presumption. To constitute an abandonment there must be an actual removal from the premises. An intention to remove is insufficient. Robertson *v.* Sullivan, 31 Minn. 197, 17 N. W. 336. The premises in question were the homestead of Ostapchuk at the time of his arrest, and remained his legal abode until he conveyed the same to the plaintiff, notwithstanding his detention in jail."

Daylight Saving Act as Affecting Period of Time Prescribed by Statute.—In Ellard *v.* Goodell (Ala.) 83 So. 569, it was held that the Federal Daylight Saving Act of March 19, 1918, did not effect the repeal or modification of the period fixed by the Alabama Code for the presentation of bills of exceptions. The following brief extract from the opinion is explanatory of the decision of the court: "Judgment was entered on March 19, 1918. The bill of exceptions was presented to the presiding judge on June 17, 1918, 'at 11:15 P.M. Central standard time and 12:15 P.M. June 18, 1918, present national legal time.' U. S. Stat. at Large, vol. 40, pp. 450, 451. The motion to strike proceeds on the theory that the bill of exceptions was not presented within 90 days after judgment entered as required by Code, § 3019. As appears, the bill was presented 45 minutes before the expiration of the nineteenth day if measured by central standard time, but its presentation was 15 minutes late if measured by the time defined by the act of Congress, above cited, approved March 19, 1918. Our statute (Code, § 3019) accords an appellant 90 days of 24 hours each in which to present to the presiding judge the bill of exceptions. The mentioned act of Congress did not effect a repeal or modification of the period fixed by our Code, § 3019, for the presentation of bills of exceptions. It was not so designed. To give that act such operation and effect as this motion to strike contemplates would involve the affirmation that this appellant had been thereby deprived of one hour of the time our statute accorded him in which to present his bill of exceptions. The motion to strike must therefore be overruled."

Homicide by Shooting Into Railroad Train as Affected by Absence of Malice.—In Banks *v.* State (Tex.) 211 S. W. 217, reported and annotated in 5 A. L. R. 600, it was held that one who deliberately shoots into a railroad train cannot avoid liability for the resulting homicide by disclaiming malice. The court said: "It appears from the record that on the night of the homicide,

and while at his post of duty on a moving railroad train, one Hawkins, a negro brakeman, was shot and killed by some member of a party of negroes who were walking along a dirt road near to the railroad track. No reason is assigned for such shooting, and it does not appear that appellant or any member of the party was acquainted with any of the parties on the train, and that any specific malice could be directed towards the deceased, but under our law the same is not necessary. One who deliberately uses a deadly weapon in such a reckless manner as to evince a heart regardless of social duty and fatally bent on mischief, as is shown by firing into a moving railroad train upon which human beings necessarily are, cannot shield himself from the consequences of his acts by disclaiming malice. Malice may be toward a group of persons as well as toward an individual. It may exist without former grudges or antecedent menaces. The intentional doing of any wrongful act in such manner and under such circumstances as that the death of a human being may result therefrom is malice. In the instant case the appellant admits his presence and participation in the shooting which resulted in the death of the deceased. . . . That man who can coolly shoot into a moving train, or automobile, or other vehicle in which are persons guiltless of any wrongdoing toward him or provocation for such attack is, if possible, worse than the man who endures insult or broods over a wrong, real or fancied, and then waylays and kills his personal enemy. The shame of the world recently has been the unwarranted killing of persons who were noncombatants, and who were doing nothing, and were not capable of inflicting injury upon their slayers. Of kindred spirit is he who can shoot in the darkness into houses, crowds, or trains, and recklessly send into eternity those whom he does not know and against whom he has no sort of reason for directing his malevolence."

LIABILITY FOR LOSS OF PROPERTY LEFT UNPROTECTED WHEN OWNER IS WRONGFULLY ARRESTED.—In Whitehead *v.* Stringer (Wash.) 180 Pac. 486, reported and annotated in 5 A. L. R. 358, it was held that the plaintiff in an action for unlawful arrest properly included in his elements of damage the loss of fittings stolen from his automobile truck, where, at the time of his arrest, in spite of his protests, the arresting officer refused to permit him to remove the truck to a place of security, the officer himself having failed to do anything for its protection. Said the court: "The respondents argue that, since the complaint shows the automobile truck was damaged by an independent intervening criminal act of third persons, which act the sheriff was not bound to anticipate, therefore the act of arresting the appellant was not the primary cause of loss. . . . We think the controlling question here is whether the complaint is sufficient to show that the sheriff knew or had reasonable cause to believe that the automobile was in an unsafe place and would likely be molested at the place where it was left. The complaint upon its face shows in the allegation hereinbefore quoted that the deputy sheriff, over the remonstrance of the appellant, refused to permit the appellant to remove the truck to a safe place; that the deputy sheriff well knew, or in the exercise of ordinary care should have known, that the truck was left in a dangerous place, where its parts could be easily stolen and would be stolen; and that the sheriff and the deputy sheriff refused to permit the appellant to have the automobile removed to a safe place, and they themselves refused to take any steps to preserve or look after the automobile truck. But for these allegations, we have no doubt the rule relied upon by the respondents would apply, and the sheriff could not be held to anticipate that a third party would intervene and molest the automobile. But when it is alleged, as it is here, that the deputy was informed of the fact that the automobile was in a dangerous place, where its parts could easily be stolen, and where the sheriff or his deputy refused to permit the automobile to be placed in a safe place, where they refused to take care of it themselves, we are of the opinion that under these circumstances they are liable for the injury which occurred to the automobile truck in such place."

RIGHT OF PASSENGER TO RE-ENTER TRAIN AFTER EJECTION.—A passenger once lawfully ejected for nonpayment of fare, at a point where the train would not otherwise have stopped, has no right, it seems, to re-enter the train on tender of fare; nor has he a right to continue his journey by tender of fare after the signal for stopping the train has been given. It was so held in Mangum *v.* Norfolk, etc., R. Co. (Va.) 99 S. E. 686, reported and annotated in 5 A. L. R. 346, wherein the court, after reviewing the facts, said: "The decided cases on the right of the carrier to eject a passenger for refusal to pay his fare are very numerous, and not altogether in harmony. It will not be necessary to discuss the nice distinctions drawn in some of them; but, confining ourselves to the facts of the case in judgment, the following propositions of law applicable thereto seem to be well sustained by the authorities: As between the passenger and the conductor, the conductor is the sole judge of the validity of the ticket tendered in payment of the fare. If he decides that the ticket is invalid, he has the right, upon so notifying the passenger, to require the passenger to pay his fare, and, if he refuses to do so, to eject him from the train. If the passenger is acting in good faith and honestly believes his ticket is good and that he is entitled to ride thereon, he is entitled to a reasonable time and a fair opportunity to decide whether or not he will pay his fare. After he has had such time and opportunity, if he refuses to pay his fare, the conductor may eject him, and, when once lawfully ejected at a point at which that train would not otherwise have stopped, he has no right to re-enter that train upon tender of fare. The passenger's right to tender his fare and continue his journey, after having refused payment, continues until the conductor has rightfully given the engineer the signal to stop the train—no longer. A tender after the signal to stop has been rightfully given comes too late to revive the right of the passenger, which he lost by refusal to pay his fare. He may not thus interefere with the proper conduct of the carrier's business, and the conveniences and safety of the traveling public. . . . Upon the defendant's demurrer to the evidence, we must hold that the plaintiff in error acted in good faith, and honestly believed that his ticket was good and entitled him to passage; that the plaintiff in error offered to pay his fare while the conductor was pulling the bell cord for the first time, and before the stop signal had been completed; that the signal could easily have been stopped at this time, without inconvenience to anyone; and that the conductor wrongfully refused to accept the fare when so tendered, and wrongfully ejected the plaintiff in error from the train. The ejection of the plaintiff in error being wrongful, all of the subsequent acts of the conductor and other employees of the company hereinbefore detailed were likewise wrongful, and for these wrongs the defendant company is liable."

LIABILITY OF RAILROAD VOLUNTARILY UNDERTAKING TO CARE FOR INJURED TRESPASSER.—A railroad company which undertakes to care for an injured trespasser cannot, it seems, be held liable for negligence in so doing unless the condition of the injured person is made worse by such neglect. It was so held in Gates *v.* Chesapeake & R. Co. (Ky.) 213 S. W. 564, reported and annotated in 5 A. L. R. 507, wherein the court after reviewing the authorities said: "Ordinarily a railroad company owes no

duty to a trespasser until his peril is discovered, and is not liable for an injury to him, unless, after his peril is discovered, the injury to him may be avoided with proper care. It is not claimed appellant's peril was discovered in time to have prevented the injury; but his cause of action is predicated upon appellee's negligence in leaving him unattended for about four hours at Maysville, after having undertaken to care for him, and because of this fact the second amputation was made necessary. Unless the acts complained of aggravated the injury, or made his condition worse, clearly the company would not be liable. Having assumed charge of appellant, as alleged in the petition, it was not incumbent upon appellee to continue to care for the injured man until he recovered or was removed by death. No such duty should be imposed. But, having undertaken to care for him, it must do so in a proper manner and without negligence. It is possible appellant would have suffered just as much, and the second amputation would have been necessary, even though he had received prompt and proper attention. That he suffered or was compelled to undergo the second operation does not of itself fix liability upon appellee. The burden is on appellant to show with reasonable certainty, that, had he received proper care, the additional pain, suffering, and second amputation could have been avoided. This may be difficult of proof, but the rights of the company must not be guessed away; there must be some evidence to support the allegation of the petition. Had appellee, with due care and diligence, after taking charge of appellant placed him in the care of a competent surgeon or physician, or taken him to a hospital or infirmary, or sent him to his family or near relatives, and stopped there, its duty and obligation to the injured man would have then ceased; more it could not be compelled to do. We are mindful of the argument that, in ordering a reversal of the case, we will be establishing a doctrine which will allow an action against a good Samaritan and let the priest and Levite go free. But such is not the case; just the contrary being true. From the narrative as recorded by the Gospel writer, we find that the necessities of the one who had been so roughly handled by the thieves, on his way from Jerusalem to Jericho, were well and carefully attended to, his wounds were bound, oil and wine poured in, transportation furnished, and lodging provided; this kind of treatment negatives any suggestion of negligence."

Liability of Publisher of Fiction for Libel Contained Therein.—In Corrigan *v.* Bobbs-Merrill Co. (N. Y.) 126 N. E. 260, it was held that the publisher of a novel was chargeable with libelous matter contained therein even though the publisher had no intent to injure and was in fact unaware of the existence of the person libeled, and that punitive damages could be recovered if malice or bad faith were shown. Speaking on the question of compensatory damages, the court said: "The fact that the publisher has no actual intention to defame a particular man or indeed to injure any one does not prevent recovery of compensatory damages by one who connects himself with the publication, at least, in the absence of some special reason for a positive belief that no one existed to whom the description answered. The question is not so much who was aimed at as who was hit. . . . This rule is unqualifiedly applied to publications in the newspaper press, and is no different when applied to those who issue books. Works of fiction not infrequently depict as imaginary events in courts of justice or elsewhere actually drawn or distorted from real life. Dickens in 'Pickwick Papers' has a well-known court scene of which Mr. Serjeant Ballantine says in his 'Experiences' that Mr. Justice Gazelee 'has been delivered to posterity as having presided at the famous trial of Bardell *v.* Pickwick. I just remember him, and he certainly was deaf.' Goldwin Smith, the distinguished historian and publicist, said of Disraeli's veiled attack upon him as 'The Oxford Professor' in the novel 'Lothair,' that ('Reminiscences,' p. 171): 'He afterwards pursued me across the Atlantic, and tried to brand me, under a perfectly transparent pseudonym, if "Oxford Professor" could be called a pseudonym at all, as a "social sycophant." There is surely nothing more dastardly than this mode of stabbing a reputation.' The power of Charles Reade's descriptions of prison life in 'It's Never Too Late to Mend' and the abuses of private insane asylums in 'Hard Cash' is undeniable, although the truth of some of his details was challenged. The novel of purpose, such as 'Uncle Tom's Cabin,' often deals with incidents and individuals not wholly imaginary. Reputation may not be traduced with impunity, whether under the literary forms of a work of fiction, or in jest (Triggs *v.* Sun Printing & Pub. Ass'n, 179 N. Y. 144, 71 N. E. 735, 66 L. R. A. 612, 103 Am. St. Rep. 841, 1 Ann. Cas. 326, or by inadvertence (Moore *v.* Francis, 121 N. Y. 199, 207. 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810), or by the use of words with a double meaning (Morrison *v.* Smith, 177 N. Y. 366, 69 N. E. 725; First Nat. Bank of Waverly *v.* Winters, 225 N. Y. 47, 50, 121 N. E. 459). Publishers cannot be so guileless as to be ignorant of the trade risk of injuring others by accidental libels. The conventional way of putting the general rule is 'that in a case of libelous publication the law implies malice and infers some damage.' Byam *v.* Collons, 111 N. Y. 143, 150, 19 N. E. 75 (2 L. R. A. 129, 7 Am. St. Rep. 726). Avoiding, for the nonce, the time honored words 'implied malice,' which are a stumbling block for many, we may safely say that unless the judge rules that the occasion is privileged, the question of malice is never for the jury when compensatory damages alone are sought; the plaintiff recovers damages if he proves that the words apply to him, and that his reputation has been injured, whether such injury is the result of defendant's evil disposition towards him or a mere concatenation of adventitious circumstances."

Treatment Endangering Life Within Statute Defining Grounds for Divorce.—In Thompson *v.* Thompson (Iowa) 173 N. W. 55, reported and annotated in 5 A. L. R. 710, it was held that subjecting a wife to curses, suspicion, and neglect, which produce mental disturbances, heart sickness, and unhappiness, may amount to inhuman treatment, calculated to endanger her life within the meaning of the divorce laws. Said the court: "The action is based on subdivision 5 of § 3174 of the Code of 1897, which reads: 'Divorces from the bonds of matrimony may be decreed against the husband for the following causes: . . . When he is guilty of such inhuman treatment as to endanger the life of his wife.' This statute does not mean that divorce from the bonds of matrimony may be decreed only when it is shown that the husband has been guilty of some act of physical violence to the wife, which in and of itself endangers her life. It does not mean that the complaining wife, before she is entitled to invoke this provision of the statute and obtain the relief which it affords, must be able to show that the husband was guilty of some physical violence, which, operating upon her person, had, in and of itself, a tendency to endanger her life; or, to express it differently, the word 'treatment,' as used in this statute, does not refer to physical violence alone. Physical violence towards the wife, when carried to such a point as to endanger her life, is unquestionably ground for divorce. Physical violence may consist in many acts, each slight in its character, and none producing marks of violence upon the person, and yet, considered as a whole, may be ground for divorce; certainly so when from them the court is able to say the life of the wife is endangered. Life may be endangered by treatment, though it involves no

physical violence. It takes more than physical body to make up the entity known as a human being. The mind can grasp the possibility of inhuman treatment that does not endanger life. Whether it does or not depends, not only upon the physical, but upon the moral, mental, or spiritual quality of the one made subject to the treatment. Some people are stoical and indifferent in a degree to certain kinds of treatment. To others, more sensitive, and delicate in their organization, the treatment is intolerable, weighs heavily upon the heart, and preys upon the mind. This, reacting upon the body, endangers the life of the body. As some poet has said: 'Killed by unutterable unkindness, worse than a life of blows.' In the case before us the record does not disclose any single act of physical violence on the part of the defendant, which, considered alone, has a tendency to endanger the life of his wife; but it does disclose a mental picture of conditions and treatment which, operating upon the mind of this plaintiff, might well tend to produce painful mental disturbance, a heavy heart, and a sorrowing mind, or in other words, such treatment as tended to humiliate her and destroy her inalienable right to be happy. The relationship between husband and wife is very close. Each rightfully looks to and depends upon the other for companionship of heart and mind, and each is pledged to the other to bring into the home life that sunshine which gives warmth and comfort and happiness. We recognize the fact that, even in the balmiest weather, a cloud may pass between the sky and earth; but none of us look with pleasure on perpetual storms, clouds, and bitter cold, though through the operation of natural laws they sometimes come into our lives. 'Some days must be dark and dreary.' We know of people who live happily in the northland, mid snow and ice and bitter cold. These conditions do not imperil their lives because they are hardened to them, yet to one brought up in the warmth of the southland, the conditions of the northland are intolerable, and under their chilling influences they fade away and die. So it is with life in the home. A woman reared in the atmosphere of love and trust and confidence pines away when transplanted into an atmosphere pregnant with curses, suspicion and neglect."

New Books

Inheritance Taxation. By Lafayette B. Gleason and Alexander Otis. Second edition. Albany: Matthew Bender & Company. 1919.

This useful and deserved popular work has now advanced to a second edition, having been originally published in 1917. It is the joint product of Lafayette B. Gleason, attorney for the state comptroller for New York city, and Alexander Otis of the New York City Bar, a specialist in inheritance taxation. A second edition was made necessary by the fact that since the publication of the first edition twenty-five out of the fifty jurisdictions it covers have materially amended their statutes and an entirely new statute was passed by the federal government in 1919. Besides a general discussion of the cases decided under the various federal and state statutes there is a collection of forms and the text of the statutes themselves. The material is contained in one large volume of over eleven hundred pages.

The Law of Automobiles. By Xenophon P. Huddy of the New York Bar. Fifth edition by Arthur F. Curtis of the Delhi, N. Y., Bar. Albany: Matthew Bender & Company. 1919.

First published in 1906 as a small volume, the law of automobiles has grown so fast that Huddy on Automobiles now appears in a fifth edition containing eleven hundred compact pages printed on thin paper and enclosed in a limp binding. The editor of this latest edition has rearranged and rewritten the major part of the book as it formerly existed, and many questions which formerly constituted but a part of a chapter have in the course of the development of the law assumed such importance, that entire chapters are now given up to their treatment. No apology should be needed for the appearance of a new edition. It is justified by the rapid accumulation of authorities and the competent handling of the same by Mr. Curtis, who has had long experience in law writing.

American Law of Charter Parties and Ocean Bills of Lading. By Wharton Poor of the New York Bar. Albany: Matthew Bender & Company. 1920.

Mr. Poor has endeavored to write a book which shall be of use to business men as well as to lawyers. The scope of the work includes time charters, voyage charters, demurrage, bills of lading and damages. There are appendices containing the text of the Harter Act and the Federal Bills of Lading Act, also a few forms. Mr. Poor has handled the authorities cited in a satisfactory manner, but it would hardly seem that he has exhausted all available sources of information in preparing the work.

The Young Man and the Law. By Simeon E. Baldwin, M. A., LL. D. New York: The Macmillan Company. 1920.

Judge Baldwin by virtue of his long association with young men as professor of law at Yale University is as well qualified to write on the young man and the law as any one could be, and out of his long and varied experience as jurist, teacher, author and practitioner, he has brought forth a volume that every young man contemplating a study of law should read and ponder over. The book takes up in turn the following subjects: Attractions of the legal profession; objections to choosing the legal profession; the personal qualities requisite for success in the legal profession; and the ideals of the profession. Judge Baldwin writes for the young men, but full-fledged lawyers would derive benefit and stimulation from the reading of his pages.

The Soldier-Lawyer Directory. Compiled and edited by R. W. Shackleford and others. Tampa, Florida: R. W. Shackleford, Proprietor. 1920.

The purpose of this book is expressed in the preface as follows: "In the preparation of the Soldier-Lawyer Directory our object has been two-fold, primarily to construct a work that would enable those attorneys who, in the majority of instances, gave up their practice for their Country's Service, to co-operate with and assist their former comrades in arms in the practice of law. It is our belief that practically every Service Lawyer strongly desires to throw his exchange practice to another who has made the same sacrifices. Not only because he wishes to benefit that other, but because he has a firm conviction that his business will be more energetically and competently handled. That our belief is shared by thousands of our profession who served has been proven by the expressions contained in letters of endorsement from all sections." How complete this directory is the reviewer is unable to say. Its value in that respect is problematical.

Arguments and Speeches of William Maxwell Evarts. Edited by his son Sherman Evarts. Three volumes. New York: The Macmillan Company. 1919.

These three volumes containing the arguments and speeches of that great lawyer and statesman William Maxwell Evarts are arranged as follows: The first volume and part of the second

contain his important arguments such as those in the Lemmon Slave Case; the Savannah Privateers' Case; the Prize Cases; the argument in defense of President Andrew Johnson before the Senate of the United States; the Legal Tender Case; the Alabama Claims; the summing up for the defendant in the case of Theodore Tilton against Henry Ward Beecher, and arguments before the Electoral Commission in the disputed Presidential Election of 1876. Then follow political and patriotic speeches including that in 1850 at Castle Garden, New York, on the Fugitive Slave Law, and the address in 1852 in New York, advocating the nomination of Daniel Webster for the Presidency. The third volume contains commemorative addresses and miscellaneous and occasional speeches. Mr. Evarts lived in an important period of the history of our country, and as he took an important part in the shaping of its policies the collection of addresses and speeches here gathered together have pronounced historical value.

A Textbook of Filing. By James N. McCord, Director of New York School of Filing. New York: D. Appleton & Company. 1920.

The modern law office is conducted along business lines and consequently the lawyer of to-day is in need of the same suggestions pertaining to the filing of papers and the systematic indexing of the same as is the business man. The volume at hand will help him to run his office with system and economy of labor. The most efficient and up-to-date methods are here explained and he cannot but be helped by a study of them.

News of the Profession

Denver Bar Association.—William J. Bryan addressed the Denver Bar Association in March.

Missouri Deaths.—Judge H. W. Johnston of Montgomery City, and D. C. Allen of Liberty, are dead.

Wisconsin Deaths.—Judge George Clementson of the fifth Wisconsin judicial circuit is dead, as is Fred A. Teall of Milwaukee.

Demise of Prominent Seattle Lawyer.—Judge Herbert T. Granger of Seattle is dead. He was an authority on insurance law. He went to Seattle from Kansas City.

Deaths in Michigan.—The legal profession in Michigan has suffered the loss of Dwight C. Rexford of Detroit and Charles M. Hitchcock of Bay City.

Indiana Judge Commits Suicide.—Judge John H. Gillett, sixty-three years old, chief justice of the Supreme Court of Indiana from 1903 to 1908, committed suicide recently.

Demise of Leading Georgia Lawyer.—Judge William Faircloth, Wrightsville, Georgia, died in March. He practiced at the bar of Wrightsville for thirty years.

Oregon Deaths.—Judge William Galloway of McMinnville has passed away. He was born in Wisconsin. Roger Sinnott, a Portland lawyer, is another who died recently.

Little Rock Bar Association.—At a recent meeting of the Little Rock Bar Association Judge W. E. Hemingway delivered an address on "The Supreme Court of Arkansas 1889-1893."

Prominent American Legion Officer to Practice Law.—Charles F. Sheridan, head of the service division of the American Legion, has resigned to take up the practice of law in Syracuse.

Minnesota Judge to Retire This Year.—Judge Daniel Fish of the Hennepin County district court will retire from the bench at the end of the present year. He has been on the bench since 1914.

Death Among Ohio Lawyers.—Recent deaths among the profession of Ohio include Judge Thomas M. Sloane, aged sixty-six years, of Sandusky, a graduate of Harvard in the class of 1877, and S. H. Carr of Dayton.

Death of California Jurist.—Judge John M. Corcoran of Berkeley, California, is dead. For thirty-one years he was on the bench in the Superior Court of Mariposa county. He was born in Cincinnati.

Death of Prominent Alabama Lawyer.—The death of Judge Henry C. Sellheimer, of Birmingham, Alabama, occurred at San Diego, California, recently. He was graduated from Princeton in 1881.

Chicago Bar Association.—Secretary of State Bainbridge Colby will be a guest of the Chicago Bar Association early this month. Another guest will be John Barton Payne, the new Secretary of the Interior.

Former Secretary of State Robert Lansing and Lester H. Woolsey, who surrendered his post as solicitor of the state department, have formed a partnership for the practice of international law in Washington.

Utah Deaths.—Lawyers of Salt Lake City who have died recently are Charles Baldwin, referee in bankruptcy, Judge John E. Booth, and Job Philip Lyon, a graduate of Union College, Schenectady, New York, and a native of Troy, New York.

Texas Deaths.—The death of Judge W. H. Bowie occurred in March. He was prominent in the affairs of Claude and Armstrong Counties for many years. Judge W. J. Burton of Crosbyton was shot and killed in his home.

Pennsylvania Lawyers Who Have Died recently are John F. Derry, Judge A. W. Williams of Mercer; J. Boyd Duff of Pittsburgh; William Drayton of Philadelphia; James Scarlett of Danville; J. Barry Colahan of Philadelphia and Henry Riblet of Erie.

Connecticut Judge Dead.—Judge Alfred B. Beers of Fairfield, Connecticut, is dead at the age of seventy-five. He was born in New Rochelle, New York. In 1912 he was National Commander of the Grand Army of the Republic.

Former Senator from New Hampshire Dead.—Henry W. Blair, formerly United States Senator from New Hampshire and for some years a practicing lawyer in Washington, D. C., died in March. He was admitted to the New Hampshire bar in 1859.

Kansas Deaths.—Deaths in the legal profession of Kansas include Judge Case Broderick, aged eighty, who represented the first Kansas district in Congress from 1890 to 1898, and Judge Fred T. Woodburn of the thirty-sixth judicial district.

Los Angeles Bar Association.—At the annual meeting and dinner of the Los Angeles Bar Association held March 8, Samuel Untermeyer of New York was one of the speakers. The new president is Edwin A. Meserve, succeeding Henry O'Melveny.

OKLAHOMA LAWYERS WHO HAVE DIED RECENTLY.—Judge Farrar L. McCain, of Tulsa, died March 24. He was born at Monticello, Arkansas, and formerly practiced in Little Ark. E. M. Stewart of Mangum, and Robert Lowry of Stillwater, are others who have recently died.

KANSAS CITY BAR ASSOCIATION.—The association held its thirty-second annual dinner recently and was addressed by former United States Senator J. Hamilton Lewis and John M. Zane of Chicago and Federal Judge Arba S. Van Valkenburg and John S. Wright of Kansas City.

MASSACHUSETTS LAWYERS WHO HAVE DIED RECENTLY.—Judge Loramer E. Hitchcock of Cambridge is dead. He was for the sixteen years preceding his death a judge of the Superior Court. He was born in Rochester, New York, and was graduated from Amherst College in 1872. Harry J. Cole of Haverhill, Herbert H. Darling of Brookline and Judge Thomas Grover of the Dedham District Court are also dead.

DEATHS IN ILLINOIS.—George A. Follansbee, a prominent Chicago attorney, is dead. He was graduated from Harvard Law School and was formerly president of the Chicago Bar Association. Other deaths in Illinois include James Martin Gray of Chicago, a graduate of Boston University Law School, John S. Goodwin of Chicago, and John L. Harmon of West Frankfort.

CALIFORNIA BAR ASSOCIATION.—Bradner W. Lee, president of the California Bar Association, has announced his committee for the coming year. The important committee on Uniformity of State Law is made up of the following: Guerney E. Newlin, Lynn Helm, Isidore B. Dockweiler of Los Angeles, Delger Trowbridge, San Francisco, and W. E. Libby, San Diego.

DEATHS AMONG PROFESSION IN MARYLAND.—Edwin Warfield, former Governor of Maryland, is dead. He was not only prominent in the law and in politics, but was well known as a financier, being president of the Fidelity and Deposit Company, Baltimore, which he organized. Other deaths recorded are those of J. Milton Reifsnider, Chairman of the Police Service Commission and formerly state's attorney for Carroll County, and Judge Charles S. Hill of Chestertown.

NEW DEPUTY ATTORNEY GENERAL OF DELAWARE.—Attorney General Reinhart of Delaware bar announced he has appointed Howard J. Cooke, Republican, of Georgetown, deputy attorney general, to succeed Daniel J. Layton, who refused to reconsider his resignation. Mr. Layton resigned as deputy attorney general during the anti-vaccination riots at Georgetown.

NEW YORK DEATHS.—Deaths among the profession in New York state include the following: Justice Eugene A. Philbin of the Appellate Division of the Supreme Court, first department; Justice Philip H. Dugro of the Supreme Court for New York County; Supreme Court Justice Warren B. Hooker of Fredonia; Alexander McKinny of Brooklyn; Francis S. Williams of Brooklyn; Ernest F. Ayrault of New York city; Evan L. Tamblyn of Brooklyn; Frank H. Platt of New York city, son of former United States Senator Thomas H. Platt; John L. Romer of Buffalo and James F. McGee, Chief Clerk of the Supreme Court, Brooklyn.

MULTNOMAH OREGON BAR ASSOCIATION.—At the annual meeting of the Association held in Portland, Oregon, the following officers were elected: John P. Winter, president; John A. Beckwith, treasurer, and W. A. Ekwall, secretary. Among the speakers was Henry L. Benson, associate justice of the Supreme Court.

KANSAS BAR ASSOCIATION.—At the annual meeting of the Kansas Bar Association in January a committee consisting of five members was provided for, whose purpose it will be to look into the present laws of Kansas either to wipe all obsolete laws off of the statute book or suggest any needed amendments to present laws. The committee will also draft laws that will have uniform operation in the other states of the Union. The chairman is S. H. Allen, who has been a justice of the supreme court. The other members are B. F. Enders of Leavenworth; Judge Charles W. Smith, of Stockton; K. M. Geddes, of El Dorado, and Ed S. McAnany of Kansas City, Kansas. The president of the Bar Association has requested the committee to have its report ready for the next annual meeting of the Bar Association which will be held at Wichita in January, 1921, so as to have legislative action on their recommendations while the 1921 legislature is in session.

AMERICAN BAR ASSOCIATION.—The executive committee of the American Bar Association held its spring meeting at the Congress Hotel, Chicago, April 8 and 9. At this meeting various topics of interest to the 12,000 members of the association were discussed and arrangements for the annual meeting of the association which is to be held at St. Louis, Aug. 25, 26 and 27, were made. Hampton L. Carson, president of the association, presided at the executive committee meeting. The personnel of the executive committee comprises the following officers of the organization: Hampton L. Carson, president, Philadelphia; R. E. L. Saner, chairman general council, Dallas, Tex.; Frederick K. Wadhams, treasurer, Albany, N. Y.; W. Thomas Kemp, secretary, Baltimore, Md.; Gaylord Lee Clark, assistant secretary; also Justice George T. Page, Chicago; Charles Thaddeus Terry, New York city; T. A. Hammond, Atlanta, Ga.; U. S. G. Cherry, Sioux Falls, S. D.; Edmund F. Trabus, Louisville, Ky.; Thomas H. Reynolds, Kansas City, Mo.; George B. Young, Montpelier, Vt.; Paul Howland, Cleveland, Ohio, and Justice Thomas C. McClellan, Montgomery, Ala.

SEATTLE BAR ASSOCIATION.—At the regular quarterly meeting of the Seattle Bar Association held in March a revised minimum fee schedule was adopted. While the new schedule in no sense controls fees, the committee stated, it will serve as a criterion and will be generally followed by the average attorney in setting his fee for a certain class of legal work. Among the items appearing on the revised schedule and their proposed minimum fees, are, appearance in superior court, $50; foreclosure of chattel mortgage or lien, $50; appearance for guardian ad litem, $25; in estate proceedings, 7 per cent for first $1,000, with a minimum of $50; 5 per cent between $1,000 and $2,000 and 4 per cent for all amounts in excess of $2,000. Divorce cases by default are to cost $100 at least, while appearance in supreme court in any case will be taxed at the rate of $150. United States district court appearance will be charged at the rate of $100 each, while the circuit court of appeals will be higher, a fee of $250 being adopted. Consultation is rated at $5, while drawing a will costs at least $15 under the new schedule. Leases and other agreements will be drawn at $10 minimum each, although a note or mortgage will be standardized at $5. Appearances in the justice court in trials will cost the litigants $15, although answering for garnishee defendant is placed at $5. Examination of abstracts will cost from $10 upwards, according to the value of the property.

"The simplest mode of meeting the proposition is to negative it in its own terms."—Per Mr. Justice Johnson in Buel. *v.* Van Ness, 8 Wheat. (U. S.) 312, 324.

English Notes*

Joint Purchase of a Bungalow.—The comparatively recent case of Harrison *v.* Walker (121 L. T. Rep. 251; (1919) 2 K. B. 453) should be a warning to persons who, on the approach of summer, make arrangements with a friend to share a bungalow on the river, or at some other pleasure resort, as a relief from their business activities. If they subsequently quarrel, the law will be slow to assist them. It is true, as stated by the learned judge, Mr. Justice McCardie, in the case under notice, that it is the duty of each party to the contract to do all that is reasonably necessary for the purpose of enabling that contract to be carried out (see Mackay *v.* Dick, 6 App. Cas. 263; Sprague *v.* Booth, 101 L. T. Rep. 211; (1919) A. C. 576; and Terry *v.* Moss Empires Limited, 32 Times L. Rep 92); but that principle of law is one which must be applied with care, and with due regard to the particular circumstances of each case. In Harrison *v.* Walker the plaintiff claimed damages for breach of contract, and a declaration that he was entitled to an undivided moiety of the bungalow and its accessories. But there had only been an isolated quarrel between the parties, and there was no threat by the defendant to inflict actual physical violence in future on the plaintiff, and no actual ouster of him, and no dispute that the plaintiff was fully entitled to a half share in the bungalow and its appurtenances. Accordingly the plaintiff's claim for damages failed.

The Increasing Number of Law Reports.—The duplication of law reports and their increasing volume is a perennial source of difficulty to the Legal Profession in the United States which at present has remained without solution, says the *Law Times*. Similarly in different parts of the Empire the subject is claiming attention. It has been considered recently at a conference of lawyers in Madras, where attention has been drawn to the existence of various series of reports published by private enterprise and covering much the same ground as the authorized Law Reports. Each province has its own series with various private collections. So also has each province in Canada and most of the States of Australia. In South Africa the reports are much less voluminous. In England the establishment of the Law Reports issued under the Council of Law Reporting strengthened the vitality of the law reports published under private auspices, instead of leading to their extinction as anticipated by its promoters. The result is that no library in the British Empire contains a complete collection of all the reports in its constituent parts, though Harvard Law Library and perhaps others in the United States contain practically complete collections. The subject is one of those awaiting the attention of an Imperial Bar Congress, for the rapidly increasing cost and difficulty of providing accommodations are becoming matters of grave concern to institutions as well as individuals in all parts of the Empire.

Effect of Drunkenness on Criminal Responsibility.—Certain principles of prime importance are enunciated by the lucid judgment of the Lord Chancellor in the recent case of Rex *v.* Beard. As long ago as 1843 the tests to be applied in the case of insanity were laid down by the answers of the judges to the House of Lords in M'Naghten's case, but no authoritative pronouncement has existed up to the present which points out the effect of drunkenness upon criminal responsibility. The decision of the House of Lords has now supplied that want, and the principles to be applied are given with tolerable certainty. In the first place, it may be stated—in fact it was hardly disputed—that homicide caused by an act of violence in the course or in the furtherance of the commission of a felony is murder. Secondly, insanity satisfying the tests in M'Naghten's case, however caused, whether by drink or otherwise, existing at the time of the commission of the crime, and whether permanent or temporary, is a defense to the crime charged. Drunkenness, however, can be an answer only if it be such as to render a person incapable of the intent to commit the act which constitutes the crime. It is no answer if the mind of the accused is so affected by drink that he is only incapable of foreseeing or measuring the consequence of the act, if he is capable of forming the intent to commit the act itself. As Lord Birkenhead puts it in the case in question: "Drunkenness in this case could be no defense unless it could be established that Beard at the time of committing the rape was so drunk that he was incapable of forming the intent to commit it, which was not the fact, and manifestly, having regard to the evidence, could not be contended. For in the present case the death resulted from two acts or from a succession of acts, the rape and the act of violence causing suffocation. Those acts could not be regarded separately and independently of each other. The capacity of the mind of the prisoner to form the felonious intent which murder involved was, in other words, to be explored in relation to the ravishment; and not in relation merely to the violent acts which gave effect to the ravishment."

Personal Liability of Company Directors.—One of the two interesting questions which were raised in the recent case of Belvedere Fish Guano Company Limited *v.* Rainham Chemical Works Limited, was this: Assuming that the plaintiff had substantiated a cause of action against the defendant company, so that it was liable, according to the doctrine which was enunciated in the celebrated case of Rylands *v.* Fletcher (19 L. T. Rep. 220; L. Rep. 3 E. & I. App. 330), for the violent explosion which occurred in its factory, were the defendant directors personally liable, they being concerned only as directors? In the view taken of the postion of those defendants by two of the learned judges of the Court of Appeal—Lord Sterndale, M. R. and Lord Justice Atkin, Lord Justice Younger dissenting—they had agreed with the Ministry of Munitions to manufacture the explosive composition, the explosion of which resulted in the damages sustained by the plaintiffs. That involved the bringing of dangerous substances on the premises belonging to the defendant company. The decision of the House of Lords in Rylands *v.* Fletcher (ubi sup.) unequivocally establishes that a person who brings dangerous substances on premises, and carries on a dangerous trade with them, is liable if, though without negligence on his part, those substances cause injury to persons or property in their neighborhood. The question of the liability of the defendant directors turned, therefore, as was said by the Master of the Rolls, on the relation that existed between them and the defendant company. It appeared that they had formed that company for the express purpose of carrying out the arrangements which they had made with the Ministry of Munitions for the manufacture of explosives. Having formed it, they assumed complete control over all its operations, "knowing"—to quote the words used by his Lordship—"perfectly well that such operations could only be carried out upon the premises by means of those substances, though they did not know of their dangerous character." Consequently, the defendant directors were, in the opinion of the majority of the learned judges of the Court of Appeal, personally liable for bringing the substances on the defendant company's premises, notwithstanding that they had put the actual manufacture thereof into the hands of the de-

*With credit to English legal periodicals.

fendant company. They were, therefore, in a position analogous to that of directors who have personally authorized the creation of a nuisance by a servant of the company.

ARMISTICE OR TREATY AS A CONTRACT.—Sir Herbert Stephen, in a cogent letter of characteristic ability, which appeared in the *Times* of February 27, under the heading "Treaty Revision," traverses the contention of Mr. Keynes in his "Economic Aspects of the Peace" that the relations between the Allies and Germany as parties to the armistice was one of contract. "There was," writes Sir Herbert Stephen, "no contract between them. Neither an agreement nor an expressed agreement, nor even a solemn agreement, is necessarily a contract. The word 'contract' imports something of the nature of a law by which it can be enforced. When parties have agreed to do anything, there is no contract until they have done something of a formal nature and capable of subsequent proof which will enable either, if the agreement is not observed, to claim from some independent authority some redress against the other." These words are applicable not merely to armistices, but to treaties, which Lord Birkenhead distinguishes thus from contracts: "Treaties," he writes, "form the contract law of States, and it is in dealing with their enforcements and duration that international law most conspicuously fails. In the absence of a supreme authority capable of developing a system of law and enforcing its decrees, all rules are of the nature of suggestions for the guidance of conduct, and while nations are so careful as they are at present to reserve their right of action on questions concerning their honor and vital interests in all general submissions to arbitration, the rules applicable to treaties of the more important kind, which do not merely deal with points of detail, must remain largely in the region of pious aspirations. The analogy between contracts between States and contracts between individuals is useful, but, if the purpose is to state the law as it is, this analogy must not be pressed too far." Lord Birkenhead wrote, no doubt, before the ratification of the Peace Treaty, in which the covenant of the League of Nations is embodied, but in that document, avowedly framed for the purpose of transforming international morality into international positive law capable of enforcement, the principle of national sovereignty is acknowledged. The provision in the first article of the covenant, defining the conditions under which a state may withdraw from the League of Nations, is, in the words of the explanatory comment, "an important affirmation of national sovereignty." "It is believed," says this document, "that the concession of the right of withdrawal will in fact remove all likelihood of a wish for it by freeing States from any sense of constraint, and so tending to their more whole-hearted acceptance of membership."

STRUCTURE FOR TRADE USE.—The structures which were sought to be defined by the defendant company either as chattels, or at least as trade fixtures removable by the tenants, in the recent case of Pole-Carew *v.* Western Counties and General Manure Company Limited, if not in any wise identical with ordinary buildings, resembled buildings such as must not infrequently be erected on premises where factories exist. They consisted, according to the description in the judgments concerning them, of acid chambers, 140 ft. long, about 20 ft. wide, and from 13 ft. to 14 ft. high, a tank, two towers, and a lean-to shed. They constituted together apparatus employed in the manufacture of sulphuric acid, an ingredient of artificial manure. Each of the several elements of the apparatus—except perhaps the lean-to shed, which was of trifling importance—played an essential part in the process of manufacture, and would be of no use by itself. The weight of the acid chambers was estimated to be of many tons even when empty; when filled, or partly filled, with acid they weighed considerably more. No part of the structures could be separated from the rest and dealt with by itself. Consequently, the authorities which were relied upon on behalf of the defendants did not really assist them, as Lord Justice Warrington was careful to point out. The erections in such cases, said his Lordship, as Wansbrough *v.* Maton (4 Adol. & El. 884), Wiltshear *v.* Cottrell (1 Ell. & Bl. 674), Rex *v.* Londonthorpe (6 T. R. 377), and Rex *v.* Otley (1 B. & Ad. 161) were all separate and independent buildings and no part of a whole which was itself a composite building. There was one authority, the learned judge added, against the defendant company's contention that such a composite building as was in question in the present case could ever be regarded as a tenant's fixture—that is to say, something which, though attached to and passing with the inheritance, unless removed is removable by the tenant. That was the decision of Vice-Chancellor Kindersley in Whitehead *v.* Bennett (27 L. J. N. C. 474, Ch.) to the effect that buildings, though erected for the purpose of trade, cannot be removed as trade fixtures. The structures in the present case constituted a composite building, not merely resting by its own weight on the soil or on a foundation, but with its walls built into and thus forming part of the soil like the walls of any ordinary building. That is plainly manifested when the fact is stated that each of the acid chambers was supported along one side by an ordinary continuous brick wall, and each was also supported in part by brick piers with girders or beams resting on them, and each also derived some support from iron columns resting on prepared foundations, stones not always of the same height, and supporting beams. Tenants, aiming at preserving their rights in respect of trade fixtures, will find in the present case an impressive illustration of what to avoid.

JOHN SINGLETON COPLEY AND HIS PAINTINGS.—The discovery of the long-lost portrait of Henry Laurens, one of the leaders of the American Revolution, by John Singleton Copley, R. A., should be a matter of very exceptional interest to members of the Legal Profession. John Singleton Copley, the celebrated historical portrait painter, who was himself born in New England, was of Irish ancestry, and the lineal descendant of Singleton, a Lord Chief Justice of Ireland. Mr. Copley was the father of Sir John Singleton Copley, who was promoted from the Mastership of the Rolls to the Lord Chancellorship, and was raised to the peerage as Lord Lyndhurst. Like Sir Robert Reid, Lord Chancellor Loreburn, who was born in Corfu—his father being Chief Justice of the Ionian Islands when under the protection of Great Britain—Lord Lyndhurst, who was born in New England when still part of the British Empire, became Lord Chancellor after the place of his birth had ceased to be within the British Empire. Mr. Copley the painter elected to be a British subject in preference to the acquisition of an American citizenship. One of the very greatest of his paintings dealt with a very thrilling and sensational incident in the political and constitutional history of this country—the appearance of Chatham for the last time in the House of Lords on April 7, 1778, when he came down wrapped in flannel, supported on crutches, led in by his son-in-law Lord Mahon and by his younger son William Pitt, who was destined to rival his fame, to protest against an address, moved by the Duke of Richmond, calling on George III. to withdraw his forces by land and sea from the revolted American colonies. He was clearly face to face with death, and his voice was barely audible in the almost breathless silence of the House. After the reply of the Duke of Richmond, Lord Chatham tried to rise again, but fell back senseless in an apoplectic fit. Mr. Copley's picture of that scene is generally

known as the "Death of Chatham." He, however, lingered until the 11th of May following. The picture is of the very highest value from the number of portraits, carefully painted from the life, which it contains, and to students of legal and judicial annals it is of very exceptional interest because in it Mr. Copley has preserved the remarkable incident, not generally known, that when the whole House of Lords rose, every member of it showing interest and concern, the Earl of Mansfield—Murray, the Lord Chief Justice—who bore Lord Chatham a determined animosity, sat still, as Lord Camden, who was present, wrote in a letter descriptive of the incident to the Duke of Grafton. Mr. Copley's picture of Charles I. on January 4, 1642, demanding in the House of Commons the surrender of the five members, which contains no fewer than fifty-eight likenesses, all taken from contemporary portraits, is preserved in the public library at Boston, in the United States. His picture of the death of Major Pierson in repelling the attack of the French at St. Helier, Jersey, has an interest particularly its own for everyone bred to the law. The little boy in a green dress, running by his nurse's side, is Mr. Copley's son, afterwards Lord Chancellor Lyndhurst.

"NOT PROVEN."—A recent criminal trial in Scotland, which attracted considerable interest in consequence of its peculiar circumstances, has also directed public attention once again to a striking peculiarity in Scottish procedure—namely, the right of the jury, which was exercised in that particular case, to return a verdict of "Not proven." A correspondent, writing the other day in the columns of a lay contemporary, went so far as to advocate the introduction of this non-committal verdict into English procedure—a suggestion little likely to find much favor. Sir Walter Scott disliked it, calling it a "bastard verdict," and adding, "I hate that Caledonian medium quid. One who is not proved guilty is innocent in the eyes of the law." So most people would think; but the right of the Scottish jury to return this equivocal verdict is too inveterate to be disturbed. The curious thing about it, however, is that apparently it is by accident and not by design that the jury can adopt this non-committal attitude with reference to the prisoner. According to a learned writer who discussed the question some thirty years ago, this verdict, and its converse "proven," were introduced by the lawyers of the seventeenth century as the appropriate verdicts in reference to the indictment; thus, the verdict "proven" meant that the indictment was substantiated and the prisoner was guilty; and, on the other hand, the verdict "not proven" meant that the indictment was not substantiated, and consequently that the prisoner was not guilty. In other words, "not proven" was merely an alternative mode of saying "not guilty." It is said that till the end of the eighteenth century the four forms of verdicts continued in use—namely, "proven," "not proven," "guilty," and "not guilty,"—but that shortly thereafter "proven" fell into disuse, but "not proven" kept its place and came to be recognized as distinct from and as falling short of "not guilty." Whether this is the true historical explanation of the verdict of "not proven" is not certain, but it has no air of plausibility about it. A verdict of "not proven" is, in its legal consequence, equivalent to one of not guilty—that is, the prisoner cannot be tried again on the same indictment. The right to return this form of verdict, in which in practice juries very frequently take refuge, is not the only respect in which Scottish criminal procedure differs from that obtaining in England. In Scotland the jury consists of fifteen instead of twelve, the foreman bears the somewhat grandiose title of "chancellor," and the verdict need not be unanimous but may be returned by a bare majority. Scotsmen have always been extremely averse to the necessity for unanimity in verdicts. When, little more than a century ago, juries in civil cases were introduced, with the necessity for unanimous verdicts, the country became bitterly hostile to this requirement, all sorts of objections being urged against it, the religious objection, based on the supposed perjury of some members of the jury in having to give way to the others, being the most powerful. For a time the English practice prevailed, but eventually it had to be modified by permitting the jury, after being inclosed for a certain time, to return a verdict by a majority of its number.

Obiter Dicta

DULL?—Converse *v.* Sharpe, 161 N. Y. 571.

ON THE JOB.—Anderson *v.* Brewing Co., 173 Ill. 213.

TOO PRECIOUS TO LOSE.—Goodwine *v.* Leak, 127 Ind. 569.

GETTING ANXIOUS?—Swift & Co. *v.* Hoover, 242 U. S. 107.

ROBBING THE CRADLE?—People *v.* Stork, 133 Cal. 371, was a prosecution for robbery.

THE RACE IS SOMETIMES TO THE SWIFT.—In Trott *v.* State, (N. Dak.) 171 N. W. 827, the plaintiff came home a winner.

WHICH CAMP JACKSON?—In Jackson *v.* State, 218 S. W. 369, Camp Jackson was convicted of carnally knowing a female person under the age of 16 years.

SWIFT RETRIBUTION.—"He played 'Home, Sweet Home' once through, just finishing, when instantly upon a shot being fired from the outside he died."—See Emery *v.* State, 101 Wis. 627.

HOT STUFF.—State *v.* Warm, 105 Atl. 244, was a prosecution for murder and not for arson, whereby a joke is lost. Furthermore, the state failed to make it hot for the defendant, who was granted a new trial.

GREATLY EXAGGERATED.—Recent reports from Europe as to the immense fortune still possessed by Bill Hohenzollern bear a close resemblance to the report of Mark Twain's death. We note that in the case of In re Kaiser, 8 Am. B. R. 108, Kaiser was declared a bankrupt.

NO DIFFERENCE.—In Opelt *v.* Al G. Barnes Co., (Cal.) 183 Pac. 241, the court said that it was a matter of grave concern "just how far to apply the rule of accountability to a bright, ten year old boy at a circus." Would it have been any easier for the court to apply the rule to a fifty year old boy at a circus?

THE PROPER FORUM.—It was perfectly natural that the parties to Doutt *v.* Doutt, 175 Pac. 740, not only should eventually seek a divorce but should be content to try the issue in Oklahoma. On the other hand it was likewise perfectly natural that the parties to Whise *v.* Whise, 36 Nev. 16, should air their domestic difficulties in the state made famous by Reno.

CARELESS PHRASEOLOGY.—Glancing casually at the case in 251 Fed. 157, one might be somewhat startled to observe such expressions as these: "Men found it impossible to stay long at a time on the Lord;" "it was a bad situation for the Lord;" "most of the Lord's men were sent to the hospital;" and "the value of the Lord was $1500." The mystery is solved, however, and the absence of any sacrilegious intent demonstrated by the statement found near the end of the opinion that "the Lord was an abandoned vessel."

EDUCATING AMERICA.—A circular received by this magazine from the "Emergency Educational Conference of Labor and Civic Organizations" protests against the laws proposed in the New York Legislature by the Lusk Committee as tending to "block all progress in the field of education." It may be so, but when we seek leadership in the field of American education it will not be of an organization on whose executive committee are found Rybicki, Trachtenberg, Baer, Bailin, Biedenkapp, Budish, Defrem, Friedland, Karlin, Markolf, Schain, Shiplacoff, Silverman, and Simkhovitch.

A BENEDICT ON THE BENCH.—In Riley *v.* State, 65 So. 882, Judge Cook of the Supreme Court of Mississippi said: "It is not always conducive to domestic peace for a husband to contradict the statements of his wife, and ordinarily the wise husband attempts to soothe and placate his irate spouse rather than to question her statements, however wide of the truth they may be. A few husbands are brave or foolhardy, and at all hazards risk the consequences; but the law does not fix rules for the guidance of the superman, but all rules are adopted for the average. Of course, a judge far away from 'the firing line' incurs no immediate danger by lining up with the superman, but we who are fashioned in the average mold shrink from even that form of bravado."

ET TU, BRUTE!—Friends of liberty have come to regard Gov. Edwards as one of their most fearless champions. Yet the law reports furnish some reason to believe that even he is an enemy of innocent joy (Edwards *v.* Candy, 14 Hun 596; Edwards *v.* Tennis, 179 N. Y. Supp. 807). But in his behalf may be cited Edwards *v.* Bryan, 88 Ga. 248. So he is no believer in the mortification of the flesh (Edwards *v.* Lent, 8 How. Pr. 28). While he is opposed to Three Rivers (Edwards *v.* Three Rivers, 102 Mich. 153) it does not appear that Green River was among them. At the risk of providing ammunition for the Anti-Saloon League, it must be pointed out that he is apparently a more thorough going revolutionist than Lenine (see Edwards *v.* Thirty-five Bags of Gold Dust Saved out of the Wreck of the Union, Fed. Cas. No. 4299a).

LONG AND SHORT STATUTES.—A recent issue of the London *Law Times* contained the following item: "The Law Property Bill, whose second reading was moved by the Lord Chancellor in the House of Lords on the 3rd inst., is believed to be one of the longest Bills ever introduced. It consists of no fewer than 250 printed pages. The very longest Bill ever introduced, according to the memory of the time, was placed before the House of Commons in June, 1883. It consisted of 400 printed pages, and was the Electric Lighting Bill introduced by Mr. Joseph Chamberlain, as President of the Board of Trade, and Mr. Holms, the Parliamentary Secretary to the Board of Trade. It was eventually withdrawn owing to the pressure of business, which towards the close of a session is always very great. Lord Coke has placed on record that the shortest statute with which he was acquainted was a statute passed in the 5th Henry IV., which was as follows: 'None from henceforth shall use to multiply gold or silver, and if any do the same he shall incur the pain of felony.'" We do not recall at the moment any very long or very short American statutes, at least none which might claim to be record-breaking. Can any of our readers help us out?

A PATRON OF THE ACT OF DRINKING.—Just as a historical novel is supposed to give an insight into the habits and customs of the period to which it has reference, so may the following extract from Los Angeles Athletic Club *v.* U. S. Fidelity, etc., Co., (Cal.) 183 Pac. 174, recall to our minds the ways of men in a nearly forgotten era of American history. Besides, it makes refreshing reading. The man Patterson was the manager of the plaintiff club which brought suit on his bond to recover the value of alcoholic beverages and the like consumed by him without paying therefor. Just what he was in the habit of doing in the way of drinking was stated in the court's opinion as follows: "Roberts, the head barkeeper, who was in that position throughout Patterson's employment as manager, testified that the latter received at his bar, on an average per day, four long whisky highballs, two cocktails, three to five pints of beer, two gin fizzes and two glasses of Lithia water; and that he smoked about eight cigars per day, and received from two to six quarts of whisky per week, and six pints of champagne per week—together with cigarettes, light wines, and other commodities not enumerated. The witness further states that he does not include in his list any liquor which Patterson might have drunk between 2:30 P.M. and 4:30 P.M. while the witness was off duty. Another bartender, named Sakai, testified that he was bartender of the club after July 14, 1913, and that he served Patterson drinks on an average of about four pints of Budweiser a day, a cocktail before dinner, another about 6:30 P.M. and about three pints of whisky a week; also occasional highballs and packages of candy. Shubata, another bartender, testifies to serving Patterson mostly highballs, Budweiser beer, and some champagne. He served him an average daily of from three to five highballs, about four pints of Budweiser, about three pints of whisky per week, a gin fizz in the morning, and sometimes wine, cocktails, and champagne."

Correspondence

JOHN SINGLETON COPLEY AND JUDAH P. BENJAMIN

To the Editor of LAW NOTES.

SIR: The recent announcement of the discovery of the Laurens portrait by Copley may make it of interest to recall the fact that the younger John Singleton Copley, son of the artist, better known in history as Lord Lyndhurst, was one of two Americans who attained great distinction in the legal profession in England.

The younger Copley was born in Boston in 1772, but, when a very young child, removed with his family to London. After notable success at the bar and in the House of Commons, he was three times Lord Chancellor and in the interval between two of his terms as Chancellor served for some years as Chief Baron of the Exchequer. In mental endowments and in the special qualities that make up excellence on the bench, he ranks among the first of great English judges. Lord Westbury, a keen and bitter critic, and himself almost an intellectual prodigy, was of the opinion that Lord Lyndhurst's was the finest judicial intellect he had known. He lived to great age, dying in his ninety-second year, and, as Bagehot has noted, "to the very extremity of a protracted life he both looked, and was, a great man."

Though Lord Lyndhurst's family were loyalists and he himself, except in early life, is presumed to have had little sympathy with republican doctrines, it is recorded that when he was once asked what was the most interesting day in his long life, he replied, without hesitation, the day spent at Mount Vernon with Washington during a visit to America, made when he was a very young man.

The other American referred to, as will readily occur to all, is Judah P. Benjamin, whose remarkable record as a leader of the bar, both in this country and later in England, is probably

much better known to the present generation than the story of Copley's life.

HENRY C. RIELY.

Richmond, Va.

"MOONSHINE" PROPERTY

To the Editor of LAW NOTES.

SIR: The daily papers are continually giving reports of sheriffs and other officers making raids upon "blind tiger stills" and destroying the still and the mash, without first having a judgment of the court upon it. This still and the mash and other materials used by the "moonshiners" is property and has all the rights of property until a court of competent jurisdiction adjudges that it is contraband and should be legally destroyed. If the statute of the state authorizes a sheriff to destroy property because forsooth in the judgment of the sheriff it is being used for moonshining, may not a statute authorize a sheriff to arrest an alleged felon and then proceed to constitute himself sole judge, jury and executioner, and if not why not?

Taine, speaking of the madmen of the Revolution, says: "Ils ne savent pas qu'il vaut mieux faire tuer cent citoyens honnettes que leur laisser pendre un coupable non jugé!" (They did not know that it is better to kill a hundred honest men than to hang one thief without a trial.) Do not the members of the Anti-Saloon League know that it would be better to have a hundred illicit stills than to destroy one without a judgment of a court?

Whenever you protest with the Anti-Saloon League for their lawlessness, you are always answered that we must do these things in order to destroy whisky and its influence. The same plea was made by Robespierre, who claimed that it was necessary to hurry a citizen off to the scaffold without the pretense of a legal judgment in order to establish a moral republic. The immoral people were always those that were in opposition to Robespierre. The Anti-Saloon League claims that it has only the purpose to establish a moral republic, and one may see that their idea of a moral republic is like that of Robespierre, a republic which shall be under the complete domination of the Anti-Saloon League, and the immoral people are those who oppose this domination. "En virtue de la constitution," says Taine, "l'anarchie spontané devient l'anarchie légale." (By virtue of the constitution, the spontaneous anarchy became legal anarchy.)

The Anti-Saloon League by its methods of enforcing prohibition is seeking to overcome the anarchy of moonshining by a legal anarchy. The history of the French Revolution as given us by Taine shows that "l'anarchie légale" was the more terrible of the two, making blood flow like water and costing millions of lives.

CHAS. E. CHIDSEY.

Pascagoula, Miss.

"Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner."—Per Swayne, J., dissenting, in Slaughter-House Cases, 16 Wall. 127.

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STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912,

of LAW NOTES, published monthly at Northport, L. I., N. Y., for Apr. 1, 1920.

State of New York } ss.
County of Suffolk }

Before me, a Notary Public in and for the State and county aforesaid, personally appeared M. B. Wailes, who, having been duly sworn according to law, deposes and says that he is the President of the Edward Thompson Co., the publishers of LAW NOTES, and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management, etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 443, Postal Laws and Regulations, to wit:

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M. B. Wailes, Prest.

Sworn to and subscribed before me this 8th day of April, 1920. Geo. Babcock. Notary Public [SEAL]. (My commission expires March 30th, 1921.)

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Law Notes

JUNE, 1920

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Argument by Epithet.

THE United States is to some extent aroused to a realization of the forces of disloyalty at work in our midst. Desirable as this result is, it has possibilities of abuse, and instances are already observable. Legitimate reform measures are called "Bolshevistic" or "Anarchistic" by their opponents, and more than one observer has reached the conclusion that reaction rather than revolution is the peril of the day. A member of the New York legislature, who served with our forces in France, advocated a bill allowing the sale of beer and light wines, and was, because of that fact, publicly referred to as "pro-German" by a prohibitionist whose clerical profession gave him exemption from military service. Two distinct evils arise from this perversion of the widespread movement for Americanization. One is that measures of importance may be driven from the field by mere epithets without a consideration of their merits. Dr. Johnson said that "patriotism is the last refuge of a scoundrel," and a yet greater student of humanity told of those who seize the livery of heaven to serve the devil in. Both these aphorisms are finding exemplification in existing efforts to influence public sentiment. A consideration of even more importance is that no surer way could be found to break the force of the patriotic sentiment which is essential to the maintenance of our institutions. The repeal of the 18th Amendment, the enactment of industrial health insurance laws, or the regulation of rental contracts may or not be sound domestic policy, but every man knows that they are not seditious, pro-German or anarchistic. After hearing these terms misapplied and perverted to every selfish purpose, the great mass of citizens will become disgusted with the whole business and turn a deaf ear to warnings which deserve to be heeded. The most dangerous enemy of the movement for a better Americanism is the man who seeks to take advantage of it to advance some partisan or commercial interest.

A Case of Atavism.

IN the long-ago day when the interpretation which the witch doctor gave to the sounds issuing from a hollow tree trunk became a "moral issue" as to which it was both heresy and treason to disagree with him, any inanimate thing which chanced to be an instrument of injury was destroyed, amid incantations directed against the evil spirit by which it was supposed to be obsessed. A little later the procedure was elaborated into a system of capital punishment of animals for injury to a human being. See Parmelee on Criminology, p. 10; Evans, Criminal Prosecution, etc., of Animals. The methodical Teuton at an early date distinguished between "thierstrafen," which was the capital punishment of domestic animals, and "thierprocesse," or judicial proceedings in ecclesiastical courts to impose sacerdotal curses on an entire species of vermin. See Von Amira, "Thierstrafen and Thierprocesse." The more practical Briton speedily transformed these into the doctrine of deodand, to the profit first of the church and later of the king. An occasional trace of the lingering spirit of barbarism is still noticed in a little child who, in a fit of temper, turns to strike the chair on which he has stumbled. It was supposed that all traces of this folly of the childhood of our race had vanished from our law. But in a case decided in 1920 (*People* v. *Marquis,* [Ill.] 125 N. E. 757) we read that an automobile truck being intercepted near Chicago, loaded with eleven barrels of bottled beer, judgment was entered, inter alia, that the sheriff should destroy the truck and the beer by "taking them to a suitable place within two miles of the court house, thoroughly saturating them with oil of a highly inflammable nature and publicly burning and destroying them between the hours of ten o'clock in the morning and three o'clock in the afternoon." Needless to say the Supreme Court of Illinois set aside the judgment and held the statutory provision under which it was entered to be void. It seems that the prohibition fanatics, having borrowed "taboo" from the South Sea Islands, are in a fair way to introduce "hoodoo" and "voodoo" along with it. It needs but two or three "reverend" gentlemen dancing around the burning truck and shouting anathemas against the demon concealed somewhere in its crank-case to complete a picture fit for the Congo. The condemnation of property used in violation of law is well enough as a form of fine. The destruction of property capable only of an unlawful use is not objectionable. But when it comes to the destruction of a motor truck worth probably several thousand dollars, and differing in no way from the trucks in lawful use all over the country, we have the crowning absurdity of a movement which is based on an utter inability to distinguish between use and abuse. It has long been a source of wonder why prohibitionists do not drown their children to keep them from having colic.

Dissenting Opinions.

IN a recent issue of the *Central Law Journal* (Vol. 90, No. 18), Mr. W. W. Thornton, in the course of a discussion of means to limit the bulk of the case law,

recommends the cessation or non-publication of dissenting opinions, urging that they are "of no earthly value." He quotes with approval a speaker who refers to their tendency "to weaken the force of the court's decision which all must accept as an unappealable finality." It is submitted that there is a considerable inconsistency between the two statements, since if a dissent does weaken the decision it is of some use to the attorney against whom the decision bears. It is a very short-sighted policy which regards it as an evil that a decision which is capable of being weakened by opposing argument should be so weakened. It is as true as when Bacon said it, that "with an enlightened bar and an intelligent people the mere authority of the bench will cease to have any weight at all if it be unaccompanied with argument and explanation." It is only as between the parties that a decision is an "unappealable finality." So far as it settles the law for the future there is always an appeal to the court of a more enlightened day, and a glance at any table of overruled cases will show how often that appeal is successful. It is no inconsiderable service which has been performed by the judges whose dissents so clearly exposed the weakness of prevailing opinions that counsel were encouraged to present the question again after time had obliterated mere pride of opinion. It is a good thing to settle the law, but it is equally a good thing to prevent it from being settled until it is settled right. Citation of cases would be invidious, but every lawyer can recall instances where the dissent of such jurists as Justice Wanamaker of Ohio, Justice Robinson of North Dakota and Chief Justice Browne of Florida has left the majority opinion emasculated of all except authority, and certain to be overruled when the personnel of the court changes. Until that far-off day when "every riddle shall be read and every knowledge shall be known" publicity for the voice of dissent is worth all that it costs.

Inviting Strikes.

EVERY right-minded man will agree that to assert an individual wrong by violence or by injury to the interests of many innocent persons is altogether wrong. But that method of assertion will be practiced by all who are strong enough to indulge in it just as long as the government encourages it by giving its chief attention to grievances thus asserted. If a labor organization suffers a real or fancied wrong there is a strike, the business of a city or a state is tied up, thousands of people who have nothing to do with the controversy suffer severely. But, when a grievance is thus brought to attention, bills are passed, commissions are created, president and cabinet officers bestir themselves to see that it is remedied. But let an equal injustice be done to the same number of persons too unorganized or too law abiding to start a public disturbance, and the best they can get is a polite letter of meaningless generalities from a Congressman. Compare, for example, the official attitude towards a demand by railroad employees for more pay and towards the like and far more deserving demand of college professors and school teachers. It is useless to rail against strikes as long as that condition exists. There never would have been a union had employers been as ready to yield to the demands of justice as they were to yield to those of force. As a penalty for invoking force, they are now compelled in many instances to yield to demands quite devoid of justice. In the days when justice in individual controversies was granted to individuals by the king's favor men rallied around a leader, that their private wrongs might be remedied by his powerful intercession. Now that the courts are open to all and even-handed justice is in the main dispensed to rich and poor alike, that condition has disappeared. When the remedy for any industrial injustice is equally available to every man, the autocratic and trouble-making powers of the union "business agent" will disappear as completely as has the semi-regal status of the feudal baron.

The Dangerous Paranœic.

A RECENT occurrence in New York city where a man, after sitting quietly through most of a church service, suddenly rose in a fit of homicidal mania and fired several shots, killing one man and wounding others, brings sharply into view a defect in our system of guarding against crime. For years the man had been considered a "harmless" crank. Any competent alienist could have discovered in five minutes that he was a paranœic and could have predicted that his disease would sooner or later lead to violence, but to what end? No judge would have refused to order his release on habeas corpus, observing his composed and intelligent demeanor. The man who but a short time ago attempted the life of Premier Clemenceau had a like history, showing infallibly to the professional eye the presence of progressive paranœia. Another "crank," the so-called "Sultan of the Sahara," was killed by his wife in self-defense a year or two ago. There probably was not an alienist in New York city who could not have predicted that this eccentric millionaire would either kill some one or be himself killed, yet under our existing laws nothing could be done about it till the tragedy occurred. Of course, in dozens of cases obscure persons have been sent to asylums under similar circumstances, but the ordinary lunacy proceeding is futile against an incipient paranœic if he has the money and influence to fight it. The release of Thaw and its inevitable sequel have not taught courts and juries that there are some dangerous forms of insanity which a layman cannot detect. Our criminal courts deal with mental disease fully as much as with law; probably forty per cent of crime is committed by persons suffering to some extent from mental disease. But in spite of that fact the courts are not organized to deal with that phase of their duty. At least in the larger cities, every criminal court should have its psychopathic department in which may be considered not only strict legal liability but also the questions of the real cause of the crime and the moral responsibility of the actor, which are essential to a sentence which embodies the maximum possibility of reform. With such a department, it would be entirely possible to get an intelligent and scientific study of the supposedly harmless crank, coupled with judicial power adequate to protect the public against the progression of his disease. But as long as we muddle along on the theory that every dog is entitled to one bite and every crank to one homicide, we will pay an annual toll in innocent lives for our national stupidity.

The Judicial Power as Autocratic.

A SUBSCRIBER, whose letter is published in this issue, takes exception to the statement in a recent number of LAW NOTES that the power of the courts to declare

legislation invalid is the nearest approach to autocracy in our institutions. The argument in support of his contention is based on the idea that a decision by a majority of the Supreme Court is no more "one man power" than a decision by a majority of the people, and that the people have in any event the power to conform the law to their desire by amending the Constitution. This view is plausible but scarcely convincing. Between absolute democracy and absolute autocracy there are many intermediate stages, and the extent to which a power not exercised by the whole people approaches autocracy depends on (1) the number of persons by whom it is exercised, (2) the extent of popular control of their selection and tenure, (3) the ease and simplicity of method by which their decision may be reviewed by the people. Applying these tests, the power to nullify all legislative acts is conferred on a majority of nine men, appointed for life, and the only form in which their decisions may be reviewed is by the slow and cumbersome process of having a constitutional amendment passed by Congress and ratified by thirty-six States. This, of course, is not a pure autocracy, but the western world has known in recent years but two autocrats more absolute, and to-day one is dead and the other in exile. It is not necessarily a condemnation of any institution to show it to be autocratic. It has been said that the best possible government is a benevolent despotism, and viewing the way in which democracy usually "muddles through" it is not unnatural that some should be willing to take a chance on the continued benevolence of the despot. Moreover, in practice, the court is not as inflexible as it would have us believe, as witness the liquor decisions from *Leisy* v. *Hardin* down to date, or the labor cases since the *Lochner Case*. The power of the courts to review the validity of statutes has done some good as a stop gap until a more perfect system of representation and popular participation in legislation is attained. None the less, it is merely a sort of protectorate over a people learning the art of self-government, which our maturity will inevitably cast aside.

Discouraging Lynch Law.

LYNCHING is, of course, an offense peculiarly abhorrent to the legal profession, constituting as it does a direct assault on our system of government by law. Among the many causes of this evil, one is suggested by a comparison of two recent cases from the same jurisdiction. In *Lotto* v. *State,* (Tex.) 208 S. W. 563, the court held that it was not "dishonorable conduct" for an attorney to say during the war that he hoped Germany would win. To this somewhat astounding pronouncement the court added by way of dictum: "It is to the everlasting credit of this community that it appealed to the orderly courts of our country instead of an improvised tribunal of a vigilance committee. Occasionally the established law has seemingly failed to afford a remedy adequate to an unusual situation. So it appeared in this case. The defect was speedily corrected by prompt state and national legislation, which pronounced such conduct a crime and provided a penalty." But alas for the hopes of the law abiding, a year later the "orderly courts of our country" produced a holding that the state act was unconstitutional because the forbidding of disloyal speech was within the exclusive power of the federal government and because such a prohibition violated the guaranty of free speech. *Ex parte Meckel,* (Tex.) 220 S. W. 81. In support of this holding no authority is cited, and it is believed that none can be produced. Of course, all this does not justify for a moment "an improvised tribunal of a vigilance committee," but assuming a local situation such as to make proper a judicial compliment on the restraint exhibited before the two decisions referred to, it is not difficult to imagine what that situation is now that they have been rendered. It is not to be doubted that both the decisions commented on were honestly and conscientiously rendered. The fault is not with the court but with the system which has grown up in many reviewing courts of bending every effort to impart a technical legality to acts of indubitable turpitude. This attitude springs primarily from a spirit of fairness toward the object of public prosecution, but in many instances fairness to the public seems to be forgotten and it is natural though regrettable that there should sometimes be a reaction of lawless violence. One reading the decisions of the lower courts in the cases arising under the Selective Draft Act and the Espionage Act need not be an apologist for lynch law to wonder at the patience and moderation of our people, and to see in that patience a sufficient answer to the assertion often made that the present effort to purge the country of disloyalty is "hysterical."

Professional Bondsmen.

WHILE he is no longer distinguished by wearing a straw in his shoe, it appears from a recent discussion before the New York State Bar Association that the professional bondsman is still very much in evidence. Judge McAdoo, Chief City Magistrate of New York, in speaking of the evils of the bonding system in the lower courts, said: "I am inclined to believe that a great deal of this individual cash bonding is done in co-operation with lawyers who frequent these courts. The lawyer says to the defendant: 'I will take charge of your case and get you a bond for so much.' The bondsman often hangs out in the lawyer's office and gives the same address. Maybe the lawyer himself furnishes the money. The matter can be fixed up between them as to how the money obtained from the defendant is to be divided, if divided at all. In this way, especially in the Women's Court, it gives the lawyer an opportunity of charging a round big fee for mixing up his professional service and the getting of the bond. One can well imagine what happens to a woman under these circumstances who is known to have considerable money or well-to-do friends. One man gave cash bail in the Women's Court in 160 cases during a period of six months. The possible extortion which may be practiced by lawyer or bondsman, or both, under these conditions is obvious." Judge McAdoo recommends the enactment of a law licensing professional bondsmen and regulating the amount of their fees. While some regulation is doubtless desirable, the question has many angles and the regulation must be drawn with care or it will do more harm than good. The persons who resort to a professional bondsman for bail are usually unable to get it in any other way. The business is one of some hazard, and if the remuneration is not sufficient to justify the risk of loss the result will be that many persons will be unable to secure bail. If it is true, as Judge McAdoo

surmises, that many of the abuses of the bail system occur through the complicity of attorneys, no legislation is necessary to remedy that situation.

The Mental Anguish Doctrine.

THERE seems to be a lack of both reason and justice in the attitude of the courts which disallow damages for mental anguish unless it is accompanied by physical suffering. It is particularly hard to reconcile that position with the rule now generally prevailing that acts of a spouse causing mental suffering only are ground for a divorce. But while it is believed that the fears generally expressed that the mental anguish doctrine would lead the courts into a quagmire of uncertainty are quite unfounded, an occasional case appears in which that doctrine seems to have been pressed to an extreme length. Such a case was recently decided in Louisiana (*Nickerson* v. *Hodges,* 84 So. 37). In that case it appeared that Miss Nickerson, a maiden lady 45 years of age, employed as a soap drummer, visited a negro fortune teller, who told her that certain deceased relatives had left a large sum in gold buried on certain premises. Miss Nickerson at once engaged assistance and several months were spent in digging around the premises in question, the proprietor good naturedly acquiescing in the exploration. At length the daughter of the owner and two young men conceived the idea of a practical joke, so they obtained and buried an old copper kettle, filled it with rocks and dirt, enclosing a note from the supposed ancestor directing that the kettle be taken to a bank and kept unopened for three days until all the heirs were notified. This direction was carried out, precautions were taken to guard the bank against robbery, and on the appointed day the "joker" was opened. Miss Nickerson having died, the court ordered an allowance to her heirs of $500 damages for the mental anguish suffered by her, the young lady who concocted the jest and her two associates being the defendants. The joke like most practical jokes was unkind, though the conduct of the victim certainly invited it. But to term it a "conspiracy" and allow a recovery of $500, inuring by pure fiction of law to heirs who suffered not a particle of injury, and if truth were known probably laughed most heartily at the joke on the old lady, is scarcely what one would expect from a court whose power to administer substantial justice is unusually free from technical limitations.

Liability of Practical Jokers.

OF course, where a substantial injury is inflicted by an act from which the injury should have been anticipated, the jocular intent of the perpetrator is no defense, and the courts have so declared in a number of cases. For example, it was a merry jest of rude Elizabethan flavor which was passed on in *Parker* v. *Enslow,* 102 Ill. 272. The proprietor of a grocery store had long been in the habit of keeping a box of smoking tobacco on the counter for the use of the public. One day in jovial mood he mixed gunpowder with the tobacco with the result that a local character of intemperate habit, having filled his pipe from the box, was blinded by the explosion which resulted when he lighted it. The court said in sustaining a recovery: "The putting of powder in smoking tobacco, whether a mere thoughtless act for purposes of amusement, or a malicious act with an intention of doing harm, was necessarily extremely dangerous in its tendency, and cannot be excused." It seems, however, that some small measure of retaliation on a joker is permissible. *Warmen* v. *Swindell,* 54 N. J. L. 589, was an action by an employer for the value of a set of reins which were taken by the defendant for the humorous purpose of making it impossible for the plantiff's clerk to drive home. The court said: "If the defendant relied upon the fact that he removed the lines by way of a joke, it was a question for the jury to decide whether the parties had been perpetrating practical jokes upon each other in such a way that the defendant had a right to believe that the plantiff would accept this act as a joke." In the practical administration of the law the infliction of a substantial injury should be the real test of liability and the New Jersey case approaches the permissible limit in taking cognizance of a trivial matter involving no malicious intent. The good sense of juries may ordinarily be trusted to distinguish between harmless and malicious humor. It is to be noticed in this connection that the verdict of the jury in the Louisiana case discussed in the preceding paragraph was in favor of the defendants.

Liability of Telegraph Companies.

REFERENCE to the mental anguish doctrine naturally brings to mind the class of cases in which it has been most frequently invoked, actions against telegraph companies for negligence in transmission of messages. As has been heretofore pointed out in LAW NOTES, the Act of Congress of 1910 (4 Fed. St. Ann. [2d ed.] 337), putting interstate messages under the control of the Interstate Commerce Commission, has rendered inapplicable to such messages not only all state statutes but all state holdings which conflict with the decisions of the federal courts. Those courts have decided that no recovery can be had in telegraph cases for mental anguish and that a limitation of liability on unrepeated messages to the sum paid for transmission is valid. The result is that telegraph companies are, except as to intrastate messages in some states, practically immune from liability for negligence. The development of our industrial system has been so rapid and the demands on it have been so strenuous that reasonable attention to safety has been secured only by rigid rules of legal ability. Does anyone imagine, for instance, that the remarkable record of the railroads in transporting passengers with a minimum of accident would ever have been attained had it not been for a rule amounting almost to absolute liability, backed by the disposition of jurors to assess damages with a free hand? The still lower percentage of accident to passengers in England has been often attributed to the fact that under the strict rules of criminal liability for negligence there obtaining "every director rides on the cowcatcher." The opposite conditions in the case of the telegraph companies will inevitably tend to increasing negligence, and increasing insolence to complaining patrons. The country had during the federal control of railroads an object lesson on the effect of nonliability not only on the efficiency of service but on the attitude of employees toward the public. There is, of course, always the consoling reflection that "every hog comes at last to the

slaughter house," and if the telegraph companies continue to merit drastic regulation they will, like the railroads, eventually receive it in overflowing measure.

The "Loaf of Bread Case."

A CONTROVERSY between a passenger and a carrier over the possession of a loaf of bread has recently wended its way through the courts of New York to final decision by the Court of Appeals, taking some five years for its pilgrimage. The bread was left by a passenger in a seat in a subway car, and was picked up by another passenger. A subway guard claimed the possession of the prize, and on the finder's refusal to turn it over to him called a superior, who in turn summoned a police officer and had the passenger arrested for larceny. In an action for malicious prosecution the court held that the property was not lost or abandoned by its owner and that the carrier was entitled to possession as gratuitous bailee for the owner, so that one seeking to deprive it of that possession was guilty of larceny. In one sense it is deplorable that the time of the courts should be occupied at length by a dispute so trivial, but the profession is indebted to stubborn litigants over trifles for many of its leading cases. Was not the opinion of Judge Lamm in the "Mule Case" worth all the litigation cost? The decision in the New York case has excited comment because of the small value of the property involved rather than because of the novelty of the facts or the ruling. There is a clear distinction between lost property and property which is merely mislaid. As to mislaid property it is well established that a finder acquires no rights, but the right to possession is in the owner of the premises where the property is found. See the note to *Foster* v. *Fidelity Safe Deposit Co.*, Ann. Cas. 1917D 798. Convictions of larceny have been had in similar cases, as where a sum of money left in a street car was appropriated by a passenger. *State* v. *Courtsol*, 89 Conn. 564. The rule thus established is clearly the best in practice, since there is a much greater chance of the owner getting back mislaid property from the "lost property" desk of a carrier or a department store than from a private finder. There are, of course, many cases where mislaid property is never reclaimed, and in view of that fact it is not unnatural that a finder may, with no dishonest intent, be reluctant to surrender his chance of permanent possession to one standing no nearer to the owner than himself. It does not seem, however, that any rule could be devised which would work more equitably than that which the courts apply, or which would be so effective in preserving the rights of the true owner.

RELIGIOUS BELIEF AS EXCUSE FOR FAILURE TO FURNISH MEDICAL ATTENDANCE

THE practice of medicine or the art of healing may fairly be assumed to date back to the beginning of man. Certainly it has existed in one form or another for such period of time as mankind has been able to record. Probably the earliest example of medical practice of which we have a record is found in Egyptian history, though medicine in China was undoubtedly known and practiced in those dim ages of which no record other than tradition is available. It was, from the very beginning, more or less associated with religious belief, and its practice and teaching were in the hands of the priests of the various deities, and for many years they were the sole prototype of the modern "medic." In the early stages of its development it was elemental in form, ranging from the weird incantations of the priests, the use of a formidable array of crude and curious concoctions and barbarous remedies, to the taking of quarts of blood on the slightest provocation as practiced by the profession in comparatively recent years. To-day we enjoy the benefits of scientific surgery, extensive knowledge of drugs and the liberal use of common sense, sunshine and moonshine.

In whatever form practiced it was early recognized as a necessity, and as it perfected itself it was so recognized by the law, until to-day we have the well-established doctrine that the omission of one on whom rests the duty of supplying medical attendance to those dependent on him renders him liable for the consequences. This rule is based on and is an outgrowth of the rule that where damage or injury is the direct and immediate result of the omission of a person to perform a plain duty imposed on him by law or by contract, he may be held accountable. The duty imposed, however, must be a plain and positive duty. That is, it must be one as to which different minds agree, and that does not admit of any discussion as to its obligatory force. Where doubt exists as to what conduct should be pursued in a particular case, and intelligent men may differ as to the proper action to be taken, the law does not impute guilt to any one, where from the omission to adopt one course instead of another fatal consequences follow to others. The law does not enter into the reasons governing the conduct of men in such cases to determine whether they are culpable. In addition the duty must be one which the party is bound to perform by law or by contract, and not one the performance of which depends simply on his humanity, or his sense of justice or propriety. As was said in *People* v. *Beardsley*, 150 Mich. 206, 13 Ann. Cas. 34, 113 N. W. 1128, 121 Am. St. Rep. 617, 13 L. R. A. (N. S.) 1020: "The law recognizes that under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter. . . . This rule of law is always based upon the proposition that the duty neglected must be a legal duty imposed by law or by contract, and the omission to perform the duty must be the immediate and direct cause of death." Thus even in the absence of such obligations, it is undoubtedly the moral duty of every person to extend to others assistance when in danger; to throw, for instance, a plank or rope to a drowning man, or make other efforts for his rescue. And if such efforts should be omitted by any one when they could be made without imperiling his own life, he would, by his conduct, draw on himself the just censure and reproach of good men, but this is the only punishment to which he would be subjected by society.

As a second prerequisite necessary to render criminal the neglect of parents or others having charge of children or other dependents, there must be capacity, means and ability as well as the legal duty to provide and act. But as was said by Lord Russell in *Reg.* v. *Senior* (1899) 1 Q. B. (Eng.) 283, 19 Cox C. C. 219: "Neglect

is the want of reasonable care—that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind—that is, in such a case as the present, provided the parent had such means as would enable him to take the necessary steps. I agree with the statement in the summing up, that the standard of neglect varied as time went on, and that many things might be legitimately looked upon as evidence of neglect in one generation, which would not have been thought so in a preceding generation, and that regard must be had to the habits and thoughts of the time. At the present day, when medical aid is within the reach of the humblest and poorest members of the community, it cannot reasonably be suggested that the omission to provide medical aid for a dying child does not amount to neglect."

Among the domestic relations of society there are many as to which the law has imposed certain positive and unquestioned duties. Of these the most common may be said to be that of parent and child and husband and wife. It is well settled that where a parent wilfully omits to provide shelter, clothing and food for an infant child, and by reason of such omission the child dies, the parent is guilty of manslaughter, and it has been held that medical attendance comes within the scope of the duty imposed on a parent to furnish necessaries to a child, when it is reasonable and proper that medical treatment and assistance should be provided. *Rex* v. *Brooks,* 9 British Columbia 13; *Rex* v. *Lewis,* 6 Ont. L. Rep. 132, 23 Can. L. T. 257, 7 Can. Crim. Cas. 261, 2 Ont. W. Rep. 290, 566. That such an omission may amount to manslaughter in case of the death of the neglected person is well established. Thus in *Westrup* v. *Com.,* 123 Ky. 95, 93 S. W. 646, 124 Am. St. Rep. 316, 6 L. R. A. (N. S.) 685, it was said: "Involuntary manslaughter is the killing of another person in doing some unlawful act not amounting to a felony, nor likely to endanger life, but without an intention to kill, or where one kills another while doing a lawful act in an unlawful manner. . . . Any person neglecting to discharge a duty required of him, either by law or contract, thereby causing the death of another, is guilty of involuntary manslaughter. Thus, if a parent or master neglects to supply food and clothing or medical attendance to a child or apprentice whom he is under a legal obligation to maintain, and the child or apprentice dies of the neglect, he is guilty of involuntary manslaughter. . . . Where the husband neglects to provide necessaries for his wife, or medical attention in case of her illness, he will be guilty of involuntary manslaughter, provided it appear that she was in a helpless state and unable to appeal elsewhere for aid, and that the death, though not intended, not anticipated by him, was the natural and reasonable consequence of his negligence. . . . A criminal intent is not necessary in involuntary manslaughter." And in *Owens* v. *State,* 6 Okla. Crim. 110, Ann. Cas. 1913B 1218, 116 Pac. 345, 36 L. R. A. (N. S.) 633, the court in construing a statute requiring a father to provide necessary support and education for his child, said: "The word 'support,' as used in the statute, includes necessary medical attendance, as much so as necessary food and clothing." Likewise in *Morse* v. *Powers,* 45 Vt. 300, it was said: "The plaintiff agrees that the son should have 'support for himself and family from the business,' and he was in the habit of appropriating goods for that purpose. Proper medical treatment to the sick is deemed by usage as necessary as the provision of bread to the hungry." It has been held, however, in at least one instance, that the failure of a father to procure medicine to be administered to his children would not support a prosecution under a statute making it a crime to torture, torment or deprive a child of necessary sustenance. *Justice* v. *State,* 116 Ga. 605, 42 S. E. 1013, 59 L. R. A. 601. The court said in that case: "There is a very great difference between depriving a child of sustenance, and refusing to permit medicine to be administered to him. Sustenance is 'that which supports life; food, victuals, provisions'; while medicine is defined to be 'any substance administered in the treatment of diseases; a remedial agent; a remedy, physic.' Our statute, in the use of the word 'sustenance,' means that necessary food and drink which is sufficient to support life and maintain health. And evidence that while a father fully provides for the wants of his children as to food, he refuses to permit them to take medicine, will not support a conviction under this statute." The decision in that case, however, was based on the wording of the particular statute and did not involve the general doctrine of the liability of one who wilfully neglects to perform duty imposed on him by law.

Assuming, then, that medical attendance in proper cases is included among the duties owed by a parent to his child, or by others occupying similar relations, and this seems to be unquestioned, the question arises whether the religious belief of one on whom is cast the duty of furnishing medical attendance to another can be set up as a defense to a criminal prosecution for his failure to furnish such medical attendance. The question appears to have arisen most frequently in the United States in cases where the party accused was a Christian Scientist, and believed in faith rather than a medical cure. In England the accused has in most instances belonged to the sect known as the "Peculiar People," who substitute for medicine in case of sickness the prayers of their elders and the anointing of the patient with oil. While the courts of modern days have been careful to refrain from interference with religious belief as such, they have been no less positive in denying the right of any person or association of persons to commit offenses against the general welfare of the public under the cloak of religious teaching. The general doctrine as to religious belief as an excuse for the violation of law was clearly and forcibly stated by the Supreme Court of the United States in a case involving the right to engage in polygamy as follows: "The only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn

herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?" *Reynolds* v. *United States,* 98 U. S. 145, 25 U. S. (L. ed.) 244.

The principle therein announced has been followed and applied by the great majority of cases dealing with the question of religious belief as a defense to a prosecution for failure to furnish medical attention. *People* v. *Pierson,* 176 N. Y. 201, 68 N. E. 243, 98 Am. St. Rep. 666, 63 L. R. A. 187, reversing 80 App. Div. 415, 81 N. Y. S. 214. See also *State* v. *Chenoweth,* 163 Ind. 94, 71 N. E. 197; *Kansas City* v. *Baird,* 92 Mo. App. 204; *Spead* v. *Tomlinson,* 73 N. H. 46, 59 Atl. 376, 68 L. R. A. 432; *State* v. *Marble,* 72 Ohio St. 21, 2 Ann. Cas. 898, 73 N. E. 1063, 106 Am. St. Rep. 570, 70 L. R. A. 835. In the leading case of *People* v. *Pierson,* supra, it appeared that the defendant was indicted for violating a section of the Penal Code of the state of New York, which provides that "a person who wilfully omits, without lawful excuse, to perform a duty, by law imposed upon him, to furnish food, clothing, shelter, or medical attendance to a minor . . . or neglects, refuses or omits to comply with any provisions of this section, . . . is guilty of a misdemeanor. . . ." The defendant was charged under this statute with having omitted, without lawful excuse, to perform a duty imposed upon him by law, in failing to furnish medical attendance to his minor child, and refusing to allow her to be attended by a regular physician, when she was sick with and suffering from the disease of pneumonia. The excuse offered by the father of the child for not calling a physician was that he believed in Divine healing, which could be accomplished by prayer. He stated that he belonged to the "Christian Catholic Church of Chicago"; that he did not believe in physicians, and that his religious faith led him to believe that the child would get well by means of prayer. He believed in diseases, but believed that religion was a cure for all disease. This excuse or justification on the part of the defendant for violating the statute in question was not sustained by the court, and his conviction below was affirmed. In concluding its opinion the court used the following language: "We are aware that there are people who believe that the Divine power may be invoked to heal the sick, and that faith is all that is required. There are others who believe that the Creator has supplied the earth, nature's storehouse, with everything that man may want for his support and maintenance, including the restoration and preservation of his health, and that he is left to work out his own salvation, under fixed natural laws. There are still others who believe that Christianity and science go hand in hand, both proceeding from the Creator; that science is but the agent of the Almighty through which he accomplishes results, and that both science and Divine power may be invoked together to restore diseased and suffering humanity. But, sitting as a court of law for the purpose of construing and determining the meaning of statutes, we have nothing to do with these variances in religious beliefs and have no power to determine which is correct. We place no limitations upon the power of the mind over the body; the power of faith to dispel disease, or the power of the Supreme Being to heal the sick. We merely declare the law as given us by the legislature."

In a recent case arising in New Jersey, the court in imposing on a father a fine of $1000 for manslaughter in allowing his infant daughter to die of diphtheria without medical treatment said: "I am satisfied from the evidence in this case that your failure to secure medical aid for your daughter during her illness arose from a conscientious belief on your part of the efficacy of the treatment recognized by the Christian Science Church, of which you are a member. . . . However, in the light of present-day science, which is the result of many years of progressive experiment and demonstration, no one is justified in neglecting the use of such agencies as have been shown to be efficient in the treatment of malignant and contagious diseases."

The prevailing rule that religious belief does not constitute a defense for the wilful neglect to furnish medical attendance when such a duty is imposed by law is also controlling in England and Canada. *Reg.* v. *Senior,* (1899) 1 J. B. (Eng.) 283, 19 Cox. C. C. 219; *Rex* v. *Lewis,* 6 Ont. L. Rep. 132, 7 Can. Crim. Cas. 261, 23 Can. L. T. 257, 2 Ont. W. Rep. 290, 566. In the case last cited the court, in sustaining a conviction for manslaughter based on the failure to furnish medical attendance to a child, said: "The question, therefore, of the prisoner's guilt or innocence, depends upon whether he had or had not omitted, without lawful excuse, to provide necessaries, that is to say the necessaries of life, whatever they were, for his child, in consequence of which its death was caused. What are or may be such necessaries in any particular instance, is not defined by the Code, but I can see no reason for saying that medical aid, assistance or treatment may not, under the circumstances, be necessary quite as much as food and clothing are so. . . . There was evidence on which the jury might find that medical aid and assistance ought to have been provided, and the further questions for their determination were whether it had been in fact provided, and if not, whether it had been omitted—neglected—by reason of any lawful excuse. In dealing with all these questions, the jury would have to take into consideration, and they were so directed, the prisoner's knowledge of the child's illness and its serious nature, and his ability to procure and pay for medical aid and treatment. In giving evidence on his own behalf, the prisoner admitted that the child's illness was such that at one period of it he would have called in a doctor if he had not been a Christian Scientist. Speaking for myself, I must say that in such a case as this the jury ought to be told that no matter how earnestly a parent might believe in the efficacy of Christian Science treatment as developed in Mrs. Eddy's handbook of the doctrines of the sect, yet if they came to the conclusion that medical aid and treatment was necessary, they ought also to find that would not be furnished by means of mental treatment by a Christian Science 'demonstrator.' Persons sui juris may, by mutual consent and within certain limits, practice upon each other what experiments of this kind they please, and in some instances and in some kinds of disorders, where the mind of the patient is responsive to the treatment, it may possibly be done with beneficial results. But it would be shocking if in the case of infants or others incapable of protecting themselves, they and the community in which they lived were to be exposed to danger from contagious and infectious diseases which the instructed common sense of mankind in general does not as yet find or admit to

be curable by means only of subjective or mental treatment." In *Reg.* v. *Cook,* 58 Alb. L. J. 232, 62 J. P. (Eng.) 712, it appeared that the defendant parents were members of a sect known as the "Peculiar People," whose belief was opposed to medical treatment in case of sickness, and who substituted therefor prayers by elders and the anointing the patient with oil. Holding that their religious belief constituted no defense in a prosecution for manslaughter in failing to provide medical attendance for their child when necessary, the court said: "The speech made by the male defendant is of a most fatalistic character. Not only would he not call in a doctor, but he left his case to-day absolutely in the hands of the Lord. He did not want any counsel, but said the Lord Jehovah would get a proper verdict; at least, so I understand it. Although the conclave of the 'Peculiar People' had decided that a physician was not to be called in in the case of sickness, it had not yet considered the case of a surgeon. The evidence was that none of the 'Peculiar People' had yet broken bones, but when a case of that kind happened they would determine whether the Lord could set bones or whether he could not. It is the duty of parents to provide medical aid for their children. A child did not know anything about the tenets of the 'Peculiar People.' While a child is of tender years and could not choose for itself the law protects it. If the defendants neglect the duty which the law imposed upon them—the duty of calling in medical aid for the child—and death is thereby caused or accelerated, they are guilty of the charge made against them." It appears from the language of the court in this case that not only the medical profession, but also the legal, was taboo with the members of this particular faith.

While the liability of a person on whom the duty is cast by law for failure to furnish adequate medical attendance in case of sickness may be said to rest on the ground of omission to perform a legal duty owed to another, there is a second phase of the liability which is grounded on the duty that a member of society owes to his fellow-citizens. In respect to this duty, as well as that owed to the individual, religious belief cannot be set up as an excuse for a failure to comply therewith. This angle of the matter was set out in the case of *In re First Church of Christ, Scientist,* 205 Pa. St. 543, 55 Atl. 536, 97 Am. St. Rep. 753, 63 L. R. A. 411 as follows: "In certain diseases the individual affected may be the only one to suffer for lack of proper attention. But in other types, of a contagious or infectious nature, they may be such as to endanger the whole community, and here it is the policy of the law to assume control and require the use of the most effective known means to overcome and stamp out disease which otherwise would become epidemic. In such cases, failure to treat, or an attempt to treat, by those not possessing the lawful qualifications, are equally violative of the policy of the law. It may be said that the wisdom or the folly of depending upon the power of inaudible prayer alone, in the cure of disease, is for the parties who invoke such remedy. But this is not wholly true. 'For none of us liveth to himself, and no man dieth to himself,' and the consequence of leaving disease to run unchecked in the community is so serious that sound public policy forbids it. Neither the law nor reason has any objection to the offering of prayer for the recovery of the sick. But in many bases both law and common sense require the use of other means which have been given us for the healing of sickness and the cure of disease. There is ample room for the office of prayer, in seeking for the blessing of restored health, even when we have faithfully and conscientiously used all the means known to the science and art of medicine."

MINOR BRONAUGH.

LIMITATION ON TIME FOR DEPORTATION OF ALIENS

IN the mind of a person contemplating the "activities" of the federal government in the deportation of the thousands of seditious aliens who now infest this country, the question naturally arises whether there is any time short of the death of the alien from old age within which the deportation must be accomplished. Until a recent date, comparatively little attention has been paid to the matter of deportation. Contagious disease, pauperism, and similar grounds for exclusion could ordinarily be discovered at the time of entry, and no particular attention was paid to any other form of unfitness for citizenship. The urgency of the trade unions has led to some sporadic activity in the enforcement of the contract labor clause of the immigration law, opposition being made at one time to the landing of a preacher under contract to take the pulpit of a church which enjoys the patronage of a well-known "captain of industry." These questions, however, also ordinarily arose at the time of entry. The idea foremost in the legislative mind, therefore, in dealing with deportation at that period was the case of persons entering the United States in violation of law, and logically enough limitations were attached to deportation which gave a reasonable time to take advantage of matters which might have been ascertained at the time of entry, but were then overlooked. In pursuance of that policy, the Immigration Act of 1903 and the Immigration Act of 1907 which superseded it (see 3 Fed. St. Ann. [2d Ed.] 637) contained a general provision for deportation "within three years." Several interesting questions arose under that provision, but subsequent legislation has made them unimportant. The first action toward an extension of the period limited was with respect to alien prostitutes, legislative activity on that subject being spurred by the uncovering of a systematic importation of women of that class. The Act of March 26, 1910 (3 Fed. St. Ann. [2d Ed.] 649) designed to make it possible to stamp out that system, provided in substance that any alien found to be an inmate of a house of prostitution, or owning or employed in such a house or subsisting on the earnings of a prostitute "after such alien has entered the United States" might be deported. This act was held to remove all limitations on the time for the deportation of persons within its scope. *Bugajewitz* v. *Adams,* (1913) 228 U. S. 585, 33 S. Ct. 607, 57 U. S. (L. ed.) 978; *Schwartz* v. *Adams,* (1913) 228 U. S. 592, 33 S. Ct. 609, 57 U. S. (L. ed.) 980; *U. S.* v. *Weis,* (1910) 181 Fed. 860; *U. S.* v. *Prentis,* (1910) 182 Fed. 894; *U. S.* v. *Williams,* (1910) 183 Fed. 904; *Sire* v. *Berkshire,* (1911) 185 Fed. 967; *Ladaux* v. *Berkshire,* (1911) 185 Fed. 971; *U. S.* v. *North German Lloyd Steamship Co.,* (1911) 185 Fed. 158; *Ex p. Cardonnel,* (1912) 197 Fed. 774; *Chomel* v. *U. S.,* (1911) 192 Fed. 117, 112 C. C. A. 461; *Ex p. Garcia,* (1913) 205 Fed. 53; *U. S.* v. *Czeslicki,*

(1913) 209 Fed. 496; *Choy Gum* v. *Backus,* (1915) 223 Fed. 487, 139 C. C. A. 35; *Oceanic Steam Nav. Co.* v. *U. S.,* (1916) 232 Fed. 591, 146 C. C. A. 549, Ann. Cas. 1917C 248.

It is, of course, elementary that an alien sojourns in any country by sufferance only and acquires no vested right to continue his residence there by any lapse of time. Accordingly it was held that the Act of 1910 was valid even as to persons who had been in the United States for three years prior to its enactment. *Bugajewitz* v. *Adams,* 228 U. S. 585, 33 S. Ct. 607, 57 U. S. (L. ed.) 978; *U. S.* v. *Weis,* 181 Fed. 860; *U. S.* v. *Williams,* 183 Fed. 904. The doctrine was stated in the Williams case as follows: "An alien who has decided to permanently reside in this country and who has acquired what is called a domicile of residence undoubtedly is entitled to the same protection of life, liberty and property as a citizen; but the fact that an alien has resided in this country for a long time, or intends to make such residence permanent, does not affect in any way the right of the government to exclude him, if, in the judgment of Congress, such exclusion is proper." Since the tendency of recent legislation is to remove limitations on the time for deportation, these decisions are important and establish clearly the general rule that no matter how long an alien has resided in the United States deportation proceedings are not barred except by a statute in force at the time when it is sought to deport him. This was clearly brought out in the case of *Guiney* v. *Bonham,* 261 Fed. 582. The proceeding there involved was for the deportation of a member of the I. W. W. who entered the United States in 1913. The deportation proceeding was begun in 1919 under the Act of 1917, and after holding that the five-year limitation created in some instances by that Act did not apply, the court held further that deportation could be ordered under the Act of October 16, 1918, which contains no limitation as to time for proceeding.

With a single exception, the Act of October 6, 1918 (Fed. St. Ann. 1919 Supp. p. 71), relating to seditious aliens and permitting deportation without limit as to time, the time within which deportation proceedings must be brought is now regulated by section 19 of the Act of February 5, 1917 (Fed. St. Ann. 1918 Supp. p. 230). So much of that section as relates to time provides as follows:

"At any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials; any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing; except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists any prostitute or protects or promises to protect from arrest any prostitute; any alien who shall import or attempt to import any person for the purpose of prostitution or for any other immoral purpose; any alien who, after being excluded and deported or arrested and deported as a prostitute, or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes in any of the ways hereinbefore specified, shall return to and enter the United States; any alien convicted and imprisoned for a violation of any of the provisions of section four hereof; any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; at any time within three years after entry, any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by immigration officials, or who enters without inspection, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported."

As will be observed, the act designates in successive clauses the several classes of aliens liable to deportation, affixing a time limit in some clauses and not in others. The construction of the act with respect to the reading of limitations into clauses containing none is fixed by a proviso (the third) to the section which reads: "The provisions of this section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States." As would seem to be required imperatively by this proviso, the only cases thus far passing on the section have held that limitations in one clause cannot be read into another. *Lopez* v. *Howe,* 259 Fed. 401; *Guiney* v. *Bonham,* 261 Fed. 582. In each of these cases the deportation was under the second clause of section 19, and it was held that the five-year limitation in the first clause was inapplicable.

The law, as embodied in the Act of 1917, seems to have reached a thoroughly practical solution of the question. With respect to grounds for exclusion which are ordinarily discoverable at the time of entry a reasonable limitation is provided, while with respect to causes for deportation not so discoverable, or of such a nature that they may come into existence after entry, there is no time limit whatever. The abolition of limitations in such cases is not only beyond all doubt in respect to its validity, but stands on the clearest considerations of public policy. The United States, as Mr. Roosevelt said, is not a "polygot boarding house." The idea of America as a kind of enlarged Salvation Army home, holding out welcoming arms to the physically, mentally and morally unfit of the rest of the world, and provided with just enough of the native born to make good looting for the newcomers, is about "played out," though it has been expounded with oratorical fervor within the last year by a high officer of the federal government. The United States is a nation, albeit somewhat lacking as yet in national spirit. It has room for those who are capable of becoming good American citizens and for no others. The alien who comes to our shores should be regarded as on probation. He should not be admitted to citizenship without the most rigid examination, and until his naturalization he should at all

times be subject to summary deportation if he exhibits criminal, immoral or seditious tendencies.

With respect to the class of cases in which the time for deportation is limited, there is one disputed question of law which the Act of 1917 does not settle. The deportation provision of the Immigration Act of 1907 was to the effect that an alien within its terms might "be taken into custody and deported to the country whence he came at any time within three years after the date of his entry." Similar phraseology was used in the Act of March 3, 1903, which was superseded by the Act of 1907. The cases arising under those acts are in conflict as to whether the deportation must be completed within the three-year period. In *Botis* v. *Davis,* (1909) 173 Fed. 996, it was held that there must be an actual deportation within three years or the power to deport is lost. So in *International Mercantile Marine Co.* v. *U. S.,* (1912) 192 Fed. 887, 113 C. C. A. 365, *reversing* 186 Fed. 669, it was held that the alien must be actually delivered on board ship for deportation within three years after his entry. On the other hand, it was held in *U. S.* v. *Redfern,* (1910) 180 Fed. 506, that it is sufficient if deportation proceedings are begun within three years, the court saying: "I consider the government should have the whole of the last day of the three years in which to make the arrest, and, prescription being interrupted by the arrest, the government is entitled to a reasonable time in which to carry out the sentence of deportation." That decision was followed in *Bun Chew* v. *Connell,* (1916) 233 Fed. 220, 147 C. C. A. 226, wherein the court said: "We think the statute should be construed in analogy with statutes of limitation in criminal cases, the requirement of which is answered if prosecution is begun within the time limited. It does not seem reasonable to suppose that Congress intended that before ordering the arrest of an alien believed to be unlawfully in the country the Secretary must take into account the probable time that must ensue between the arrest and the warrant of deportation, and compute the time of all possible delays in obtaining testimony, and possible delays to be caused by appeals or writs of habeas corpus." In a brief opinion in the case of In re Russomanno, (1904) 128 Fed. 528, it was said that since an alien was not "seized, even, for purposes of deportation" before the expiration of the time limited the authority to deport was lost.

The view that the time allowed is for the commencement of proceedings is unquestionably the more sound; the other view makes it possible to defeat the intention of the law in many cases by dilatory proceedings. Moreover, in section 20 of the Act of 1917, by which provision is made for charging the cost of deportation to a steamship company or to the person who procured the immigration of the deported alien, reference is several times made to cases where the deportation proceeding was "instituted" within five years, the expense not being chargeable unless the proceeding was so instituted. Since the limitation imposed, if any, by section 19 is five years, it would seem clear that it was considered to be a limitation on the time to "institute" proceedings. Otherwise the provisions of section 20 may become nugatory as to a considerable number of the cases provided for in section 19.

But, though Congress has allowed the far-flung æons of eternity for the deportation of seditious aliens, is there any particular reason why it should all be used?

W. A. S.

THE "SLEEPING BEAUTY" OF NORTH DAKOTA

A RATHER remarkable state of facts is that portrayed in the quite recent case of *Larson* v. *Russell,* 176 N. W. 998. Beside such a real story as this and thousands of equal human interest in the law reports, the fictitious experiences of Mr. Tutt, Craig Kennedy and similar celebrated characters pale into dim in significance. It appeared in the case cited that on February 3, 1915, the plaintiff was working in the capacity of a domestic servant in a rooming house. She had occasion to go down the steps of a stairway on the outside at the rear of the building and while making the descent a section of the veneered brick wall fell out, some of the bricks striking the plaintiff and inflicting injuries on her. To continue in the language of the majority opinion: "At the time the plaintiff received the injury she was twenty-two years of age. She enjoyed good health, and was receiving for the work that she had been doing $25 per month and her room and board. On the day of the accident the plaintiff's brother found her lying at the bottom of the stairway at the rear of the building in an unconscious condition, with the bricks from the fallen wall lying upon and about her. She was carried to a room in the building, bleeding at the mouth and nose, and upon her back there was a bruised area over the spinal column and about the shoulder blades. A doctor was at once called to attend her, and up to the day of the trial she had been constantly under the care of this physician. Between the date of the injury and the date of the trial, a period of approximately three years, the plaintiff had been bedfast and in a paralyzed condition which her doctor described as traumatic neurosis. This disease is attributed to the injury in question, and the diagnosis of its presence is positive." The result of the trial was a verdict for $26,000 damages against the owner of the building, and this verdict was at first affirmed on appeal by a divided court.

So far, so good. But Judge Robinson, who is by the way the humorist par excellence of the American bench to-day, dissented, and from his opinion one gets quite a different view of the situation. He said: "The plaintiff is known to the court as the Sleeping Beauty. She is an ideal of physical perfection, and yet she claims that for three years she has been reposing continuously on her bed. Her mother is the holder of a rooming house tenement on Broadway, in the city of Fargo. She holds it as the assignee of a lease made by the defendant to Papamanoles. The lease was made in April, 1913. Two months afterwards it was assigned to the mother. Then, towards the last days of February, 1915, and nearly two years afterwards, during a violent storm, the plaintiff had the misfortune and imprudence to go down the back stairway, when some of the brick veneering fell on her shoulders, to her great injury. Her claim is that she has been permanently injured and paralyzed, so that she will always be confined to her bed. It appears beyond dispute the falling brick contused the flesh on her shoulders, but did not cut or break the skin or in any way mar her personal appearance. At the trial her body showed no signs of bedsores, though she claimed to have been continuously in bed for three years. The doctors examined her head, eyes, mouth, tongue, teeth, and found everything normal. She is a well-built young woman; her arms, legs, and body are normal and well nourished; her digestion is good; her weight is normal; her muscles are natural and not shrunken. From the crown of her head to the soles of her feet she has not on her body a scar, a blemish, or a defect. Hence we call her the Sleeping Beauty. The appeal is from a verdict and judgment for $26,000. The trial was conducted in a manner decidedly improper. As in a theatrical play, the plaintiff was brought into court on a cot, and by her tears, screams, and ap-

pealing looks she impressed the jurors—won their pity and commiseration. Then, it appears that counsel in his zeal for defendant forgot all prudence, and cross-examined the plaintiff, and gave her an excuse for tears, and angered the jury. And the plaintiff was shrewd and perceptive; she knew when to weep, when to scream, when to remember, and when to forget. The appeal was to the pity and commiseration of the jury, rather than to their deliberate judgment. If the plaintiff was in a helpless condition her testimony should have been taken by deposition and the court should not have permitted any theatrical play. The verdict must be largely for future damages, and to give the jury some basis for guessing at such damages proof was given that plaintiff was only twenty-two years old; that she had a fair prospect of forty years in bed, with the expense of attending physicians and nursing, and the loss of her earning capacity. Her three physicians testified that, in their opinion, her injury was permanent. Three other physicians testified that, in their opinion, she was merely shamming, and that she could walk if she wanted to. To give weight to this testimony, it was shown that plaintiff had been kept in seclusion in the building in which she was injured, and she had been kept from general observation, and not in a hospital or sanitarium. Of course such treatment and such seclusion lend color to the charge that she was acting a part and to a great extent shamming. Hence defendant offers to pay such sum of money as may be necessary to give the plaintiff the best of care and medical treatment and attendance at the best sanitariums and hospitals, and to pay her, or to the clerk for her use, such sum as the court may think just and reasonable, or about $700 a month for six months. But to that offer counsel for plaintiff do strenuously object. By right or wrong, they have obtained a verdict, and by fas or nefas they purpose to hold onto it. In argument counsel have shown that in cases like this such verdicts are often obtained by fraud and imposition on courts and jurors, and that after payment of the judgment the plaintiff quickly recovers from the alleged personal injury. In this case, if the plaintiff recover $13,000, and her counsel $13,000, I think that within a year the Sleeping Beauty would be perfectly cured and the judges would have reason to feel like dolts. Certainly the verdict is so grossly excessive as to show that the jurors were affected by the theatrical acting and by the tears of the Sleeping Beauty."

There is much more in the opinion of Judge Robinson which is worth reading. It is full of diverting side remarks, such as that the Greek Papamanoles had just constructed a Riverside flat, worth some $25,000 or more "at the expense of creditors"; that the fall of the brick wall was occasioned by an unusual and violent storm which (à la Daisy Ashford) blew down "an adjacent, new, and expensive Ford motor vehicle building"; and that when the bricks fell the plaintiff "stood in the shoes of her mother."

There is also a second opinion by Judge Robinson delivered on the "motion to reconsider." It begins and concludes thus:

> "'Open your mouth and shut your eyes,
> And I will give you something to make you wise.'

Such is the plea of plaintiff's counsel. By a great theatrical play, and by very questionable means, they have obtained a personal injury judgment for $26,000. On this they have filed a lien for $11,000, and now, on the motion for a new trial, they beg the judges to shut their eyes to the light of truth, the facts in the case, the manner of conducting the trial, the way the plaintiff has been kept in seclusion, under lock and key, by her elder sister and Papamanoles, who were living together without being married. They wish the judges to shut their eyes to the way in which Papamanoles, the head of the Larson family, attempted to get rich at the expense of his creditors, his building the Riverside flats, mortgaging the same to his mother-in-law for $15,000, conveying the same to her for $20,000, going into bankruptcy, taking with him into the federal court the whole Larson family to swear that they had loaned him the money to build the flats. The judges are requested to shut their eyes to the way in which the suit was first commenced against the city of Fargo to recover for the injury, $10,000, with no claim that the plaintiff had been paralyzed. . . . It appears that counsel for plaintiff discredit the verdict. If the plaintiff had sustained injury to the amount of $26,000, and if she alone was paralyzed, and not the counsel, then, of course, she should have the great bulk of the money, and the counsel should be well satisfied with a fee of $5000. When they charge $11,000 (a sum that no court should permit) it must mean that they did something extraordinary; that by some shrewd and theatrical practice they recovered a verdict largely in excess of the real injury. Truly, on the trial of the case the theatrical play was so wonderful it does seem the fitting climax was to cast on the screen, 'Attorney's fee, $11,000.'"

But we must not unduly prolong this item. Suffice it to say that whether because of Judge Robinson's dissent or for some less potent reason, the court reversed itself on rehearing and sent the case back for a new trial. We shall await the outcome with eager anticipation. But what an opportunity for a Sat-E-Post law writer!

H. N. G.

Cases of Interest

POWER OF DIRECTORS TO SELL PROPERTY OF CORPORATION WITHOUT CONSENT OF STOCKHOLDERS.—The majority of the directors of a corporation organized to deal in real estate may sell the real estate of the corporation without the consent of all the stockholders, although it will result in annihilating the corporation, if such is not the purpose of the sale. It was so held in Hendren *v.* Neeper, (Mo.) 213 S. W. 839, reported and annotated in 5 A. L. R. 927, the court saying: "The contention is made by appellants that, if the sale of the land in controversy is consummated, it will result in annihilating the corporation, and that this cannot be done without the consent of all the stockholders. We cannot subscribe to that view. To do so would be to lose sight of the purposes for which the corporation was formed. Its charter powers expressly authorize it to buy and sell real estate—in fact, recite that the corporation was formed for that purpose. The sale of the land in question has no reference to the destruction of the corporation, it is merely carrying out the specific charter power the corporation possesses. Nor is there anything in the record that discloses any attempt or desire in making this sale, upon the part of the majority of the directors, to interfere with the integrity of the corporation. Cook, in his admirable treatise on Corporations, states the following as the law: 'The law seems to be clear that all corporate contracts are to be made by the directors. This includes original contracts as well as modifications of them. If a contract is within the express or implied powers of the corporation, then the directors need not consult the stockholders nor follow their wishes, even though the latter constitute a majority or a minority, and though these stockholders object in meeting assembled or individually in the courts.'"

EFFECT ON INSURANCE POLICY OF INCLUSION AMONG GOODS INSURED OF ARTICLE BOUGHT UNDER CONDITIONAL SALE.—An in-

surance policy on stock and fixtures is not vitiated because the title of the insured is stated to be fee simple, while among the fixtures is an automatic scale bought under conditional sale, title to which is not vested in the insured, if it is not specifically covered by the policy and all claim to recovery for it is waived, although it is included in the schedule of losses. It was so held in Coniglio *v.* Connecticut Fire Ins. Co. (Cal.) 182 Pac. 275, reported and annotated in 5 A. L. R. 805, wherein the court said: "It is contended that plaintiff had no insurable interest in the automatic scale described in the findings; that the policy is nonseverable, and that by reason thereof it never attached to the risk. There is no merit in the insurance company's position in that behalf. A purchaser of property under conditional sale, by the terms of which title is to remain in the vendor until full payment is made, has at least an insurable interest to the extent of his payments on account. 14 R. C. L. 916, § 93; Tabbut *v.* American Ins. Co. 185 Mass. 419, 102 Am. St. Rep. 353, 70 N. E. 430. See 20 Am. Dec. 513, note, Vendor & Vendee. Appellant suffered no possible injury by reason of the fact that plaintiff owed $50 on the scale at the time of the fire, because there was a waiver at the trial of any claim arising out of the destruction of that article. It is true that in the portion of the policy signed by the witnessed mark of Coniglio (who could not read or write) was a declaration that the interest of the injured in the property was 'fee simple,' but there was no showing that appellant was or could be injured in the slightest degree by such alleged misrepresentation. It is to be remembered that contracts of this sort are to be interpreted in the light of the fact that they are drawn by the insurance companies, and are rarely, if ever, understood by the people who pay the premiums. Every rational indulgence must be shown by the assured."

DUTY OF ABUTTING OWNER TO CONTINUE SAFEGUARD AGAINST INJURY WHICH HE HAS VOLUNTARILY FURNISHED.—In Cavanagh *v.* Hoboken Land, etc., Co. (N. J.), 107 Atl. 414, reported and annotated in 5 A. L. R. 933, it was held that one who, having constructed a leader or drain pipe to conduct water from his roof to a sewer in the street, temporarily permits it to be out of repair so that the water flows over the sidewalk and freezes, making the way dangerous for pedestrians, is not liable for injury to a pedestrian who is injured by falling on the ice when attempting to use the walk with knowledge of the defective condition of the pipe. The court said: "It is argued that, conceding the defendant was under no legal obligation to construct the leader for the purpose of carrying the water into the drain, yet, having assumed to do this, he was bound to use reasonable care to maintain the leader in such a condition that it would perform the function for which it was intended; this being the doctrine, as it is said, laid down by the supreme court in Wolcott *v.* New York & L. B. R. Co. 68 N. J. L. 421, 53 Atl. 297, and approved by this court in Brown *v.* Erie R. Co. 87 N. J. L. 494, 91 Atl. 1023, Ann. Cas. 1917C 496. The doctrine of these cases, however, is not so broad as it seems to have been considered. A person who assumes to protect others against injury which may result to them from the exercise by him of a legal right, in a legal manner, is under no obligation to continue that protection indefinitely. He may abandon his purpose at his own will, and, having done so, is under no obligation to afford further protection to third persons who have knowledge or notice of such abandonment. . . . The defendant had permitted the leader to become broken so that it no longer served the purpose for which it had been installed, and, although it had notice of this condition, it made no attempt to repair. Its failure to restore the leader was an abandonment, pro tempore at least, of its purpose to protect travelers along the sidewalk against dangers resulting from the formation of ice caused by the freezing of water discharged from the roof. Mrs. Cavanagh had personal knowledge of this situation, for she testified that on the evening before the accident, while walking past the defendant's premises upon the same sidewalk where she afterwards fell, she observed the water escaping out of the broken pipe and running down to and spreading over the sidewalk to such an extent that the street was all ice. The defendant having abandoned its purpose, at least temporarily, of taking care of the flow of water by conducting it through the leader into the drain, and Mrs. Cavanagh having knowledge of such abandonment, she is not entitled to recover against the defendant upon the theory that, having once assumed to protect travelers using the sidewalk against danger from accumulating ice, it was under a legal obligation to her to continue that protection."

RIGHT TO PROCEEDS OF LIFE INSURANCE POLICY IN CASE OF DEATH IN COMMON DISASTER.—In Watkins *v.* Home Life, etc., Ins. Co. (Ark.) 208 S. W. 587, reported and annotated in 5 A. L. R. 791, it was held that where the insured and the beneficiary, under a policy providing that if the beneficiary should die first, the interest of the beneficiary should vest in the insured, perished in a common disaster, without evidence as to which died first, the proceeds of the policy should be paid to the representatives of the beneficiary on the theory that he did not die in the lifetime of the insured. Said the court: "It is well settled at common law that when two or more persons perish in the same disaster, and there is no fact or circumstance tending to prove which survived the other, there is no presumption whatever on the subject. The law treats the case as one to be established by evidence, and, in the absence of proof tending to show which one died first, all will be considered to have perished at the same moment, not because that fact is presumed, but because from failure to prove it the actual survivorship is unascertainable, and property rights must be settled as if death occurred to all at the same time. 8 R. C. L. p. 716; Young Women's Christian Home *v.* French, 187 U. S. 401, 47 L. ed. 233, 23 Sup. Ct. Rep. 184; 1 Greenl. Ev. 16th ed. § 30, p. 126; Lawson, Presumptive Ev. p. 298; United States Casualty Co. *v.* Kacer, 169 Mo. 301, 58 L. R. A. 436, 69 S. W. 370, 92 Am. St. Rep. 641; Re Wilbor, 51 L. R. A. 863, and note (20 R. I. 126, 78 Am. St. Rep. 842, 37 Atl. 634), and St. John *v.* Andrews Institute, 191 N. Y. 254, 83 N. E. 981, 14 Ann. Cas. 708. The rule that there is no presumption of survivorship in a common disaster applies where the insured and beneficiary died in a common disaster. 14 R. C. L. p. 1380. In the absence of any presumption as to which died first, the law requires evidence as a foundation for action in the matter. The burden of proof is always upon him who has the affirmative, and if he fails to discharge it with evidence legally sufficient for the purpose, he must suffer defeat. The adversary party succeeds, not upon proof of his own case, but by reason of the absence of evidence on the part of him who has the burden of proof. The authorities are divided upon the question of where the burden of proof lies in cases like this. In some of the cases it is held that the contract in policies like the one in the present case is made conditional on the beneficiary surviving, and that, there being no presumption, in case of death from a common disaster, that the beneficiary has survived the insured, the burden of proof is upon the representatives of the beneficiary, because the conditional benefit becomes absolute only upon proof of actual survivorship. Middeke *v.* Balker, 198 Ill. 590, 59 L. R. A. 653, 92 Am. St. Rep. 284, 64 N. E. 1002, and Males *v.* Sovereign Camp, W. W. 20 Tex. Civ. App. 184, 70 S. W. 108. Other cases hold that the result is the

same as though the insured died first, on the theory that the beneficiary did not die in the lifetime of the insured. Cowman *v.* Rogers, 73 Md. 403, 10 L. R. A. 550, 21 Atl. 64; United States Casualty Co. *v.* Kacer, 169 Mo. 301, 58 L. R. A. 436, 92 Am. St. Rep. 641, 69 S. W. 370, and Faul *v.* Hulick, 18 App. D. C. 9. We think the latter rule is more in accord with the trend of our decisions."

REFUSAL OF CONTINUANCE IN CRIMINAL CASE AFTER ATTEMPT TO LYNCH ACCUSED AS ABUSE OF DISCRETION.—In Fountain *v.* State (Md.), 107 Atl. 554, reported and annotated in 5 A. L. R. 908, it was held to be reversible error to refuse to adjourn or postpone the trial of one accused of crime, where a mob attempted to lynch him when he was passing from the court room to the jail, from which he escaped by flight, and was brought back under heavy guard. The court said: "The issue tried before the jury in this case was whether the prisoner at bar, who is a colored man, was in fact the negro who committed the rape charged in the indictment. There was no question that the unfortunate girl, who testified as prosecuting witness, had been brutally outraged, but the defense was that the accused was not the perpetrator of the horrible crime, and that he was in reality a number of miles distant from the scene of the assault at the time it occurred. It was his undoubted right to raise such an issue of fact and to have it determined by the verdict of a jury under circumstances which would enable it to exercise its independent judgment. He was entitled to have the verdict represent solely the effect of the evidence, and not the influence of popular sentiment. In order that the defense interposed might be impartially considered, it was necessary that the jurors should have the opportunity to calmly weigh the evidence without having their minds distracted and dominated by undue manifestations of public hostility against the prisoner. The conditions under which the appellant was tried were such as to make it almost impossible for the issue upon which his life depended to be impartially considered and decided by the jury. It is in the highest degree improbable that the jury as a whole could have kept its judgment free from the influence of the demonstrations made against the accused in the immediate neighborhood of the court in which the trial was being conducted. The presence of a large and menacing crowd, determined that the prisoner should die, and unwilling to await the orderly processes of the law, which had been set in motion with the utmost promptness, the attempt to forestall by lynching the verdict of the jury and a judicial sentence, the flight of the defendant to escape immediate death at the hands of the mob and the unusual measures taken by the court to insure his safety when recaptured, evidencing the belief of the judges as to the extreme gravity of the emergency with which they were confronted, combined to create an atmosphere and environment incompatible with the right of the accused to a fair and impartial trial. According to the general rule, the suspension or postponement of a trial is recognized as being within the discretion of the trial court, and its ruling on a question of that nature will not be disturbed on appeal unless such action is plainly required in the interests of justice. . . . There can be no doubt that the court below made earnest efforts to protect the defendant's right to a fair trial, but the conditions with which the court had to deal appear to have rendered such a trial at that time and place impracticable. In such an extraordinary situation as that in which the lower court was placed in this case, and with such vital issues involved, its rulings upon the application to have the trial deferred could not properly be held to be so far discretionary as to be beyond the scope of appellate review."

LIABILITY OF PHYSICIAN FOR GIVING ERRONEOUS ADVICE AS TO CONTAGIOUS NATURE OF DISEASE.—In Skillings *v.* Allen (Minn.), 173 N. W. 663, reported and annotated in 5 A. L. R. 922, it was held that a complaint stated a cause of action which alleged that the defendant, a physician, was employed by the plaintiff to attend his minor daughter professionally while she was sick; that, knowing that the child's disease was scarlet fever, he negligently advised the plaintiff's wife, who inquired in his behalf as well as in her own, that it was safe to visit the child, then in a hospital and under the defendant's care; that he also advised her that it was safe to remove the child from the hospital to the plaintiff's home, and that there was no danger that the disease would be communicated, although it was then at a stage when great danger of infection existed; and that the plaintiff and his wife did not know of the infectious nature of the disease and relied on the defendant's advice, and accordingly visited their child at the hospital and removed her to their home, and the plaintiff thereby contracted scarlet fever to his damage. Said the court: "Generally speaking, one is responsible for the direct consequences of his negligent acts whenever he is placed in such a position with regard to another that it is obvious that if he does not use due care in his own conduct he will cause injury to that person. Depue *v.* Flatau, 100 Minn. 299, 8 L. R. A. (N. S.) 485, 111 N. W. 1. It was remarked in Farrell *v.* Minneapolis & R. R. Co. 121 Minn. 357, 361, 45 L. R. A. (N. S.) 215, 141 N. W. 492, that 'it is now generally recognized that each member of society owes a legal duty, as well as a moral obligation, to his fellows.' Assuredly this is a case where there is every reason to hold that defendant was under a legal duty to plaintiff, and it is of little practical consequence whether we call the duty contractual or noncontractual. The health of the people is an economic asset. The law recognizes its preservation as a matter of importance to the state. To the individual nothing is more valuable than health. The laws of this state have been framed to protect the people, collectively and individually, from the spread of communicable diseases. Scarlet fever is classed as such a disease. The state board of health is charged with the duty of prescribing regulations for the disinfection and quarantine of persons and places as an incident in the treatment of all infectious diseases, and physicians are required to report all infectious cases to their local boards of health. Chapter 345, Gen. Laws (Minn.) 1917 (Gen. Stat. Supp. 1917, § 4640). When defendant discovered that plaintiff's child was suffering from an infectious disease, it became his duty to comply with the laws of the state in the particulars mentioned in order that the public health might be protected. His duty did not stop there. The child's parents were naturally exposed to infection to a greater degree than anyone else. To advise them that they ran no risk in visiting her at the hospital or in taking her into their home necessarily exposed them to danger if they acted on the advice, and defendant was bound to know that they would be likely to follow his advice. . . . We conclude that the complaint is not demurrable, although it may be true, as suggested by defendant's counsel, that it is a matter of common knowledge that scarlet fever is an infectious disease, and that plaintiff may not have been greatly influenced by defendant's alleged assurance that he might visit his child or take her to his home without running any risk of infection."

"That every man has a natural right to the fruits of his own labor, is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission."—Per Marshall, C. J., in The Antelope, 10 Wheat. (U. S.) 120.

News of the Profession

NEW ASSISTANT ATTORNEY GENERAL OF ARKANSAS.—Silas W. Rogers of Little Rock has succeeded J. Burton Webster as assistant attorney general of Arkansas.

MONTANA PROSECUTOR RETIRES.—Donald Campbell of Forsyth, Montana, has resigned as prosecuting attorney of Rosebud county. Sam I. Crawford is his successor.

DEMISE OF IDAHO LAWYER.—William L. McConnell, a prominent Idaho Falls lawyer, died recently. He was a former United States Commissioner.

CONNECTICUT DEATHS.—Lyman T. Tingier of Rockville, Connecticut, is dead. He was once a lieutenant-governor of the state. Major E. Henry Hyde of Hartford is also dead.

NEW FEDERAL JUDGE FOR NORTHERN NEW YORK.—Frank Cooper, corporation counsel of Schenectady, has been appointed a federal district judge to assist Judge George W. Ray in the northern district of New York.

PROMINENT BALTIMORE LAWYER DEAD.—Former city solicitor, Samuel S. Field, for many years a leading member of the Baltimore Bar, is dead. He was born in Fauquier county, Virginia.

COUNTY BAR ASSOCIATION OF WASHINGTON ELECTS OFFICERS.—The Whitman County Bar Association, at its annual meeting recently held, elected Frank E. Sanger of Pullman, president, succeeding Fred Helwig of Malden.

COUNTY BAR ASSOCIATION OF VERMONT MEETS.—The semi-annual banquet of the Rutland County Bar Association of Vermont, was addressed by Judge Stanley C. Wilson of Chelsea. Harvey C. Wilson was toastmaster.

FORMER MISSOURI JUDGE DEAD.—The demise of former Judge Edward P. Gates of Independence, Missouri, is reported. He served some time as a circuit judge and was born in Lunenburgh, Vermont.

ILLINOIS DEATH.—The death of Judge Lyman McCarl, county judge of Adams county, is announced, also that of Judge Richard S. Tuthill of Evanston, a circuit judge of Cook county for thirty-five years.

KANSAS CITY BAR ASSOCIATION.—Senator David I. Walsh of Massachusetts was the principal speaker at a smoker of the Kansas City Bar Association held recently. He spoke on the operation of the workmen's compensation laws in the various states.

NEW YORK DEATHS.—Recent deaths among the profession in New York state are Max Lehman, James A. Wilson of Brooklyn; Charles J. Leslie and David T. David of New York city; Theodore T. Lane of Flushing; Jacob C. E. Scott of Albany, and Eugene B. Hastings of Utica.

NEBRASKA HAS NEW SUPREME COURT JUDGE TO FILL VACANCY CAUSED BY DEATH.—Judge L. A. Flansburg of Lincoln, who the late Judge A. J. Cornish of the Nebraska supreme court had asked to have succeed him, has been appointed to fill the vacancy.

NEW WISCONSIN JURIST.—Levi H. Bancroft of Rickland Centre, Wisconsin, has been appointed circuit judge for southwestern Wisconsin, succeeding the late Judge George Clementson. He is a former state attorney general.

MONTANA COUNTY ATTORNEY RESIGNS.—Lester H. Loble, county attorney of Lewis and Clark county, has resigned to enter practice. He is succeeded by J. R. Wine, deputy county attorney.

RESIGNATION OF OKLAHOMA COUNTY ATTORNEY.—Robert Burns has resigned as county attorney of the county including Oklahoma City, Oklahoma. He is succeeded by O. A. Gargill, his former assistant.

NORTHERN CHAUTAUQUA BAR ASSOCIATION.—Benjamin S. Dean of Jamestown, New York, was the guest of honor at a recent dinner of the Bar Association of Northern Chautauqua, New York. This association is the successor of the Dunkirk-Fredonia Bar Association.

LITTLE ROCK BAR ASSOCIATION.—The 1920 convention of the Little Rock Bar Association will be held on the second and third days of June. W. H. Martin of Hot Springs is president of the association.

WORCESTER COUNTY BAR ASSOCIATION ENTERTAINS NEWLY APPOINTED JUDGE.—Judge George A. Flynn of Boston, the most recent appointee of the Massachusetts Superior Court, was recently the guest of honor of the Worcester County Bar Association.

MINNESOTA JUDGE ABOUT TO RETIRE.—Josiah D. Ensign, aged eighty-six, dean of the Duluth bench and bar, who has served continuously for nearly thirty-two years as judge of the district court for the Eleventh Judicial District of Minnesota, is about to retire.

UNIVERSITY OF MAINE LAW SCHOOL.—William T. Atwood of Boston, and a native of Maine, has been elected dean of the University of Maine Law School. The new dean is a graduate of Dartmouth College, class of 1899, and of the Boston University Law School.

JUSTICE OF CALIFORNIA SUPREME COURT COMMITS SUICIDE.—Justice Henry A. Melvin of the California Supreme Court, committed suicide by drowning himself in a bath-tub at a hospital. He was born in Springfield, Illinois, and was formerly grand exalted ruler of the Elks.

SAN DIEGO BAR ASSOCIATION ENTERTAINS JUSTICES OF SUPREME COURT.—Members of the San Diego County Bar Association recently entertained five justices of the California supreme court. The address of the evening was made by Judge Warren Olney, his subject being, "Work of the Appellate Court."

DEATH OF FORMER FEDERAL JUDGE.—Ex-Judge Nathan Goff of Clarksburg, West Virginia, is dead. For many years he was a United States Circuit Judge and later he was a United States senator from West Virginia. In the administration of President Hayes he was secretary of the navy.

RAMSEY BAR ASSOCIATION.—At the annual meeting of the Ramsey County, Minnesota, Bar Association, John Bradford was elected president for the ensuing year. The association unanimously indorsed the "minimum fee bill" designed to secure greater uniformity of legal charges.

PROMINENT NEBRASKA ATTORNEYS WHO HAVE DIED.—Nebraska has lost by death, Judge Albert J. Cornish of the Nebraska Supreme Court; Silas A. Holcomb, former governor and supreme court judge, and a native of Indiana; Judge J. E. Douglas, formerly county judge of Cass county, and Edmund C. Strode, a well known Lincoln lawyer.

COUNTY BAR ASSOCIATION OF MAINE MEETS.—The Knox County Bar Association, a Maine organization, met in Rockland recently, and the following officers were elected: J. H. Montgomery, Camden, president; Arthur S. Littlefield, Rockland, vice-president; O. H. Tripp, Rockland, secretary-treasurer, Librarian E. K. Gould and E. C. Payson were added to the book committee.

MASSACHUSETTS ASSOCIATION OF WOMEN LAWYERS.—The annual election of the Massachusetts Association of Women Lawyers resulted in the election of the following officers: Mrs. Emma Fall Schofield, president; Miss Harriet Weller, vice-president; Miss Sarah J. Coyle, treasurer; Mrs. Mary A. Costello, recording secretary; Miss Dorothy M. Hobson, corresponding secretary; Miss Edith Batchelder, auditor, and Miss Sybil H. Holmes and Mrs. Rose Kingsley, directors.

AMERICAN BAR ASSOCIATION.—Plans for the annual meeting of the American Bar Association, to be held in St. Louis on August 25, 26 and 27, were discussed at a meeting of the executive committee of the organization, held recently in Chicago. It was announced that speakers on the programs would include Governor Gardner of Missouri, H. L. Carson of Philadelphia, president of the association; Franklin K. Lane and former Senator A. J. Beveridge of Indiana. A board composed of S. S. Gregory and Judge G. T. Page of Chicago, John Lowell of Boston, and O. J. Long of Wichita, Kan., was appointed to formulate plans for changes in the official journal.

SOUTH CAROLINA BAR ASSOCIATION.—The South Carolina Bar Association at its annual meeting recently held elected as officers the following: W. D. Morgan of Columbia, president; Collins Monteith of Columbia, secretary; Alfred Wallace of Columbia, treasurer. Judge M. S. Whaley of the Richland Court and United States Senator King of Utah made the principal addresses.

PENNSYLVANIA DEATHS.—The legal profession of Pennsylvania has lost by death the following members: John T. Lenahan of Wilkes-barre, a former member of Congress; J. Davis Brodhead, formerly of Bethlehem and at the time of his death a resident of Washington, D. C., ex-judge and ex-congressman; Oscar J. Denny of Sharon; A. P. Howard of Erie; John G. MacConnell of New Brighton, and Joseph de F. Junkin of Philadelphia.

OHIO STATE BAR ASSOCIATION.—Co-operation of the Ohio State Bar Association in the Americanization work to be undertaken in Ohio by the Americanization Committee, created by the general assembly, has been pledged to Ross Ake, chairman of the committee, by Smith W. Bennett, president of the state bar association. The project has received the hearty support of Chief Justice Hugh M. Nichols, of the supreme court.

CLEVELAND BAR ASSOCIATION ENTERTAINS PRESIDENT OF AMERICAN BAR ASSOCIATION.—Hampton Carson of Philadelphia, president of the American Bar Association, told members of the Cleveland Bar Association whose guest he recently was that the time had come to curb the tendency of the federal government to centralize all powers. He said that the jurisdiction of "police power" had already been interpreted so far that "we have forgotten the meaning of 'due process of law.'"

DEATHS IN MASSACHUSETTS.—James Schouler of Boston, lawyer, law professor, and writer, died at North Conway, N. H., April 17. Judge Everett C. Bumpus of the same city died April 21. He was a member of the International Panama Land Claim Commission. Thomas Weston, also of Boston, died April 17. He was at one time counsel for the Old Colony Railroad. William H. Gove of Salem died in April. He served on the council of Gov. Eben S. Draper, and was born in Berwick, Me. Ex-Mayor James H. McMahon of Fitchburg is also dead.

MISSISSIPPI BAR ASSOCIATION.—The fifteenth annual convention of the Mississippi Bar Association was held at Meridian, Mississippi, April 29 and 30. The annual address was made by J. B. Harris, president of the association. J. Kelly Dixon of Talladega was elected president for the ensuing year. Besides a new president, the association elected five vice-presidents and new members to both the central council and executive committee. The other working committees will be appointed by the president. The vice-presidents elected were: W. O. Mulkey, Geneva; E. J. Garrison, Ashland; Felix S. Smith, Rockford; S. A. Lynne, Decatur, and W. W. Lavender, Centerville. Alexander Troy of Montgomery was re-elected secretary-treasurer of the association. The new members of the central council chosen were Zeb Rudolph, Birmingham; Alto V. Lee, Gadsden; W. P. Acker, Anniston; W. S. Welch, Bessemer; Ivey Lewis, Birmingham. The new executive committee consists of B. P. Crum, Montgomery; F. S. Ball, Montgomery; J. Q. Smith, Birmingham; Alexander Troy, Montgomery; B. deG. Waddell, Seale.

English Notes*

INTERFERENCE IN AFFAIRS OF FOREIGN STATES.—The attitude of Mr. Davis, the American Ambassador, in declining to accede to the request of the Lord Mayor of Dublin that he should intervene on behalf of political prisoners in Dublin, is unquestionably correct and in accordance with the elementary principles of international morality by which one state is precluded from interference in the internal affairs of another state, since such interference would constitute an infraction of the rights involved in independence. Professor Lawrence defines independence as "the right of a state to manage all its affairs, whether external or internal, without control from other states." The right of independence has been laid down by Mr. W. E. Hall, "in its largest extent, as a right possessed by a state to exercise its will, without interference on the part of foreign states, in all matters and upon all occasions, with reference to which it acts as an independent community." The Lord Chancellor, in commenting on these definitions, describes by anticipation the position of Great Britain as an independent state, and therefore absolutely unaffected by influences from without in the management of her own affairs: "Both these definitions and descriptions are of a general character and may require to be strictly modified in practice, but the essential conception is familiar and therefore readily grasped. An independent state is entitled to live its own life in its own way, the sole judge within the law of its domestic government and its foreign policy. The particular form of government which it has chosen in the working out of its national destiny concerns itself and itself alone, for every independent state has the right of setting its own house in order." Phillimore in his summary of the rights incident to independence places at the head of the list of these rights the right to a free choice, settlement, and alterations of the internal constitution and government without the intermeddling of any foreign state. The American ambassador in his attitude of absolute aloofness and abstinence from all attempts to influence the executive government of this country in matters relating exclusively to itself is

*With credit to English legal periodicals.

acting in accordance with the best traditions of diplomacy and the doctrines propounded and rigorously maintained by the government of the United States in relation to situations created by interference, whether designed or otherwise, by foreign ambassadors in American internal affairs.

Young Men in Public Life.—A lay newspaper, calling attention to the fact that Mr. E. A. McTiernan, the Attorney-General, with a seat in the Cabinet, of the newly formed Storey Administration in New South Wales, is not yet six-and-twenty, states that, with the possible exception of Sir Samuel Griffith, who was Attorney-General for Queensland at twenty-six, Mr. McTiernan is the youngest Attorney-General in the history of Australian politics. The youngest law officer of the Crown in England in modern times was probably Philip Yorke (Lord Chancellor Hardwicke), who was appointed Solicitor-General at the early age of nine-and-twenty, in 1719. The most conspicuous instance of the attainment of high office at an early age is that of the younger Pitt, who was "bred to the Bar," to use his own words. He was made Chancellor of the Exchequer at twenty-three and Prime Minister at twenty-four. In England many statesmen have, like Mr. Pitt, attained, with the very greatest benefit to public life, high office in early years. Mr. Fox was appointed a Junior Lord of the Admiralty in 1770 at one-and-twenty. Lord Henry Petty was appointed Chancellor of the Exchequer in 1806 at twenty-six. Lord Castlereagh was Irish Secretary at twenty-seven, and Sir Robert Peel at twenty-four. Mr. Addington (Prime Minister and Viscount Sidmouth) was placed in the Chair of the House of Commons at little over thirty years old, and Lord Grenville before reaching that age had been Speaker of the House of Commons and Secretary of State, while Lord Palmerston at three-and-twenty was a Lord of the Admiralty. Mr. Gladstone regarded the participation of young men in public life and in the direction of national affairs as conducive to the very highest interests of the state. In support of this doctrine he yielded to the paradox, as it must have been to one of his democratic leanings, of defending small boroughs. In the debate on Lord Derby's Reform Bill in 1859 Mr. Gladstone said: "Allow me to take the case of six men—Mr. Pelham, Lord Chatham, Mr. Fox, Mr. Pitt, Mr. Canning, and Sir Robert Peel. Mr. Pelham entered the House at the age of twenty-two, Lord Chatham at twenty-six, Mr. Fox at twenty, Mr. Pitt at twenty-one, Mr. Canning at twenty-two, and Sir Robert Peel at twenty-one. Here are six men whom you cannot match out of the history of the British House of Commons for the hundred years which preceded our own day. Every one of them was a leader in the House, almost every one of them a Prime Minister. All of them entered Parliament for one of those boroughs where influence of different kinds prevailed."

Power of Club Committees.—The decision of Mr. Justice Roche in Young *v.* Ladies' Imperial Club, Limited, has recently been reversed by the Court of Appeal. Although in certain aspects the point involved may seem trivial, it nevertheless is in reality one of considerable importance, chiefly, of course, for those concerned in the management of clubs, for what the case decides is that before the extreme step of calling on a member to resign, or, in other words, resorting to the drastic step of expulsion, the committee must see to the punctilious observance of its rules and advise all its members. In the case in question what happened was this: One of the club rules, that under which the committee purported to act in erasing the plaintiff's name from the list of members, required that for such a resolution to be effective it must be passed at a committee meeting specially convened. Admittedly no notice was sent to one member of committee, the reason for the omission being that that member had stipulated that she should not be called on to attend any of the meetings. The question then narrowed itself to this: Was the act of the committee valid in the absence of notice to this particular member? It has long been clear law that, where a certain act is to be done by a particular body, all the members entitled to attend must be summoned if they are within reasonable summoning distance, and the omission to summon anyone so entitled will invalidate the proceedings (see Smyth *v.* Darley, 2 H. L. C. 789). Mr. Justice Roche treated a person who had agreed to allow her name to appear in the list of members of committee, but had intimated that she would be unable to attend any of the meetings, as a non-summonable person, and consequently that the action of the committee, which was otherwise regular, could not be impeached on the ground of want of notice to that member. In this the Court of Appeal has now said that he was wrong. In the course of his judgment the Master of the Rolls accepted the view that, where a person is beyond reasonable summoning distance, the empty form need not be gone through of sending notice to him or her, and he inclined to the opinion, without, however, actually deciding the point, that the same rule would apply in the case of a member who was so ill as to be unable on that ground to attend, but, except in these cases, he emphasized the obligation of sending notice to each member of committee. A person who allows his or her name to appear on the list of members of a committee has certain duties to perform, as well as privileges to enjoy, and it may well be that a person joining a club does so on the faith of the particular member of committee discharging the duties attaching to the office. At all events, this is now made clear, that each member of committee must be given the opportunity of attending. If this rule is not observed the resolutions of the committee are in great peril of being declared of no validity.

Lapsed Legacies.—"The law does not, in general, permit a gift by will to a person who is dead at the time when the will takes effect" (Sanger's Wills and Intestacies, p. 35). This seems almost a truism, as how can a person receive a legacy when he is not alive? Testators have been known to try to evade this rule by declaring that the gift shall not lapse, without appointing any substituted legatee, but this does not prevent its doing so, as negative words do not amount to a gift (Jarman on Wills, 6th edit., p. 425). The same learned author points out, too, on the previous page that merely adding to the name of the legatee "his executors and administrators" will not prevent a lapse, as that is merely a way of expressing an absolute gift. The gift can, however, be given to the executors or administrators so as to make it part of the estate of the deceased. Thus in Re Smith; Prada and Vandroy (115 L. T. Rep. 161) the following clause satisfied the Court of Appeal and prevented a lapse: "I declare that no legacy given by this my will shall lapse by reason of the death of the legatee before me, but that the same shall take effect as if the death of such legatee had happened immediately after my death, and such legacy shall accordingly pass to the legal personal representative of such deceased legatee." In Re Morris; Corfield *v.* Waller (115 L. T. Rep. 915) the proviso was "that in case any child of mine shall die in my lifetime leaving issue surviving me the bequests hereinbefore contained to my children shall take effect in the same manner as if the child so dying had survived me and died immediately after me and so that the share or shares of my said estate bequeathed to him or her, or which he or she would have taken if surviving me, shall devolve to his or her next of kin or legatees as part of his or her estate accordingly." Mr. Justice Eve held that the share of a daughter who had predeceased the testatrix intestate

went to the daughter's husband as administrator of her estate, and not to her children. The learned judge treated the reference to the next of kin or legatees as an inaccurate attempt to describe the first part of the declaration. The legislature, feeling doubtless that a parent would wish the family of a deceased child to be provided for, made the famous exception to the rule concerning lapse, by providing that a gift to issue of the testator who predeceases him leaving issue surviving him "shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contract intention shall appear by the will" (Wills Act 1837, s. 33). The result of this enactment is to increase the legatee's estate, but not necessarily to benefit his surviving issue. He may, for instance, leave it right away from them, or, as the recent case of Re Pearson (122 L. T. Rep. 515; (1920) 1 Ch. 247) shows, it will pass to his trustee in bankruptcy if he was an undischarged bankrupt at his death. A testator who provides no substitute for a deceased child runs the risk of the gift having to provide two sets of death duties, one in respect of his own death and one in respect of that of the child (Re Scott, 83 L. T. Rep. 613; (1901) 1 Q. B. 228). If he substitutes the issue for any child dead at the death of a tenant for life, he should be careful to provide that the issue to take be living at the tenant for life's death. Otherwise some of the issue living at the child's death, but since deceased, may share in the gift (Martin *v.* Holgate, L. Rep. H. L. 175).

THE SUFFICIENCY OF STREET LIGHTS.—A decision of considerable importance to the local authorities of the metropolis was given by Mr. Justice Shearman in the recent case of Carpenter *v.* Finsbury Borough Council. The case arose out of a fatal accident to the driver of a post-office van, who was crushed while trying, at night, to drive under an archway through which a street in the defendant's area passes. It appeared that the deceased man was unfamiliar with this street, and had been obliged on the occasion in question to turn into it owing to the thoroughfare through which he usually drove being closed owing to a fire. His widow, who sued under Lord Campbell's Act for damages, based her case on the alleged negligence of the defendants in failing to provide sufficient light to disclose to any one driving along the street in question the existence of the archway, which, owing to its being only slightly over nine feet in height, was a source of danger. It appeared that the nearest lamp was seventy feet from the entrance to the archway, and that the street lighting—that is, the number of lamps—had been the same for at least twenty years. Mr. Justice Shearman exonerated the deceased from any contributory negligence, and the question narrowed itself to this: Was the street sufficiently lighted in accordance with the obligation imposed on the defendants as the local authority by section 130 of the Metropolis Local Management Act 1855? That section provides that the local authority "shall cause the several streets within their parish or district to be well and sufficiently lighted, and for that purpose shall maintain, or set up and maintain, a sufficient number of lamps in every street." Whether a street is sufficiently lighted may be said to be a question of fact, but the importance of the case lies in the answer to the further question, Who is to determine whether a street is well and sufficiently lighted? The same point had been considered by the Divisional Court in Baldock *v.* Westminster City Council, and Justices Lush and Bailhache there took the view that it was for the local authority, and not for a jury, to say whether a street was sufficiently lighted. That case went to the Court of Appeals (120 L. T. Rep. 470), and the decision of the Divisional Court, although upheld, was upheld on different grounds, and no opinion was expressed on the point mentioned. In the case before him, Mr. Justice Shearman had to decide between the two conflicting views, the one that there is an absolute obligation cast on the local authority by section 130, and consequently that it is for the jury to say whether this obligation has been fulfilled; and the other which makes the local authority the sole judges whether the statutory requirement has been satisfied. He adopted the first view, that it is for the jury or other tribunal of fact to determine whether the local authority have complied with the requirements of the section, and, being himself the tribunal of fact in the particular case, he came to the conclusion that the place where the accident occurred was insufficiently lighted having regard to its peculiar nature, and he gave judgment for the plaintiff. As has been said, the decision is important because the metropolitan local authorities can no longer shelter themselves by merely saying that the sufficiency of the lighting of the streets is a matter entirely for their discretion.

Obiter Dicta

A HOT FIGHT.—Fry v. Fry, 155 Iowa 254.

VACATION TIME IN MAINE.—Chase *v.* Fish, 16 Me. 132.

MAID AGAINST MISTRESS.—Cook *v.* Covert, 71 Mich. 249.

DUTCH PREJUDICE.—City of Harrisburg *v.* Baptist, 156 Pa. 526.

WHO WOULDN'T?—Ford *v.* Ford, 110 Ind. 89, involved the filing of a remonstrance.

NOT DIVIDED.—In De Vide *v.* De Vide, 186 App. Div. 814, relief by way of a judicial separation was denied.

THEIR BUSINESS.—"Homicide, see Army and Navy."—Cross-reference in Federal Reporter Advance Sheet, vol. 262, No. 4.

SAY IT QUICKLY! "Under our present system one may plead as many pleas as he pleases."—Per Evans, J., in Pollak *v.* Winter, 166 Ala. 260.

BREAKING UP THE HOME.—In a recently published list of causes pending in the English courts, we find Home *v.* Home, under the head of "Divorce Cases."

TEN YEARS AGO.—"It seems needless to say that $15 a month and board for a boy sixteen years old is not cheap labor." Per Sanborn, J., in Botis *v.* Davis, 173 Fed. 996.

PLAYED NO FAVORITES.—In Favorite *v.* Superior Court (Cal.) 184 Pac. 15, wherein the plaintiff applied for a writ of prohibition to prevent the defendant judge from sitting in the case on the ground of prejudice, the application found no favor with the court.

MORAL—DON'T ESTIMATE! "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."—Per Mr. Justice Holmes in Nash *v.* U. S. (1913) 229 U. S. 377.

AN INTERESTING EXHIBIT.—In State *v.* Allgor, 78 N. J. L. 313, the court ordered to be quashed an indictment which charged the defendant with maintaining a common nuisance in suspending and exhibiting on a rope from his building, to a

pole near the edge of the highway, "a pair of blue overalls, one pair of dirty white overalls, one old piece of bed ticking, one pair of ladies' white drawers, two pairs of men's red flannel drawers." The court was undoubtedly right. Had the decision been otherwise, what would become of all our wash lines?

A REAL RETORT COURTEOUS.—All of us remember the reply by Curran (or was it some other famous lawyer?) when his argument was interrupted by the judge, who said: "Mr. Curran, that is not the law." Curran replied: "It was until your lordship spoke." A more delicate way of suggesting much the same thing is shown in the following colloquy in Regina *v.* Dickinson, 1 Cox Crim. Cases 27:

Patteson, J.: "It is a great error, though a very general one, to suppose that where a statement is made quite voluntarily on the part of a prisoner, it should be discouraged by the officer."

Clarkson, for the defense: "Perhaps, my lord, the fact of the error being a general one arises from this—that no such emphatic opinion on the subject has been before expressed."

A CASE OF CONFLICT OF LAWS.—An esteemed correspondent in Stevens Point, Wis., refers, in an interesting letter which space does not permit us to print in full, to the expense usually attending the enforcement of the not uncommon conveyance of property in consideration of life support. As he says, while the wisdom of the bar has often been called on to devise some method whereby such expense may be avoided, so far as known the legal mind has not discovered any method of overcoming this defect in the law. But, he continues, genius is a quality different from education, and it has remained for a layman to furnish a solution of the problem which has baffled the bench and bar for generations. In examining an abstract of title recently the writer came across a land contract containing the following clause: "Second parties agree to support first party, furnish her good and sufficient lodging, food and clothing and one room to live in during her natural life, said first party to live with second parties where they live, to not be obliged to do housework and be allowed to keep not to exceed one dozen hens, and said second parties to provide food and shelter for the same, and do everything they reasonably can do for party's comfort; also to give her a decent burial after death. When said conditions are fulfilled said first party is to execute a good and sufficient deed in fee simple, free and clear from all liens and incumbrances for the following real estate, to wit:" Our correspondent concludes thus: "Of course there are such instances as refusals to perform contracts deliberately entered into, but these instances are comparatively infrequent, and the courts have devised a method of compelling specific performance of such contracts. There would be a little added inconvenience and possible expense in bringing actions upon such contracts for specific performance, as the grantee would have to go into another jurisdiction or obtain service by publication."

CERTAIN DOMESTIC INFELICITIES.—Stories of domestic infelicity are sometimes amusing, providing, of course, the troubles are not our own. In two quite recent divorce cases, the grounds alleged for judicial separation, although serious enough probably in the estimation of the parties themselves, are of such a nature as to excite the risibilities of the casual reader. In one case (Crumbley *v.* Crumbley, 186 Pac. 423) the wife, although she accused her husband of cruel and inhuman treatment because he called her names, did not perform well at the table, and burned the late periodicals before she had a chance to read them, nevertheless seems herself to have been the real aggressor, for not only was she in the habit of "calling him a scurrilous name, indicating that his ancestry was of canine origin," but, as her husband complained bitterly, she "practiced the doctrines of Malthus, while he desired to be fruitful, to multiply and replenish the earth, according to their capabilities." In the second case (Croghan *v.* Croghan, 83 So. Rep. 460), the husband seems to have been the real offender and he was quite naughty, really. The wife was "a refined and well-reared lady," "a lady of refinement and culture and of the sensibility and sensitiveness of a lady towards violent and grossly profane language," and had "the horror of a lady and of a person of refinement for coarseness of speech." It was quite natural, therefore, that she should be unhappy when tied to a man who did not possess "the manners of a Chesterfield and who sometimes met refined acts of unkindness with human expressions of reasonable anger, even to the extent of saying 'damn,'" which she said "was very common, very rude, and very brutal." But after all, what was that compared with the following: "There is a general charge that it was the defendant's custom to lie in bed and smoke and blow the smoke in his wife's face, and that on more than one occasion he seized her by the nose and forcibly turned her face to him and toward the smoke again, and compelled her by mere brute force to receive the fumes of his tobacco smoke in her face, and refused to allow her to get out of the bed to avoid his cruel and abusive treatment." The brute! And yet, though the court said that "the home life of this couple could not be called heavenly," it refused in a "very common, very rude, and very brutal" manner to grant a divorce.

Correspondence

JUDICIAL NULLIFICATION.

To the Editor of LAW NOTES.

SIR: In LAW NOTES for March, you publish at page 219 my letter taking exception to your use of the expression "judicial nullification," and at page 202 you make editorial comment upon it.

While we cannot carry on indefinitely an argument, I ask leave to point out some fallacies in your editorial. You speak of "five judges, who, against the opinion of their four colleagues, can declare the act to be void and be answerable to no one on earth." The court is answerable to the Constitution and to the people by whose supreme authority it was made. That has often been shown. When the Supreme Court of the United States properly held that a State might be sued for a debt owing to an individual the Eleventh Amendment was proposed by Congress and adopted to prevent such a suit thereafter, for at that time most of the states were in dire financial distress and they felt that it would be a belittling of their dignity to be brought to the bar by all sorts of claimants. Again, when, under the provision of the Constitution regarding taxes, it was held that an income tax could not be laid, Amendment XVI was proposed and adopted.

As pointed out by Story and other writers on the Constitution, the judiciary is the weakest of the three departments—far weaker than the executive, and infinitely weaker than the legislative. It is less to be feared than either. Anyone acquainted with the constitutional history of this country, particularly during and after the Civil War, does not need citations under this proposition. The executive department gave little or no heed, even in Northern states in which the courts were open and which never were under military control, to the constitutional

provision regarding habeas corpus, and then it disregarded the special requirement of Congress that arrests and imprisonments without trial in states in which the civil law was in force and the courts were open be reported to the Secretary of State and the Secretary of War. In its turn Congress, in its desire to be supreme, made laws to fit its passions and finally tried to unseat the Executive. In the light of what Story and others have shown as to the comparative weakness of the judiciary, and in the light of the foregoing historic facts (a few out of many), your statement that "the nearest approach to autocracy in the American Republic is the power of the courts" is wholly unfounded.

Your reference to "five-to-four decisions" is meaningless. Our system of government is founded on majority control. Some of the most important questions in our history have been disposed of by a single vote. In many instances the Vice-President of the United States, who ordinarily has no vote at all, has cast the deciding vote in most momentous matters. But he thereby expressed the constitutional will of the whole American people—as fully as if every man in the country had voted on the question. In the last National election the Democratic party defeated the Republican party by a vote of 9.1 to 8.5, a difference of only 6/10. That is more than three times narrower than your so-called five-to-four decision, which is equivalent to a vote of 10 to 8, or 20/10. It is well known that by a plurality of only 3,800 in California the Democratic party secured an electoral vote which gave it control of the country—that is, the small number of 3,800 determined the political status of 18,528,743 voters.

There is no magic in a unanimous opinion. A given number of persons may be unanimously wrong as well as unanimously right. In 1791 Congress decided in favor of a national bank. In 1811 Congress decided against a bank. In 1815 Congress decided against a bank. In 1816 Congress decided in favor of a bank. When was it right? In the meanwhile the government survived. When the whole body of elective representatives of the people thus fluctuate in opinion (and other cases without number might be cited) what license have they to contend that the members of the judiciary should never disagree? Or that when the judges disagree the decision of the majority must be bad?

One of the chief causes of the failure of the Articles of Confederation was that in practically everything the unanimous concurrence of the states was required. Thus the provision permitting amendment of the Articles required unanimity; and therefore our supplanting the Articles by the Constitution adopted by nine of the thirteen states was a revolutionary step. Three attempts had been made to amend the Articles with respect to revenue and commerce, and, although the need of the changes was almost unanimously recognized as necessary, a single state in each instance was able to prevent progress. When our Constitution was adopted it was carefully provided in Article V that no such miscarriages should come to pass again; and it was declared that an amendment to the Constitution may be proposed by two-thirds of both Houses—not two-thirds of the membership, but two-thirds of the constitutional quorum, which is a majority. Therefore out of 96 senators and 435 representatives an amendment to the Constitution of the United States may be proposed by 179 persons, or less than 34 per cent of the total. Now, if the first step toward amending the Constitution of the United States may be taken by a vote of 34 per cent in Congress, why should anybody have a fit about a five-to-four decision of the Supreme Court of the United States, which is a decision by 55.5 per cent? By what line of reasoning can any one reach the conclusion that a unanimous decision by the Supreme Court of the United States is necessary on constitutional questions, when the Constitution itself can be amended from end to end by proposals emanating from only 34 per cent of Congress?

Disposing of judicial questions by a preponderance of learned opinion should be no more shocking than that majority opinion should control in the legislative department, in every corporation, in every business organization, in every club, in every place where men assemble. Many of our states have done away with the unanimous verdict of the jury for the like reason that our Constitution rejected the unanimous vote of the states—it is not practicable and therefore it is not sensible. Such miscarriages as caused the states to change the verdict of the jury from unanimity to a fixed majority would have resulted in the many cases decided by the Supreme Court of the United States without unanimity, which decisions were accepted as correct by Congress and by the country and have so gone into history. In those cases Congress would have been thereby permitted steadily and stealthily to achieve the encroachment which the limitations in the Constitution were calculated to prevent, since unanimity of opinion can never be expected among men in regard to any great question. For example, in the Act of September 1, 1916, Congress went beyond its authority under the commerce clause to prohibit the transportation in interstate commerce of articles to the making of which child labor had contributed. The act was not in any proper sense a regulation of commerce, but a direct interference with the police power of the state in local matters, and the Supreme Court so held (247 U. S. 251). Yet the decision was not unanimous. If such legislation were to stand unless challenged by unanimous opinion, that interference in state affairs would be followed by another, and another, until the very evil which was feared when the Constitution was framed and which caused the adoption of the first ten amendments (and particularly IX and X) would come to pass, namely, the National government would swallow the State government. With respect to the prohibitory amendment that very question is now as vital as it was when the first ten amendments were adopted.

You refer to People *v.* Williams, 189 N. Y. 131, and say that eight years later the court discovered that it was wrong. In LAW NOTES of March, 1914, you said (p. 222) that "the opinion was based upon perfectly valid grounds." No one who examines the opinion can reach any other conclusion. Without stating any reasons of health or public welfare the legislature of New York put an adult woman in a class with minors and said that she should not work at night. No question of health or public welfare was involved in the decision. The case of People *v.* Schweinler, 214 N. Y. 395; 108 N. E. 639, which came eight years later, was not, as you say, based on "an identical statute." The statute was fundamentally different. It was passed after an investigation of the condition of labor and it recited that it was to require "a period of rest at night for women." It was "to protect the health and morals of females employed in factories."

The proposition "that it was the intention of the makers of the Constitution that each department of government should judge for iself whether its acts were in conflict with the Constitution" is erroneous. The first judiciary act shows this. It was Madison, I think, who called the suggestion an expression of "imbecility." Of course, all kinds of notions were expressed in the constitutional convention and in the state conventions which passed upon and adopted the Constitution. But what the "intention" was must be gathered from the Constitution itself. It does not even hint at anything of the kind. On the contrary, it clearly and fully says (Art. III) that the judicial power shall deal with constitutional questions, with acts of Congress, with treaties, with controversies between states, and between citizens

of different states. As if that were not enough, it says (Art. VI) that the Constitution shall be supreme over the state, and that legislators and judges in the states shall be sworn to observe it and uphold it. When a conflict arises in any of those cases must there not be an umpire to dispose of it? The most important rule of interpretation is to ascertain what construction was put upon the document by the governmental officers who were in the beginning charged with the duty of applying it in daily use. That "collateral interpretation" is, not that each department of the government shall determine for itself what course it will follow under the Constitution, but that the judiciary, whenever a citizen claims that his right to life, liberty or property has been invaded by the government, shall pass upon the question and declare the law.

Each department of the government of England was judging "for itself whether its acts were in conflict with the Constitution" when King Charles judged that the legislative department was a nuisance to him and that he would abate it by arresting its leading members and throwing them into the Tower. Later, when the legislative department cut off the head of the King, it was judging for itself what powers it should exercise and whether its acts were in conflict with the Constitution. At another time the legislative department was judging for itself what its powers were and was exercising them accordingly when it concluded to make laws in violation of the Constitution of England without submitting them for the approval or signature of the executive. At another time Parliament judged for itself the extent of its powers when it concluded that it could not be dissolved except at its own pleasure, an act contrary to the unbroken constitutional history of the realm. The House of Commons was judging for itself how much power it had when it undertook to abolish the House of Lords and be the whole legislature. In the fight between the executive tyrant and the legislative tyrant the former was entirely "outclassed."

It was to avoid those pitfalls exposed by history to the view of our deeply learned forefathers that the Constitution was framed. When Madison looked back on that procedure and called it imbecility he hit it off right, didn't he? Hallam shows that that kind of work went on for 500 years before a constitution was finally worked out prohibiting to some degree a department of government from judging for itself what power it possessed and then exercising its unlimited and happy will. As Jefferson pointed out with so much vigor, if the legislative or the executive is to determine for itself the extent of the power which it possesses and to exert it to the extent to which it determines for itself that it should go, then the end of constitutional government is at hand. While our Constitution was pending before the people of your state the argument was made to them by a writer of the Federalist that "an elective despotism was not the government we fought for." The elective despotism was then the horrible example in English history. It was said that it would be "no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one."

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Congressional Declaration of Peace.

It has been asserted frequently of late that any attempt by Congress to declare the war at an end is an infringement on the constitutional rights of the executive, and that the nation must perforce await the negotiation and ratification of a treaty before the present anomalous situation can end. It seems quite clear, however, that such is not the law. The Constitution is silent as to the power to make peace. It gives the treaty making power to the President "with the advice and consent of the Senate," but a treaty is in no sense necessary to the termination of a state of war. War may be terminated by treaty, by the submission of one belligerent to the other, or by the mere cessation of hostilities. *Freeborn* v. *The Protector,* 12 Wall. 700. Hostilities having ceased for twenty months and the enemy having submitted to the will of the United States and its allies, we are still at war simply because the war measures enacted by Congress provide a particular method of determining the end of this war, viz., the proclamation of the President. That would not have been the law had not Congress so enacted. It is a rule wholly of legislative creation and as such its abrogation rests entirely in legislative discretion. Congress may of course delegate to the President the power to ascertain a fact on which the operation of a statute is made to depend. *Field* v. *Clark,* 143 U. S. 649. Equally of course it may withdraw the delegation and proceed to determine the fact for itself. A congressional declaration that peace exists amounts to that and to nothing more. Whatever confusion of thought has existed on the subject seems to have arisen from a failure to remember that but for the congressional provisions referred to the war would now be over under well settled rules of law. An entirely different question would be presented were Congress to attempt a declaration of peace in the face of existing actual hostilities.

The Prohibition Decision.

The Supreme Court of the United States has held that the Eighteenth Amendment is valid, and that despite the grant of "concurrent power" to the states the federal enforcement act nullifies all inconsistent state laws. The decision is the law of the land and must be respected as such as long as it stands unreversed. It is, however, most unfortunate that a decision of such importance should have been rendered without an opinion by the court. This court is no exception to the aphorism of Bacon quoted in our last issue—"with an enlightened bar and an intelligent people the mere authority of the bench will cease to have any weight at all if unaccompanied with argument and explanation." The criticism by the Chief Justice of the failure of the court to give any reasons for its decision and the frank confession of Mr. Justice McReynolds in his separate opinion that he was unable to come to a definite conclusion on some of the questions involved but serve to accentuate the dissatisfaction with which the decision must be received by all who are not content with the mere fact that authority has been exercised in their favor. Perhaps no decision has ever been rendered which affected directly so large a part of the population. In addition, several states were in court claiming that their reserved sovereignty had been infringed. From every aspect the situation was momentous. It must be assumed that the court conscientiously did the best it could under all the circumstances, and the fact that it found itself compelled to adopt the unusual course of rendering a syllabus decision after long deliberation makes it impossible to regard the decision as one which permanently settles the question. No lawyer worthy of his profession will fail in respect for the Supreme Court. It is perhaps the most august tribunal ever set up on earth, and the manner in which it has exercised its great powers for over a century gives reason to hope for the day when the reign of law will displace that of violence over all the world. But there is one thing worthy of respect even more than the court—the reason of the law whose mouthpiece the court is. On the issues involved in the Eighteenth Amendment authority has spoken but not reason. As citizens we must yield full obedience, but as lawyers we must stand unconvinced.

War Without Bloodshed.

It was said at a recent religious conference in the United States that were it not for the loss of life it would be a good thing for the nation to have a war every few years. The same thought without the humanitarian qualification has long been a theme of German writers, and behind it lies some measure of truth. War does bring out many noble attributes of national character which are not manifested in times of peace. It is not war as war which accomplishes this result; the business of war is hard, dirty, wasteful and brutalizing. That despite all this it does work a national regeneration is due to the spirit which it inspires; to the fact that it jars people out of their selfish

and self centered routine and compels them to serve and sacrifice for something greater than themselves. Long tradition has invested war service with a glamour which attaches to nothing else. But there is nothing at all in the nature of things which confines this inspiring potency to war alone. It is a defect in our education and our national ideals that attaches to war a glory not attributed to the bloodless victories of peace. The struggle against disease, against ignorance, against poverty, is as real, and as vital to the national safety, as the struggle against an alien enemy. The battle for honest government, for law and justice against the forces of reaction, corruption and anarchy, is no less real than the battle of the Marne. The exigency of war shows the height to which our human nature will rise under a proper stimulus. To give that stimulus to the activities of peace is merely a matter of education; a readjustment of mental focus. Little bands of devoted men have worked patiently year after year without reward or hope of reward to secure juvenile courts, reform in judicature or the like. Ignored or sneered at, they have gone on steadily, foregoing opportunity for personal gain, inspired only by the desire to leave the world better than they found it. Why is it that such service attracts no attention while the few days of heroic resistance by Col. Whittlesey and his "lost battalion" fired the imagination of the entire country? Why is it that men will slave through every hardship for a pittance if dressed in khaki while the same men dressed in blue denim are forgetful of every public interest and think only of getting the maximum of pay for the minimum of work? Is it not the greatest of the lessons of the war that the cause of most of our national ills is in our ideals and not in our laws?

The Growing Police Power.

THE extreme consequences which may flow from the manner in which constitutional limitations on the police power have been released by recent decisions was forcibly brought out in a late address by Chief Justice Browne of Florida. After a review of the history of the police power he said: "If Lenine and Trotsky were asked why they abolished the 'right to privately own land within the boundaries of the Russian Republic,' and 'confiscated without compensation for the loss incurred all land, mines, forests and waters,' they would reply that it was 'for the general welfare, happiness, comfort and prosperity of the people; that the public safety and public morals required it; that private ownership in these properties caused wealth to be accumulated in the hands of the few, and the many reduced to poverty, suffering and crime; that when poverty is widespread, men will steal to get what they cannot otherwise acquire, and women will sell their virtue to get the necessities of life and to feed their starving children.' They point to the condition of the masses in Russia under the Romanoff dynasty, and say that 'private ownership in these properties is inimical to the public welfare; producing idleness, pauperism, suffering and crime, and consequently the right of property in them 'is declared not to exist in any person, association of persons or corporations.' This doctrine sounds strangely familiar. Perhaps Trotsky when living in the United States read some of our legislative enactments and the decisions of our courts sustaining them under the doctrine of our Super-constitution, and was inspired thereby to embody them in the Russian law." The opinion has been more than once expressed in LAW NOTES that it would be a good thing if every limiting provision of the Constitution was repealed outright, an expression which has usually evoked horrified protests from the more conservative members of the bar. But now, according to the distinguished jurist quoted, that repeal has been substantially accomplished by judicial construction. If such is the fact, it must be met by the same measures which would follow a formal repeal; by greater care in the selection of representatives and by added methods of popular review of their action. If it is thus met the growth of the police power doctrine will be a good thing, but until some added check on representative action is provided it is a danger which the legal profession at least should not ignore.

A Cure for Official Ruffianism.

A LAW enacted in a spirit of blind fanaticism is usually enforced for a time in the same spirit, and the prohibition laws have proved to be no exception to that rule. In the recent case of *Moore* v. *Wichita* (Kan.), 189 Pac. 372, it appeared that four police officers, whose exact official status does not appear, went at night to the home of a reputable citizen, broke in the door, cursed and abused the owner and his wife and daughter, destroyed furniture and generally dismantled the interior in a search for concealed liquor, refusing profanely to show any warrant for their intrusion. Doubtless because the intruders were financially irresponsible, the householder brought suit against the city under a state law making municipalities liable to damage done by mobs, and the Supreme Court sustained a recovery on that ground, saying: "We must not remove the ancient landmarks of common-law liberty, or weary of the presumptions accorded those suspected or accused of crime, or become impatient with the muniments of title which have for centuries made us feel secure in the possession of our Anglo-Saxon freedom. The human tendency to exalt and expand a little brief authority may sometimes be excusable, but it can never form a justification for refusal at the expense of settled principles of liberty to make its possession known when properly called upon to do so. The undisputed testimony is to the effect that the plaintiff is a law-abiding citizen, and to invade his house and treat him and his wife and daughter the way they did, the men composing this mob in fact and in law brought the defendant city within the plain operation of the statute invoked." The general irresponsibility of municipalities for outrages committed under color of police authority has left many victims without remedy, and it is refreshing to see the taxpayers of at least one community brought to a realization of the responsibility they assume when they bestow drastic powers on men without property and often without character. The fears expressed in LAW NOTES several months ago respecting the manner of appointing federal agents for the enforcement of the Volstead act have been borne out by subsequent reports of homicides by such agents which, on the face of the press accounts, were nothing less than murder. Considering but a single instance, it may seem unjust to impose on taxpayers a liability for the acts of an officer of whose very existence most of them are ignorant. But a rigid rule of liability will operate as nothing

else can to dispel the prevailing apathy as to the restrictions surrounding the delegation of police authority.

The Crime Wave.

THE newspapers of late have been filled with speculation as to the cause and the cure of the epidemic of crime in the larger cities. The favorite explanation seems to be that it is due to the reaction from the war, a theory which as a universal solvent of problems has been somewhat overworked. It is a fact familiar to every student of criminology that crime and the cost of living are intimately connected. Charts covering a period of years show that crimes against property increase and decrease in almost exact correspondence with the price of some characteristic staple such as wheat which represents fairly the cost of living to the poor. It is not, therefore, surprising that there should be a wave of crime; it would be surprising if there was not. Crime, like death, is beyond prediction in individual cases, but in bulk is susceptible to quite definite calculation, and springs from definite causes. Crimes of different kinds show also a seasonal periodicity, crimes against property normally reaching their peak in December or January when casual labor is in the least demand and weather conditions are most oppressive. Since the cause of the increase of crime is financial distress, labor conditions which tend to equalize the increase in living expenses will measurably hold down the percentage of crime. Favorable labor conditions do not, however, wholly counteract the effect of high prices, since it is the lower fringe of labor, the shiftless, improvident and unskilled, who profit least thereby and these are the persons who first revert to crime. But the mere fact that the causes of crime are well known to those who have taken the pains to study the subject gives no surety of any speedy action to obviate them. Even though we have emerged from the idea that disease is a special dispensation of Providence, and have traced the origin of epidemics with scientific certainty, the governmental measures in aid of the public health are few and inadequate, as any physician will bear witness. With even more lagging steps the era of preventive criminology approaches.

Large or Small Counties.

MR. WILLIAM ERSKINE WIMPY, a member of the bar of Clarkston, Ga., has issued several interesting pamphlets maintaining the proposition that law is better enforced and public business better administered in large counties than in small. From one standpoint there is much force in the argument. Small communities often lack the means to provide adequate police protection—the necessity in several states of resorting to state police emphasizes that fact. Small communities also are usually so permeated by personal ties and interests that it is hard to get firm and impartial enforcement of law. The same considerations make federal regulations much more potent in any community than those prescribed by the state. But with this, as with every argument in favor of the centralization of government, it is hard to find a logical stopping place. If several small counties may advantageously be merged into one large one, why not merge all counties into the state and all states into the United States? The centralization of authority gives some advantages but they are bought at the expense of local self-government, and local self-government, despite the inroads made on it by the Eighteenth Amendment, is of the very essence of individual liberty. The moment the power to settle any matter which concerns only a particular community is vested in any body outside that community self-government is pro tanto denied. Any self-governing community will have just as good a government as a majority of its members desire, and no community is entitled to anything more than that. It is not difficult to maintain that principle and still avoid most of the evils which inhere in small units. The making of local regulations, the determination of the expediency of local expenditures and the like are local questions and should be remitted wholly to the vicinity involved. But the enforcement of law and the administration of justice stand on a different footing. State police and judicial districts extending over a considerable territory and drawing jurors from all parts thereof in no way infringe the principle of local self-government and fully protect individuals from local favoritism or incompetence. The local constable who is blind to the acts of a person of local influence, but death on visiting automobilists; the local justice of the peace whose church and business connections make his court a travesty on justice—these relics of a cruder age could well go into the discard and not infringe the rights of any community to rule its local affairs without being at the mercy of a large unit of differing interests.

The Terminology of Internationalism.

IT has been said that he who knows the terminology of a science knows the science. If this be true international jurisprudence is going to remain unknown for a long time if Dr. John H. Wigmore has his way. The genial but all too learned Doctor, who perpetrated "autoptic proference" and "prophylactic rules" on an unsuspecting profession has an article in the May issue of the *Illinois Law Review*, entitled "Synoptic and Hyperethnic Nomology." Putting the reader out of his misery at once, let it be explained that it is concerned with the terminology of the world law which is expected soon to come into being. Synoptic Nomology may be said, in words of one syllable, to be the like rules found in the laws of all lands, while Hyperethnic Nomology is the term proposed for those supernational laws which would be imposed as a result of international association, and this in turn he proposes to divide into Mesoethnic Nomology and Cosmopolitic Nomology, the former denoting the relation of a state to the supernational law while the latter denotes the relation of the individual thereto. It is too much, altogether too much! The writer will become an "irreconcilable," a "bitter-ender" or anything else that Senator Johnson may desire if the alternative is to become subject in his individual capacity to "Cosmopolitic Nomology." Dr. Wigmore has unknowingly dealt a fatal blow at the League of Nations. What orator can declaim, what poet sing, of the day when

> "The common sense of most shall hold the fretful realms in awe,
> And the kindly earth shall slumber wrapped in hyperethnic nomology."

Asexualization.

A recent federal case (*Wickle* v. *Henrichs*, 262 Fed. 687) holds to be invalid a Nevada statute imposing vasectomy as part of the penalty of rape. The court said: "Reformation of the criminal is a wise and humane pur-

pose of punishment, to be disregarded only when the death penalty is inflicted. It needs no argument to establish the proposition that degrading and humiliating punishment is not conducive to the resumption of upright and self-respecting life. When the penalty is paid, when the offender is free to resume his place in society, he should not be handicapped by the consciousness that he bears on his person, and will carry to his grave, a mutilation which, as punishment, is a brand of infamy. True, rape is an infamous crime; the punishment should be severe; but even for such an offender the way to an upright life, if life is spared, should not be unnecessarily obstructed. It will not do to argue that, inasmuch as the death penalty may be inflicted for his crime, vasectomy, or any other similar mutilation of the body, cannot be regarded as cruel, because the greater includes the less. The fact that the extreme penalty is not exacted is evidence that the criminal is considered worthy to live, and to attempt reformation. For him, and for society, a fair opportunity to retrieve his fall is quite as important as the eugenic possibilities of vasectomy." Quite apart from the constitutional question, the entire folly of such a statute should be apparent to everyone. The weak point in the whole eugenics theory is the lack of any definite knowledge as to what traits or proclivities are transmitted by inheritance, and has any scientist ever maintained that the disposition to commit sexual crime was peculiarly hereditary? That being so, the requirement of an operation which in no way prevents the repetition of the offense is simply fantastic. This kind of pseudo-scientific criminology is bad enough in itself and intolerable because it tends to bring disrepute on the really sane attempts which are being made to deal with the problems of crime and degeneracy.

Lynch Law.

THE readiness with which the minds of apparently law abiding men turn to the impatient remedy of lynch law is well illustrated by a recent declaration of a clergyman who has won some notoriety by his tirades against the vice supposed to exist in New York city. Dealing with the supposed iniquities of some theaters and the like he is reported to have said that the proper remedy was to tar and feather the proprietors of these supposedly vicious institutions. The trouble with this sort of remedy is that it is hard to tell where it is going to stop. There are many men in New York city who sincerely regard the church as a social evil. Suppose they started out with a few barrels of tar and a couple of pillows in search of preachers. The man who has a strike at his plant would advocate tar and feathers for the strikers, who would reciprocate heartily. Between Gov. Edwards and W. H. Anderson it would be a question whose party could buy the most tar. But, seriously, the reverend whose views furnish the text of the moment exemplifies in himself the greatest reason why reform is not successful—the tendency of men, discerning a real evil, to bring impatience, intolerance and violence to its cure rather than understanding of causes or considered plans for constructive reform. The lynching of a prisoner may be caused by honest indignation at the delays and technicalities of the criminal law, but it helps not at all to reform the system or make its administration more efficient in the future. Zeal, enthusiasm, righteous indignation are valuable social forces, but they are blind forces doing as much harm as good without intelligent discretion. The problems of a hamlet or of a nation can be solved only by men who are willing to give them patient study, inspired by no self seeking but by sincere love of their fellow men. Understanding, service and sacrifice, not violent laws or lawless violence, are the means whereby genuine progress is brought about. The man who seeks a short cut, be he clergyman or Bolshevist, no matter how lofty his purpose, not only accomplishes nothing, but impedes the forces which actually work for progress.

REFERENDUM ON AMENDMENTS TO FEDERAL CONSTITUTION.

IT is settled by the decision of the federal Supreme Court that, with respect to the ratification of the Eighteenth Amendment, the action of a state legislature is final and not subject to a referendum in a state whose constitution provides for a review in that manner of legislative acts. So far as this amendment is concerned the question is res judicata. It is therefore possible now to present the inquiry whether the rule thus announced is founded on reason and worthy to be continued as a part of our governmental system, and to secure for the inquiry a consideration unbiased by the merits or demerits of the question in connection with which it first arose. Few men—and few courts—can rise to the height indicated by Mr. Justice Wanamaker who began an opinion on the question now under discussion (*Hawke* v. *Smith,* [Ohio] 126 N. E. 400), in these words: "The question in this case is not, Should our state or nation be 'wet' or 'dry'? The question is not, Are you for or against the referendum in the making of state or national constitutions? The question is not, Are you for or against any particular amendment to the national Constitution, proposed or prospective? The question is, Can the referendum be used by the people of Ohio on any proposed amendment to the national Constitution when proposed by Congress and submitted to the states for ratification by 'the Legislatures' thereof? Is such a use of the Ohio referendum permitted, not by the constitution of Ohio merely, for this is conceded, but by the Constitution of the nation, particularly article V? A judge who would permit his personal preference on the merits of any particular amendment to influence his judgment in deliberation upon and decision of such a question, by so much as a pennyweight, not only disqualifies himself as a judge, but brings dishonor upon the judiciary."

In addition to the decision of the federal Supreme Court it may be said at the outset that the right to a referendum has been denied in the greater number of decisions on the point, similar rulings having been made in *Re Opinion of Justices,* (Me.) 107 Atl. 673; *Herbring* v. *Brown,* 92 Ore. 176, 180 Pac. 328; *Ex parte Dillon,* 262 Fed. 563; *Barlotti* v. *Lyons,* (Cal.) 189 Pac. 282 and *Prior* v. *Noland,* (Colo.) 188 Pac. 729. The opposite view was taken in *State* v. *Howell,* (Wash.) 181 Pac. 920 and *Hawke* v. *Smith,* (Ohio) 126 N. E. 400. Closely analogous on the same side, but involving a different constitutional provision, is *State* v. *Polley,* 26 S. D. 5, 127 N. W. 848.

The provision of the United States Constitution (article V, 11 Fed. St. Ann. [2d ed.] p. 309) is in brief that amendments shall be valid "when ratified by the Legislatures of three-fourths of the several States." In those States which have made the referendum a part of their legislative system the question is therefore whether the term "legislatures" in article V means legislatures as they were known at the time that article was adopted or means the body to which at any time the legislative power is given. The former view was expressed in *Re Opinion of Justices,* (Me.) 107 Atl. 673, as follows: "The State Legislature in ratifying the amendment, as Congress in proposing it, is not, strictly speaking, acting in the discharge of legislative duties and functions as a law-making body, but is acting in behalf of and as representative of the people as a ratifying body, under the power expressly conferred upon it by article V. The people, through their Constitution, might have clothed the Senate alone, or the House alone, or the Governor's Council, or the Governor, with the power of ratification, or might have reserved that power to themselves to be exercised by popular vote. But they did not. They retained no power of ratification in themselves, but conferred it completely upon the two houses of the Legislature, that is, the Legislative Assembly." The argument was somewhat amplified in *Barlotti* v. *Lyons,* (Cal). 189 Pac. 282, where the court said: "The initiative and referendum provisions constitute simply a reservation of power in the people to propose and enact laws independent of 'the Legislature' and to adopt or reject any act of 'the Legislature.' This has always been the meaning ordinarily attributed to the term in this country, and it is difficult indeed to conceive that the makers of the Constitution of the United States, in providing for ratification 'by the Legislatures of three-fourths of the several states or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by Congress,' intended by the words 'the Legislatures' anything other than the representative lawmaking bodies of the several states. At the time of the adoption of the Federal Constitution, as is shown by the brief of learned counsel for petitioner, every state had such a body, existing under one name or another, and, of course, it was to be assumed that, in accordance with our guaranteed republican form of government, each state would always have such a body. Just what this body should be, what called, how constituted, whether bicameral in form or not, was a matter for each state to determine, but the essential characteristic of the thing was that it was a representative official body invested with the functions of lawmaking, the legislative official body of the state." So the federal Supreme Court said:

> The argument to support the power of the State to require the approval by the people of the State of the ratification of amendments to the Federal Constitution through the medium of a referendum rests upon the proposition that the Federal Constitution requires ratification by the legislative action of the States through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this —ratification by the State of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment.
>
> It is true that the power to legislate in the enactment of the law of a State is derived from the people of the State, but the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the State derives its authority from the Federal Constitution to which the State and its people have alike assented.

The contrary view was urged by the Washington court in *State* v. *Howell,* (Wash.) 181 Pac. 920, as follows: "It was doubtless intended that 'Legislatures' should mean one thing—that is, the legislative authority of the state—and 'conventions' another thing—an extraordinary representative body, convened by and in the state, for the sole purpose of passing upon the proposed amendment to the Federal Constitution. If it had no other intention in adopting the term 'Legislatures' in specifying one of the instrumentalities for passing upon the proposed amendment than to express the idea of legislative power, of whatever that power consists, then it must be deemed to mean all the branches or component parts of that power, which have included the qualified voters also, if they so desire. Inasmuch as the Constitution was formulated not for a day or a year, but for all time except as amended, we may consider that it contemplated the same kinds of state legislative bodies then in existence and known to the framers, or any other kinds of legislative bodies that should come into existence in the future. One of the important ideas governing the framers of the national Constitution was that amendments to that instrument should be ratified by the States as units, recognizing and preserving the integrity and sovereignty of the States as parties to the compact creating and continuing that Constitution. Doubtless there was no other idea prevailing in providing for adoption of amendments by the 'Legislatures' or 'conventions' of three-fourths of the States than that. Certainly it was and is of no concern to the others what sort of Legislature any particular State has, so long as it conforms to the scheme of a republican form of government."

Thus stands the case on the arguments judicially adduced. The proposition that the Constitution is to be construed in the sense in which its words were understood by its makers has of course been several times declared and never expressly repudiated by the federal Supreme Court, but more often it has been ignored. The last important instance when it was emphasized was by Mr. Justice Taney in the Dred Scott case where he justified his decision by the fact that at the time the Constitution was adopted a negro had no rights which a white man was bound to respect. Had that rule of construction been applied rigidly the effect would have been to make the Constitution, which in the words of Story (*Martin* v. *Hunter,* 1 Wheat. 326, 4 U. S. [L. ed.] 103) "was to endure through a long lapse of ages the events of which were locked up in the inscrutable purpose of Providence," a fetter on future progress. For example, under the power of Congress "to establish post offices and post roads" aeroplane mail delivery between New York and Chicago has been established. It is needless to review cases to show that the meaning of constitutional phrases is not inflexibly limited to the understanding of the makers of the Constitution, since the federal Supreme Court explicitly and unanimously decided in *Davis* v. *Hildebrant,* 241 U. S. 565, 36 S. Ct. 708, 60 U. S. (L. ed.) 1172, that the word "Legislature" as used in article I, section 4 of the Federal Constitution relating to the apportionment of election districts meant the legislative power as modified by a provision in a State constitution for a referendum. Moreover, as was said by Justice Wanamaker in *Hawke*

v. *Smith,* (Ohio) 126 N. E. 400, "When the national Constitution was adopted at least three of the several States had what was known as an 'executive council.' Though this was rather an administrative or executive name, in function the body was legislative; that is, it was the lawmaking power of the State. The constitution of Ohio nowhere uses the word 'Legislature,' and if the strict letter of the law be applied, Ohio has no Legislature in the strict and technical sense. Its Legislature is a 'General Assembly' plus the referendum in the hands of the people."

Starting then from the premise that there is no fixed rule determining the construction of the term "legislature" in article V but merely the opinion of a court as to what it may mean in a particular instance, will the construction now given to it stand the test of time? The tendency of the age is toward increased participation by the people in the business of government. Referendum provisions will increase in number and in scope. The extent to which they shall go rests in the discretion of the people of the several States. *Pacific States Telephone, etc., Co.* v. *Oregon,* 223 U. S. 118, 32 S. Ct. 224, 56 U. S. (L. ed). 377. Suppose, then, that a State should abolish the legislative assembly altogether, substituting an executive commission with initiative and referendum. Such a course is not illegal or even improbable. In what way could that State manifest its assent to or dissent from a proposed amendment? Suppose thirteen States adopted such a form of government. How could any amendment be ratified by 'the legislatures' of three-fourths of the several States? Congress could of course provide for ratification by convention, but one of the constitutional methods of ratification would be abrogated.

It may be, as was said by the California court in *Barlotti* v. *Lyons,* (Cal.) 189 Pac. 282, that the judges upholding the right to a referendum based their argument "more upon some present day conceptions of what the law in this regard ought to be than upon the intention of the framers of the Constitution." Granting the fact, is it not well that arguments and decisions should be so based? Is it not time to apply to the entire nation the splendid aphorism of Justice Furman who declared that Oklahoma should be ruled by the living and not by the dead?

Approaching the question from another angle, the Constitution is the supreme law of the land. Like every other law in a free nation it derives its sanction from the consent of the governed. Is it not illogical to the last degree that when the people have declared that they will not entrust their representatives with the power to make laws for a State except subject to popular review those same representatives should have the power to make, irrevocably and beyond all review, the greater law which sets all inconsistent State laws at naught?

That legislators actually represent the people in passing on constitutional amendments is a polite fiction. They are rarely elected with reference to that issue and their action, unlike the vote on a statute, cannot be undone by electing successors more responsive to the popular will. Starting from the premise that the people are entitled to the fullest possible participation in government, that a gross injustice is done if they are deprived of any part thereof, construing article V of the Constitution with the idea of avoiding that injustice if possible, there can be no doubt that any court would reach the conclusion that a referendum is allowed. There is nothing impossible about that construction; no fixed rule of law which prohibits it, as witness the fact that courts have so decided the question. The fault in the Supreme Court decision is not that it was not honest, not that it was not learned, but that it took for its guiding light the distrust of the people and the desire to put limits and checks on their power of self-government which characterized the early stages of our government.

From whatever angle the decision is approached it is seen to be at war with the progressive spirit of the age; it is a dead hand reaching out of a less enlightened century to fetter a living and growing generation. That it was honestly and conscientiously rendered cannot be denied. That it is the law to-day will not be gainsaid. But it is clearly one of those decisions, like that in the Dred Scott case and the Lochner case, rendered at a transition period by a court unable to see the vision by which the people are led. Like them it is certain eventually to fall, either, as in one instance, by the hand of the people, or, as in the other, through the growth of the court into better accord with the spirit and understanding of the times.

W. A. S.

DECISIONS OF EVENLY DIVIDED COURTS

IN a recent issue of the London *Law Times* there appears an article upon the subject of decisions by courts evenly divided in opinion. Although the question is of relatively small importance in this country, due to the fact that the federal courts and the appellate courts of the various states are, with few exceptions, composed of an uneven number of judges, it is not without interest. And this is so, since the absence or sickness of a judge, or his disqualification from sitting in a particular case, may render an evenly divided opinion possible, although in certain jurisdictions statutory provision is made for the appointment of a special judge to sit in the place of one disqualified.

According to the *Times* article "two plans have been adopted in the English courts and courts governed by English law for insuring a definite decision from an evenly divided court. One plan is to act on the maxim *Semper proesumitur pro negante,* which has been paraphrased in the saying—'To doubt is to affirm.' In cases other than appeals the maxim would become—'To doubt is to acquit' of a criminal charge, or to find for the defendant in a civil action. This is in fact only insisting that the plaintiff shall prove his case, the case not being proved when the balance of testimony and argument is exactly even. The result of this method of solution is that the plaintiff or appellant fails in his claim or appeal, with the necessary corollary that the decision of the court is given in favor of his adversary." This method is followed in the courts of the United States and is the one adopted in the House of Lords and the Supreme Court of Canada. Concerning this plan the article says: "When the Lords of Appeal are equally divided the appeal is dismissed. This happened in the important case of *Reg.* v. *Millis,* ([1844] 10 Cl. & F. [Eng.] 534), and there have been many similar cases down to the present day, one of the latest being *Paquin Limited* v. *Beauclerk* ([1906] A. C. [Eng.] 148;

94 L. T. N. S. 350). In all these cases the judgments of the courts below were affirmed, though, in accordance with a practice which only seems to have grown up since 1876, without costs (see, as to the question of costs, *Anderson v. Morice,* 1 App. Cas. [Eng.] 713; 35 L. T. 566). This practice of the House of Lords, both as to affirming the judgment below and as to dismissing the appeal without costs, where the appellate tribunal is equally divided, has been adopted in the Supreme Court of Canada. In vol. 46 of the Canadian Supreme Court Reports (for the year 1912) will be found (pp. 638-658) no less than four reports of cases in which the court of six judges was equally divided in opinion, and the judgment below affirmed in consequence, the appeals being dismissed without costs. With reference to these Canadian cases it is noteworthy that there is no difference as regards appeals coming from Quebec, where French and English law prevails."

The alternative plan, which finds no place in American jurisprudence, is "either for the junior judge to withdraw his judgment, or (what amounts to the same thing) for the presiding judge to have a casting vote; in different phraseology the decision of the court follows the opinion of the presiding judge. In either case, under this alternative plan, the decision of the court is governed by a mere presumption—that the senior or presiding judge is more likely, and the junior judge less likely, to be correct in their respective opinions."

Concerning the second method, the author further says: "The plan of arriving at a decision by the withdrawal of the junior judge's judgment obtained in the old common law courts in England before the Judicature Acts, and the question whether it is to continue in force now, or whether it is to give way to the rule of *Semper proesumitur pro negante,* has been raised by the Divisional Court of the King's Bench Division in more than one case. In *Ellis* v. *Banyard* (104 L. T. N. S. [Eng.] 460) a County Court appeal came before Mr. Justice Phillimore and Mr. Justice Horridge, who differed in opinion, Mr. Justice Phillimore being in favor of allowing the appeal. Nevertheless the latter concluded his judgment by saying: 'As the court is divided this appeal must be dismissed.' Had the judgment of the junior judge (Mr. Justice Horridge) been withdrawn, a contrary decision would have been given and the appeal would have been allowed. Precisely the same thing happened in *Metropolitan Water Board* v. *Johnson* ([1913] 3 K. B. [Eng.] 900; 107 L. T. N. S. 711), where Mr. Justice Channell and Mr. Justice Avory differed in opinion, with the result that the appeal was dismissed, instead of being allowed in accordance with the opinion of the senior judge. In this case, however, Mr. Justice Channell expressly referred to the competing plans for insuring a decision. He said: 'I think it is the proper result, wherever there is an appeal to two judges who differ, that the judgment appealed from should stand, and not that the junior judge should withdraw his judgment.' In a case before Mr. Justice Bray and Mr. Justice Lush—*Poulton* v. *Moore* ([1915] 1 K. B. [Eng.] 400; 109 L. T. N. S. 976)—the view above quoted as that of Mr. Justice Channell did not meet with approval. The case was again a County Court appeal, and, Mr. Justice Bray being in favor of the appeal being allowed, Mr. Justice Lush (who was of the contrary opinion) formally withdrew his judgment in order that Mr. Justice Bray's judgment should stand as the decision of the court allowing the appeal, which—had the procedure followed that adopted in the two other cases above cited—would have been dismissed. Mr. Justice Lush stated that he withdrew his judgment 'in accordance with the usual practice.' Subsequently an application was made to the court that the withdrawal of the judgment of Mr. Justice Lush should be reconsidered, and the two cases in the Divisional Court above referred to were cited. The learned judges, however, remained of opinion that the withdrawal of the junior judge's judgment was the proper course to be taken under the circumstances, and that the junior judge has a discretion to withdraw his judgment. Mr. Justice Lush intimated that, apart from the question of established practice, he thought that a judgment appealed from ought to stand unless a majority of the appellate court thought it wrong, and that it was desirable that some uniform practice should be laid down. The result of these cases in the Divisional Court is that at present an appellant to that court is in absolute uncertainty as to what will follow from a division of opinion between the two judges."

As to the Court of Appeal, it is said: "The difficulty of an evenly divided court does not often happen in the Court of Appeal in England, as appeals are ordinarily heard by three judges, and, under the Judicature Act 1899, appeals heard before two judges who differ in opinion may be reargued before a court of three. However, the Court of Appeal occasionally sits at its full strength of six, and there seems to be no statutory provision dealing with the possibility of there being an equal division of opinion in such a case."

It seems that the Judicial Committee of the Privy Council consists of four members on the hearing of appeals. Commenting on this, the writer says: "The practice of the Judicial Committee being to deliver one judgment only, the individual opinions of the members are not disclosed, and it is not known how an equal division of opinion would be dealt with. Appeals heard before a board of four have sometimes been reargued. There is also a fair presumption that the rule of the House of Lords dismissing the appeal might on occasion be adopted. So long as the present practice prevails, according to which individual judgments are not delivered, it is useless to speculate further upon this point."

In the Court of Criminal Appeal the difficulty has been guarded against by a statutory provision insuring an uneven number of judges and a majority opinion.

In commenting on the method used in Australia, the article says: "It is believed that in oversea courts the old common law practice of withdrawing the junior judge's judgment has frequently been acted on. In one Australian case, at any rate, this practice seems not to have been adopted. In *Krefft* v. *Hill,* ([1875] 13 S. S. C. [N. S. W.] 280, 303) an application for a new trial was heard by two judges of the Supreme Court of New South Wales, when the senior judge was of opinion that there should be no new trial and the junior judge thought there should be a new trial. No order was made and the verdict stood. Apparently the maxim *Semper proesumitur pro negante* was acted on, and upon a subsequent application the court of three judges refused to reopen the matter. But in more than one oversea jurisdiction express legislation has made provision for the difficulty of equal division of judicial opinion, though not on the lines of the English Criminal Appeal Act 1907. It will be sufficient to mention

two of the Australian States. Both in Victoria and Queensland before federation enactments were passed on this point. The Queensland enactment is contained in sect. 7 of the Supreme Court Amendment Act 1892 (55 Vict. No. 37), and the Victorian in the Supreme Court Act 1915 (No. 2733), s. 34. These differ somewhat, the Queensland enactment being more elaborate, and the latter has formed a model for a similar enactment in the Judiciary Act 1903 (No. 6, dealing with the procedure of the High Court of Australia) of the Commonwealth of Australia, which is worth quoting rather fully. Sect. 23 of this Act is: 'When the justices sitting as a full court are divided in opinion . . . the question shall be decided according to the decision of the majority; . . . but if the court is equally divided in opinion, the opinion of the Chief Justice or . . . senior justice present shall prevail, except in the case of an appeal from a decision of a justice of the High Court, or a judge of the Supreme Court of a State exercising federal jurisdiction, in which case the decision appealed from shall be affirmed: provided that in the last-mentioned case if the justice or judge whose decision is appealed from reports to the court that he desires that the matter shall be determined without reference to the fact that he has pronounced or given the decision, the opinion of the Chief Justice or senior justice present shall prevail.' "

And finally in drawing a comparison between the two methods, the author says: "Of the two plans above referred to, the plan of affirming the decision below where the appellate court is evenly divided seems more satisfactory than that of giving the presiding judge a casting vote (or withdrawing the junior judge's judgment.)"

In the United States, because of the uneven number of justices composing our appellate courts, an equally divided court is of infrequent occurrence. However, the rights of the public as well as those of litigants are involved and it would seem to be desirable that the judgments of lower courts should receive final adjudication upon sound legal principles and not depend upon an arbitrary rule, confessedly adopted for expediency and the desirability of putting an end to litigation.

The rule affirming the judgment of the court below upon an equal division of the appellate court is recognized with practical unanimity in this country. "In the English courts of common law, it was the early practice that when the judges were equally divided in opinion upon an essential question of law, no judgment should be given. *Proctor's Case,* 12 Coke [Eng.] 118. But it has not been so in this commonwealth. If a cause is tried . . . before a single judge, and his ruling upon an essential point is excepted to, and the judges are equally divided in respect to it after argument, judgment is commonly rendered in conformity with his ruling. If he reserves questions of law for the consideration of the full court, and the judges are equally divided on a point which involves the plaintiff's right to recover, judgment is commonly rendered for the defendant. If a cause is brought up from a lower court on a question of law by exception or appeal, and the judges are equally divided, the judgment of the lower court is commonly affirmed. In such cases the decision of the court relates to the questions of law which are raised, and not to the rendition of a final judgment. There is an agreement that it is expedient to render the judgment, and thus finish the litigation. It is expedient in respect to the interest of the public, and it is often highly so in respect to the interests of the parties. There is also a strong presumption that a point decided by a single judge has been decided rightly, and it is reasonable in such cases that this presumption should stand." *Durant* v. *Essex Co.,* 8 Allen (Mass.) 103, 85 Am. Dec. 687.

In certain jurisdictions the practice in accordance with the rule is regulated by statutory or constitutional provision, but the rule is of equal force without the sanction of the legislature.

In but one case, so far as can be ascertained, has the rule been questioned. Thus in *Elizabethtown* v. *Springfield Tp.* 3 N. J. L. 70, Kirkpatrick, C. J., said: "What the legal effect of an equal division on the bench is, has frequently become a question. And the not attending strictly to the subject matter under consideration, in the various cases wherein such division has been recorded, has created some perplexity. On a motion to set aside a judgment or discharge a rule, if there be an equal division of the court, the judgment or rule remains in full force; and hence it has been argued that the same thing would take place on an appeal or writ of error. But this is not so. For in the first case, the judgment or rule being once entered, it must have its full force, unless set aside or discharged by a judgment of the court, which upon an equal division never can be rendered. But in cases of appeal or error it is otherwise. There the effect of the judgment below is wholly superseded by the writ itself. Nothing can be done until there is a new judgment, either upon the merits in appeal, or of affirmance or reversal in error, as the case may be. The judgment can neither affirm nor reverse itself. The court must pass upon it. And to this effect is the decision in *Thornby* v. *Fleetwood,* 1 Stra. (Eng.) 318, in the case of the Duke of Hamilton and Branden. There, indeed, there was an affirmance by the request of the party against whom it was, in order that the matter might be carried up to a higher tribunal. And the court ordered a special note to be made to that effect. I am satisfied, therefore, that this judgment of affirmance is unlawfully entered, and must be quashed." This contention, however, has met with no general support, although in an early California case (*Luco* v. *De Toro,* 88 Cal. 26, 25 Pac. 983, 11 L. R. A. 543) it was held that "a motion to affirm a judgment because of an equal division of opinion among the judges qualified will be denied where it appears that before the time for the next term of court, when the cause can be heard, several of the dissenting judges will be succeeded by others, who may assist in deciding the case on its merits."

That the rule is not entirely satisfactory may also be gathered from the fact that on vacating a judgment of reversal which is void because the qualified judges of the court were equally divided, the court instead of entering judgment may order a reargument if it sees fit to do so.

The rule may be defended on the ground that it is frankly one of expediency—that it is necessary to end the litigation between the parties to a particular suit. "It is admitted that a mere failure to agree cannot have the effect, ipso facto, of an affirmance, for the Constitution requires the concurrence of four justices to pronounce judgment; but it is claimed that it then becomes the duty of the justices who voted for a reversal to unite with their associates in affirming the judgment. The reason given for this contention is an argument ab inconvenienti. It is

said that if this rule is not followed the case might be continued for four years, until a change in the membership in the court occurs; 'and then, again, the same condition of things might still continue, and this would require a further continuance; and thus it might happen that the case would never be decided.' Many English and American authorities are cited in support of the motion, and no cases to the contrary have been found by respondent; but the decisions must be read in the light of the circumstances under which they were rendered. Some of the cases referred to went off on the authority of statutes providing that in cases of equal division among the judges the judgment should be affirmed, others upon a rule following the practice of the English courts and the others upon the ground of expediency. . . . In jurisdictions presided over by judges holding for life, or for terms so great as to make the probability of a change in the membership of the court remote, the judgment of affirmance follows a division *ex necessitate rei.* In such a case the decree does not import a division as to the nature of the judgment, but as to the questions of law and fact involved in it. While the decree is a bar to any subsequent action for the same cause, no matters of law are decided, and it therefore possesses no dignity as a judicial precedent, but carries upon its face a badge which precludes any application of it in future under the doctrine of *stare decisis.* The judges simply agree that it is expedient to finish the litigation. It is a public expediency, and is often expedient also with respect to the interests of the parties. Supported by these considerations, and the presumption of correctness which always attaches to the judgment of the court below, it is proper and right that the judges who were in favor of a reversal should waive any insistence of opinion, and unite with their associates in an affirmance of the judgment. This they do without in any way relinquishing their convictions upon the questions of law or fact involved in the case. But here there are no such considerations as induced the decisions in the cases referred to." *Luco* v. *De Toro,* 88 Cal. 27, 25 Pac. 983, 11 L. R. A. 543.

But expediency, which is only a euphonious word to describe the inability of the courts to cope with the situation, should be the last consideration of a judicial tribunal, and it may be assumed that the defeated layman will find much to complain of in a rule which practically says, "We cannot decide your rights, nor remedy your wrongs. The law is impotent to help you and we leave you and your opponent to yourselves."

Disregarding, however, the complaint of the parties who may feel, and doubtless truly at times, that but for the absence of a sick or disqualified judge the scales of justice might have tipped the other way, another objection may with profit be examined. Judicial decisions are valuable in that they definitely settle disputed questions of law, forming a succession of precedents which guide men in the conduct of affairs. The ideal condition of law would be decisions of unanimous courts. But since that cannot be then the authorities are important in the proportion that unanimity is approached. The weakest is when the judges are unable to agree among themselves, disclosing the frailty even of the judicial mind. For a decision of a divided court is no decision at all. True, a judgment is entered, but its force and effect are of no interest to others than the particular plaintiff and defendant. It binds them. As to them the same questions cannot be litigated again. "The record has all the elements of a final decree. It purports to order, adjudge, and decree that the decree of the Circuit Court be affirmed with costs. In its substance it would not have been different if the judges had agreed in every point unanimously. We do not understand the statement that it was rendered by a divided court to mean that they were divided as to the question whether it should be rendered, but merely as to the questions of law which had been involved in it." *Durant* v. *Essex Co.,* 8 Allen (Mass.) 103, 85 Am. Dec. 685. But as to the rest of the world there is no let or hindrance. The same questions upon the same facts may be raised by others and a different result obtained because, perchance, a judge has recovered from his indisposition, or the disqualification does not apply. In *Rider* v. *Snow,* 20 Can. Sup. Ct. 12, it appeared that the precise question under consideration had previously been before the same court and that the judges thereof had been equally divided in opinion on the question involved. The court held that it was not bound by the former decision and that the doctrine of *stare decisis* did not apply. In *Westhus* v. *Union Trust Co.,* 168 Fed. 617, 94 C. C. A. 95, the court said: "The weight of opinion in this country is that a judgment of affirmance by a divided appellate court conclusively settles the rights of the parties in the particular litigation, but does not establish a precedent in the court which renders it, and does not control inferior tribunals in other cases." In *State* v. *McClung,* 47 Fla. 224, 37 So. 51, it was said: "An equal division of opinion cannot have the effect ipso facto of an affirmance, for the constitution makes the concurrence of a majority necessary to a decision, but where the division is permanent and there is no probability of an immediate change in the personnel of the court it becomes the duty of those in favor of reversal to unite with their associates in affirming the judgment, otherwise the case might be continued indefinitely, and the delay amount to a denial of justice. In such a case the rule with respect to the force and effect of the judgment of affirmance is the same as that which prevailed at common law where the judgment was affirmed because of an equal division of opinion. Thus it does not import a division as to the nature of the judgment, but as to the question of law and fact involved in it. While the judgment is a bar to any subsequent action for the same cause, . . . yet, as no matters of law are decided so far as the question upon which the court is equally divided is concerned, the judgment possesses no dignity as a judicial precedent. It carries upon its face a badge which precludes any application of it in future under the doctrine of *stare decisis.*" In *Dubuque* v. *Illinois Cent. R. Co.,* 39 Ia. 56, the court said: "It has always been held that a decision of a court concurred in by less than a majority of the judges has not the force of a precedent. When there is an equal division of opinion in this court, the decision of the court below stands affirmed. There must be a concurrence of a majority of the judges upon the principles, rules of law, announced in the case before they can be considered settled by a decision. If the court be equally divided or less than a majority concur in a rule, no one will claim that it has the force of the authority of the court." In *Kolb* v. *Swann,* 68 Md. 516, 13 Atl. 379, it was said: "A judgment rendered by an equally divided court has not the same authority in analogous cases that one would have rendered by a majority of the court, and where the reasons upon which it is

founded appear in the opinion." In *Morse* v. *Goold,* 11 N. Y. 282, 62 Am. Dec. 103, the court said: "Although the judgment of the Supreme Court denying any effect to the act in respect to contracts made previous to its passage was affirmed by this court, yet, as the judges were equally divided in opinion, the determination cannot be considered as a precedent, but the question must be regarded as entirely open."

In but two states has a contrary view been taken. In Kentucky it has been held that a decision by an equally divided court is binding as a precedent in all subsequent similar cases. *Smith* v. *Brannin,* 79 Ky. 114, where the court said: "When the case presents two or more questions, and the members of this court are equally divided in opinion upon one or more of such questions, and the judgment is reversed upon other points upon which all agree, the opinion of the judges who agree with the court below upon the questions about which there is an equal division here becomes the law of the case as to those questions, and is binding upon the court below and upon this court in the further progress of the case to the same extent as if all the judges had concurred with the court below upon those questions." A similar rule prevails in South Carolina. *Florence* v. *Berry,* 62 S. C. 469, 40 S. E. 871; *American Mortg. Co.* v. *Woodward,* 83 S. C. 521, 65 S. E. 739. These cases, however, are of doubtful authority at the present time.

Fortunately the cases so "decided" are exceedingly few in number. Otherwise such a condition would be intolerable because of its uncertainty. It may be said, and with perhaps some logic, that by the affirmance of a judgment when the appellate court is unable to agree, practical justice is done the parties for the reason that the successful litigant has the weight of the trial court upon his side and so has a majority of the judges who have passed upon the issues. "The trial judge possesses many advantages of judging the credibility of witnesses. He becomes invested with many facts, circumstances, and details on the trial that cannot be transmitted to us; and when it is evident that he has reviewed the case with care, and that he has sought . . . to carefully and impartially distinguish the true from the false, his conclusions ought not lightly to be brushed aside." *Case* v. *Hoffman,* 100 Wis. 314, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945, 44 L. R. A. 731. The strength of this argument, however, is more apparent than real. Carried to its logical conclusion it would make the trial judge whose rulings are being reviewed the arbiter of his own interpretation of the law and place him really upon a higher plane than the judges who are independently passing upon his decision. Again, in this view of the matter a majority of one might with equal propriety be said to be an equally divided decision if the weight of the trial court is to be thrown into the balance. We cannot, as in some jurisdictions, dismiss an appeal because our courts are unable to decide it. Nor can we, under our democratic ideas of equality, ask the junior judge to suppress his opinion to break the tie. For there are no gradations of authority on the American bench. Once robed, the opinion of the junior justice is of equal weight with that of the chief justice, and quite properly so. There might be, and doubtless is, a sincere effort to reconcile differences. Else there would not be so few decisions equally divided. But beyond a point, the official oath bars the way to a conclusive decision. That the problem, if it be important enough to attract the attention of our legislators, is not without solution, is evident. In all jurisdictions, either by the common law or by statute a judge may be disqualified for various reasons. In some states provision is made for a special judge to sit when such disqualification exists, but such provision, except in a few jurisdictions, applies only to trial courts. There seems to be no reason why such a statute should not apply as well to courts of appellate jurisdiction. In other words, where from any cause, sickness, disqualification or other reasons, an appellate court is left with an even number of judges, let a special judge by statutory provision be appointed so that there will be no evenly divided courts, no resort to expediency and no uncertainty as to the value of a judgment as a precedent.

W. M. C.

VENDOR'S RIGHT TO FORFEIT DEPOSIT

THE question of the right of a vendor to retain the deposit of a purchaser, after the contract for sale has been rescinded or otherwise put an end to for all practical purposes, constitutes a by-path in the law of property along which there are some few pitfalls. Most carefully drawn contracts for sale (particularly for sale of land) contain express provisions guarding against the contingency of the contract going off, and one of the most usual is a clause authorizing the vendor to retain the deposit in the event of the purchaser not carrying out his part of the bargain. But all contracts for sale are not carefully drawn, and an open contract for the sale of land can hardly be said to be "drawn" at all, whilst contracts for the sale of chattels are still more frequently extremely loose and inartificial. In the absence, then, of express stipulation on the subject, what are the purchaser's and vendor's rights respectively when a deposit has been paid and all chance of completing the contract is at an end? The latest case in the English reports on this point appears to be Hall *v.* Burnell (105 L. T. Rep. 409; [1911] 2 Ch. 551). In this, as in nearly all cases on the subject, the property comprised in the contract for sale was land, a sum of £50 had been paid on the signing of the contract "as a deposit" to the vendor's solicitors as stakeholders, and the vendor now asked that the contract should be rescinded and the deposit forfeited to him, on the ground of the purchaser's default in carrying out the contract. There being no express stipulation in the contract, Mr. Justice Eve held that the case was governed by Howe *v.* Smith (50 L. T. Rep. 573; 27 Ch. Div. 89), that a purchaser who repudiates the contract has no right to recover the deposit, and that this is so even though (as in the present case) the vendor had been allowed to rescind the contract and the deposit was in the hands of stakeholders. The decision in Hall *v.* Burnell thus rests entirely on Howe *v.* Smith, and treats the latter as an authority for the broad proposition that if a purchaser pays his vendor a sum of money by way of "deposit," the latter is entitled to retain this deposit in the event of the purchaser's default in carrying out the contract to completion. Is this proposition correct, and is it supported by Howe *v.* Smith? The case of Howe *v.* Smith was decided by the Court of Appeal, and is worthy of detailed examination on several grounds. One ground is that, as does not often happen in these times, a passage from Bracton was quoted as a definite authority, and this was only in the year 1884. In Howe *v.* Smith the purchaser (plaintiff) claimed specific performance or a return of the deposit, and he

was eventually held to be entitled to neither. The contract for sale contained a clause commonly inserted in agreements for sale, both by auction and by private contract, to the effect that a sum of money had "been paid on the signing of this agreement as a deposit and in part payment of the purchase money." Now, throughout the three judgments delivered in the Court of Appeal there runs the same reservation of all that was stated in general terms with respect to the right of a vendor to retain money paid by the purchaser as a "deposit," viz., that it is in the last resort the intention of the parties to the contract which must decide the question. To that intention the clause above quoted—"as a deposit and in part payment of the purchase money"—was held to be the key. Lord Justice Cotton, after referring to the wording of the contract and citing several cases, finally cited Ex parte Barrell (33 L. T. Rep. 115; L. Rep. 10 Ch. 512) as containing the right principle; the deposit was there held to be a guarantee that the contract should be performed. In the present case the purchaser had not been ready with his money, and Lord Justice Cotton concluded his judgment by saying: "Without at all laying down that whenever the court refuses specific performance it will allow the vendor to retain the deposit, in this case and under this contract the purchaser has so acted as to repudiate on his part the contract, and he cannot under those circumstances take advantage of his own default to recover this deposit from the vendor." Lord Justice Bowen prefaced his judgment by saying: "The question as to the right of the purchaser to the return of the deposit must, in each case, be a question of the conditions of the contract. . . . We have to look to the documents to see what bargain was made." Palmer *v.* Temple (1839, 9 A. & E. 508) was also quoted as laying down the principle that "in the absence of any specific provision, the question whether the deposit is forfeited depends on the intent of the parties to be collected from the whole instrument." The judgment of Lord Justice Fry was at once the longest and the most interesting, and constituted an elaborate answer to the question. What is the meaning of the expression "a deposit and in part payment of the purchase money"? Money paid as a deposit was to be regarded as an "earnest to bind the bargain . . . and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract." The word "earnest" itself was probably the same word as the Latin *arrha*, and Lord Justice Fry proceeds to cite Vinnius, Pothier, and the Institutes as to the law of arrha, and then pointed out that the Roman law as to earnest had been taken over by Bracton. Part of the citation from Bracton (Lib. ii., cap. 27) is so apt that it is worth quoting here: *Cum arrarum nomine aliquid datum fuerit ante traditionem, si emptorem emptionis poenituerit et a contractu resilire voluerit, perdat quod dedit.* The Lord Justice said: "The passage in question seems an authority for the proposition that the earnest is lost by the party who fails to perform the contract. That earnest and part payment are two distinct things is apparent from the seventeenth section of the statute of frauds, which deals with them as separate acts." The deposit in the present case, then, was the earnest or arrha of the earlier writers, and "the expression used in the present contract that the money is paid 'as a deposit and in part payment of the purchase money' relates to the two alternatives, and declares that in the event of the purchaser making default the money is to be forfeited, and that in the event of the purchase being completed the sum is to be taken in part payment." The delay of the purchaser constituted sufficient default to entitle the vendor to retain the deposit. It will be noticed that the clause on which so much stress was laid in Howe *v.* Smith was absent in Hall *v.* Burnell, where the money had simply, according to the report, been paid "as a deposit." This, of course, would not prevent the application of the principle of Howe *v.* Smith that the intention with respect to forfeiture is to be gathered from the whole of the instrument of agreement, but Hall *v.* Burnell is to be supported as following Howe *v.* Smith, it is submitted that it must be regarded as a decision as to the meaning of the expression—payment "as a deposit." In both these cases the property sold was land, but there appears to be no distinction in principle between land and chattels on this point. An apt illustration of this, and also of the view that it is in every case a question of the interpretation of the contract, in order to discover whether the parties intended forfeiture of deposit or not, occurs in a recent Canadian case in the courts of Ontario (see Brown *v.* Walsh, 1919, 45 O. L. R. 646). In this case the defendant had sold to the plaintiff a quantity of scrap iron, and a written contract contained the terms of sale. Under this contract sixty dollars had been "deposited on this contract" when it was signed, and the purchaser had to "pay forty dollars on contract" before loading. Both sums were paid, but the purchaser failed to carry out the rest of his agreement and the vendor resold the goods. The purchaser then sued for a return of the hundred dollars. The trial judge found in favor of the defendant; but this was reversed in the Appellate Division, and the plaintiff held entitled to recover his deposit and installment. The Chief Justice said: "The learned trial judge seems to have thought that all money paid by a purchaser who ultimately fails to carry out his contract belongs to the seller; but, of course, this is not so. The seller can become entitled to it only if the purchaser has agreed that he shall; and even in such a case the court may relieve against a forfeiture." With reference to the case of Howe *v.* Smith it was observed: "In that case the question was treated as one of contract, one of fact, whether the purchaser had agreed that the seller should retain the payment made if the plaintiff failed to carry out the contract." And with reference to the word "deposit," it was said: "Two payments were made in this case; one was expressed to be 'deposited,' but that word could have no technical meaning in the minds of these unlettered men . . . neither party intended a forfeiture; that is put beyond question in the testimony of each." The view that there is no general rule of law entitling a vendor to forfeit a deposit, apart from the intention to be gathered from the contract itself, is rather strengthened by recent cases in the Privy Council where relief has been given against the vendor's insistence on the right of forfeiting under express forfeiture clauses. See Kilmer *v.* British Columbia Orchard Lands (108 L. T. Rep. 306; (1913) A. C. 319); Steedman *v.* Drinkle (114 L. T. Rep. 248; (1916) 1 A. C. 275). In Brickles *v.* Snell (115 L. T. Rep. 568; (1916) 2 A. C. 599), though the relief of specific performance was refused, the claim for a return of the deposit was not raised by the pleadings and so could not be adjudicated on. These cases are thus commented on in Brown v. Walsh: "The Privy Council has gone pretty near to the rule that if the seller be fully compensated that is enough."—*Law Times.*

Cases of Interest

GIFT TO MEMBERS OF MASONIC LODGE AS VALID CHARITABLE GIFT.—A gift for the benefit of the needy members of a particular Masonic lodge is, it seems, a valid charitable or public trust. The court so held in Roberts *v.* Corson (N. H.) 107 Atl. 625, saying: "If the words of the residuary clause are given their ordinary meaning, the testator intended to create a trust for the benefit of those who may become members of Humane

Lodge; that is, he intended to create a trust for the benefit of a definite section of the public. A gift of this kind constitutes what is commonly known as a charitable or public trust. Glover *v.* Baker, 76 N. H. 393, 417, 83 Atl. 916; Haynes *v.* Carr, 70 N. H. 463, 482, 49 Atl. 638; Jackson *v.* Phillips, 14 Allen 539; Hoeffer *v.* Clogan, 63 Am. St. Rep. 241, Note 249, 171 Ill. 462, 40 L. R. A. 730, 49 N. E. 527, 11 C. J. 301. If the purpose such a trust is intended to effectuate is legal, and the persons for whose benefit it is established can be ascertained, it is the duty of the court to enforce it. Fernald *v.* First Church, 77 N. H. 108, 88 Atl. 705; French *v.* Lawrence, 76 N. H. 234, 81 Atl. 705; Adams *v.* Page, 76 N. H. 96, 79 Atl. 837. It is immaterial, in so far as the validity of such a request is concerned, how large or how small a section of the public it is intended to benefit. That is, whether it is intended to benefit every living human being (Glover *v.* Baker, 76 N. H. 393, 417, 83 Atl. 916), or whether its scope is limited to the poor and needy of New Hampshire (Haynes *v.* Carr, 70 N. H. 463, 49 Atl. 638); the sick of Franklin and vicinity (Adams *v.* Page, 76 N. H. 96, 79 Atl. 837), or to indigent and distressed Masons, their widows and orphans (Duke *v.* Fuller, 9 N. H. 536, 32 Am. Dec. 392). The bequest in question, therefore, constitutes a valid public trust for the purpose for which it was created, is legal, and it is possible to ascertain those it is intended to benefit."

INJUNCTION TO PREVENT MAN FROM ASSOCIATING WITH GIRL.—In Stark *v.* Hamilton (Ga.) 99 S. E. 861, reported and annotated in 5 A. L. R. 1041, it was held that where a man has debauched a minor girl and induced her to abandon her parental abode and live with him in a state of adultery and fornication, and persists in a continuance of such conduct, equity will afford a remedy by injunction, and to that end, in a suit by the father, will enjoin the man from associating and communicating with the girl, either by writing, telephoning, or telegraphing, personally or through the aid or agency of any other person. Said the court: "The case under consideration differs on its facts from any case heretofore decided by this court and from any of the cases cited from other states. It in a sense involves both personal and property rights. The father has the right, under the statutes of this state, to protect his minor child, to be protected by her, and to have her reside in his home and with his family and to enjoy the comfort of her association and the advantage of her services. It is his moral and legal duty to support her in sickness and in health. Reformation of a wayward daughter is always possible, and the father has the legal and moral right to make the effort to save her, and in some measure lessen the reproach to his name and to the reputation of his family. It is difficult to understand why injunctive protection of a mere property right should be placed above similar protection from the continual humiliation of the father and the reputation of the family. In some instances the former may be adequately compensated in damages, but the latter is irreparable; for no mere money consideration could restore the good name and reputation of the family, or palliate the humiliation of the father for the continual debauching of his daughter. Under the pleadings and the evidence the interlocutory injunction was properly granted."

VALIDITY OF ORDINANCE PROHIBITING BOOTHS IN RESTAURANTS.—In Ogden City *v.* Leo, (Utah) 182 Pac. 530, reported and annotated in 5 A. L. R. 960, it was held that a statute conferring on a municipality the power to regulate restaurants authorizes it to prescribe and enforce all such proper and reasonable rules and regulations as may be deemed necessary and wholesome in conducting the business in a proper and orderly manner, and that the court cannot declare that an ordinance prohibiting booths in restaurants is unreasonable on its face. Said the court: "Every presumption, as we have pointed out, is in favor of the validity of the ordinance. Unless, therefore, the regulation prescribed in the ordinance is manifestly oppressive or necessarily constitutes an unreasonable and unwarranted interference with defendant's business under any possible view that can be taken of the local situation, we must uphold the ordinance. We confess our entire inability to discover anything in the ordinance that is unreasonably oppressive or which constitutes an undue interference with the business of conducting a restaurant. We have a right to assume that the purpose of the ordinance is merely to prevent persons of both sexes who have regard for neither the law nor good morals from meeting at late and unusual hours of the night and entering these booths where they can avoid detection and can indulge their propensities for violating both the law and good morals. It certainly cannot be said that law-abiding persons and all those who frequent restaurants and public eating places only for the purpose of obtaining refreshments desire seclusion from the eyes of others who may also be in the place for the same purpose. We know, as all men know, that the best and largest dining rooms everywhere are open, and that the respectable and law-abiding men and women do not seek closed booths or dark rooms when they go to a public eating place to eat their meals. The fact that an ordinance like the one in question here was deemed necessary to regulate public eating places is no reflection either upon the good morals or the law-abiding propensities of the good people of Ogden. It reflects credit upon the city authorities rather than discredit. Similar ordinances might well be adopted and enforced in any city of the size of Ogden."

LIABILITY FOR FRIGHTENING HORSE BY OPERATING LOADED AUTOMOBILE ON HIGHWAY.—In Pease v. Cochran (S. D.) 173 N. W. 158, reported and annotated in 5 A. L. R. 936, it was held that to render one liable for frightening a horse by a load transported in a motor car on a highway there must be something about the appearance of the car or the manner in which it was loaded that would suggest to the ordinarily prudent man that it would terrify or frighten an ordinary horse, and that a passenger automobile loaded with an article of furniture extending above the back seat, bags of grain on the front seat, and a short ladder strapped to the side, was not so loaded as to suggest to a reasonably prudent person that it would frighten or terrify an ordinary horse. The court said: "In order to constitute actionable negligence on this branch of the case, there must have been something about the appearance of the car or the manner in which it was loaded that would suggest to an ordinarily prudent man that it would terrify or frighten an ordinary horse; i.e., a horse that had become accustomed to automobiles on the road. There are horses that would take fright at any automobile, regardless of whether it was loaded at all; but people are not required to refrain from using automobiles on the highway to avoid frightening such horses, and a person taking such horse on the highway would do so at his own peril. On the other hand, there are horses that would not take fright at an automobile, no matter how it might be loaded or what its appearance might be. But this fact would not justify a person in going upon a highway with an automobile so loaded, or having such an appearance, that it would be calculated to frighten or terrify an ordinary horse. In this case, we do not believe that defendant's automobile was loaded in such a manner as to suggest to a reasonably prudent person that it would frighten or terrify an ordinary horse. The article of furniture that defendant was hauling was one that he had a right to have in his possession and

to move from one place to another, if he so desired, and to move it in an automobile if that were his most convenient mode of conveyance. To hold otherwise would be to prohibit him from moving such article of furniture over the public highway, unless he did so at a time when he knew there would be no horse-drawn vehicles on the road."

VALIDITY OF ORDINANCE FIXING SIZE AND SHAPE OF PRODUCE CONTAINERS.—In Stegmann *v.* Weeke (Mo.) 214 S. W. 137, reported and annotated in 5 A. L. R. 1060, the court held to be valid an ordinance of a city containing hundreds of thousands of consumers which fixed, without penalty, the shape and size of containers in which farm or garden product could be marketed. After declaring that the ordinance was not unconstitutional as impairing the obligation of contracts, the court held the ordinance not to be unreasonable, saying: "But it is claimed the ordinance is an unreasonable regulation in its operation, in that it not only prohibits the use of containers of any other capacity than that provided, but prescribes the exact dimensions, the length and depth of the boxes, and forbids the use of containers of equal capacity of any other shape; that is, a box may be a perfect cube and contain a bushel or a half bushel. Of course, this court may determine whether an ordinance is reasonable or unreasonable (Union Cemetery Asso. *v.* Kansas City, 252 Mo. loc. cit. 500, 161 S. W. 261), and in considering the matter may settle it by inspection of the ordinance on its face, or may find it unreasonable by a state of facts which affects its operation (St. Louis *v.* St. Louis Theatre Co. 202 Mo. 690, loc. cit. 699, 100 S. W. 627). It might be unreasonable in one place and perfectly reasonable in another. It might be unreasonable in a mere village, whereas in a large city, with its great volume of business of the character affected, it would be a reasonable regulation. Here there are several thousand farmers engaged in raising and selling produce. There are hundreds of thousands of consumers in the city of St. Louis, many of whom, doubtless the majority, at some time or other purchase these very commodities. The evident purpose of the ordinance in providing containers of uniform shapes and sizes was so that a purchaser easily could tell the exact quantity of the commodity he was buying, the presumption being that the box containing the commodity which he purchased had passed the final test as to capacity, and he need not trouble himself in relation to that matter or inquire further. Likewise it may be said that certain definite shapes and dimensions would greatly facilitate inspection, lessen the expense of supervision for the city, and conduce in no way to hamper or hinder the course of trade."

LIABILITY IN DAMAGES FOR INJURY TO HIGHWAY BY TRANSPORTING HEAVY LOADS THEREOVER.—In Summer County *v.* Interurban Transportation Co. (Tenn.) 213 S. W. 412, reported and annotated in 5 A. L. R. 765, it was held that in the absence of statute there could be no recovery of damages for injury to a public highway caused merely by the transportation of heavy loads thereover. The court said: "A public road is a way open to all the people, without distinction, for passage and repassage at their pleasure. Definitions in other terms have been given, but they mean substantially the same as the one just stated. The authorities make it clear that any road which is not for the use of the people is not a public road; the fact that it is for the benefit of the public destroys the thought that there can be a private ownership of the road. . . . Public roads, like everything else, are developing in their nature and character, and in the uses to which the public subjects them. As civilization develops, and the inventive genius of man progresses, new uses of public roads may be found. The remedy, in such event, is not to restrict the public in its enjoyment of the public highways, but to improve and enlarge the highways. Their sole use is to accommodate the public, and enable its members to communicate with each other, both socially and in a business way. It is well-settled law that every member of the public has the right to use the public roads in a reasonable manner for the promotion of his health and happiness. Such use, however, is restricted to a use with due care and in a reasonable manner. In so far as the bill seeks to prevent defendant from using the public roads, because its trucks and their loads are too heavy, it must be dismissed. The motor vehicle is now a common means of transportation, and its use upon the public roads is authorized, wherever the size and character of the vehicle is not restricted by the legislature, and will be controlled, so far as we know, only by the convenience and profit of the public. The fact that the transportation company has used vehicles heavier than customary does not give the court, or anyone else, an action against it for such use. The county can neither restrain it from using the public roads and bridges, because of the size of its vehicles, nor collect damages for their reasonable use. If the defendant has operated its vehicles negligently, it would be liable in damages to anyone who has been injured thereby. We do not think the defendant is liable for the excessive use of the roads. There is no legislative enactment prescribing an excessive use, and until there is one we cannot say that the uses to which the roads were subjected by defendant are excessive."

PRIVILEGE OF COMMUNICATION TO ATTORNEY BY CLIENT IN ATTEMPT TO ESTABLISH FALSE CLAIM.—In Standard Fire Ins. Co. *v.* Smithhart, 183 Ky. 679, 211 S. W. 441, it was held that communications to his attorney by one who had burned his house to secure the insurance, for the purpose of seeking aid in defrauding the insurer into paying the loss, were admissible against him in an action on the policy. After discussing the rule and its exceptions with reference to the privilege attaching to communications by a client to his attorney in the latter's professional character, the court said: "As an instance of the character of communications which cannot be given to nor received by a lawyer in his professional character are communications made to a lawyer by persons who are contemplating the commission of crimes or the perpetration of frauds, and who seek the advice of the lawyer as to how the crimes or frauds contemplated may be committed and how the consequences of them may be avoided. The reason of the principle which holds such communications not to be privileged is that it is not within the professional character of a lawyer to give advice upon such subjects, and that it is no part of the profession of an attorney or counselor at law to be advising persons as to how they may commit crimes or frauds, or how they may escape the consequences of contemplated crimes and frauds. If the crime or fraud has already been committed and finished, a client may advise with an attorney in regard to it, and communicate with him freely, and the communications cannot be divulged as evidence without the consent of the client, because it is a part of the business and duty of those engaged in the practice of the profession of law, when employed and relied upon for that purpose, to give advice to those who have made infractions of the laws; and, to enable the attorney to properly advise and to properly represent the client in court or when prosecutions are threatened, it is conducive to the administration of justice that the client shall be free to communicate to his attorney all the facts within his knowledge, and that he may be assured that a communication made by him shall not be used to his prejudice. While the general rule, which applies to communications made by a client to his attorney in his professional capacity, and his

advice thereon, and to information acquired by an attorney from his client, or touching his client's affairs, concerning matters about which he is employed in his professional capacity, is that he cannot, and will not be permitted to, give evidence touching such matters without the client's consent; but the exception touching communications to an attorney concerning crimes and frauds which the client has in contemplation, and in furtherance of which he makes the communications, is as broad as the rule itself."

New Books

Problems in Business Law. A Collection of Cases Briefly Summarized for Use in Colleges and Schools of Business. By Justin H. Moore, Associate Professor School of Business and Civic Administration, The College of the City of New York, and Charles A. Houston, Assistant Professor School of Business and Civic Administration, The College of the City of New York. New York and London: D. Appleton & Company. 1920.

We quote from a prospectus of the volume at hand, as follows: "This book has been written solely for the purpose of training business men in the subject of business law. It omits all theories and presents cases which illustrate actual business conditions of the present day. The emphasis is laid upon the substantive law, that is, the rights and remedies a man has in contract, for the subject of contract in its applications includes practically everything of a legal nature with which a business man usually has to deal. Thus agency sales, insurance, partnership, negotiable instruments, suretyship, are all of them specialized applications of the law of contract. Great care has been exercised in selecting cases, and in eliminating all unimportant facts." It will be seen from the quotation that "Problems in Business Law" is intended for a limited class of students in training for business pursuits. The material is gathered from concrete cases in business law which have been adjudicated in the different courts throughout the United States, preference being given to the New York Court of Appeals. The salient facts of each case are stated very briefly, followed by a citation of the law report where the case may be found, but the decision of the court on the particular facts is not given. If the student desires an answer to his problem he is required to go to the report of the case. We can see the value of such a book and will watch with interest its reception by schools of commerce and business.

American Business Law. With Forms. By A. B. Frey, ex-Judge of the Circuit Court of St. Louis, sometime Lecturer on Contracts, St. Louis University Law School. New York: The MacMillan Company. 1920.

The attention now being paid to business law in the different colleges is probably responsible for the textbooks on the subject which are appearing. The object and scope of Judge Frey's book are stated as follows: "The object of this book is to set forth clearly and concisely those fundamental principles upon which is built the superstructure of Business Law. In order to make clear such principles and at the same time to impress them upon the reader's mind in a practical as well as in a theoretic manner, concrete illustrations have been used, some of which are synopses of, and excerpts from, the leading cases decided in Great Britain and the United States. At the end of each chapter a number of carefully prepared questions have been given referring to the subject-matter of the text preceding. Some of the hypothetical cases have been chosen from actual decisions of the courts of last resort. The reader should endeavor to work out the answers to each of the questions. By so doing he will gain a more accurate knowledge of the principles set forth. Likewise, by applying such principles to concrete cases, he will train his mind to solve his own difficulties. A number of legal forms have been given in connection with the various subjects."

The bibliography at the end of each chapter puts the reader on track of authorities where a fuller discussion of the subject under consideration can be had.

We should say that the student of business would find this book suggestive and helpful, as it covers satisfactorily the ordinary subjects which he would be likely to meet in everyday business life.

A Treatise on International Law. With an Introductory Essay on the Definition and Nature of the Laws of Human Conduct. By Roland R. Foulke. Two volumes. Philadelphia: The John C. Winston Co. 1920.

This work, the material of which is contained in two volumes, purports to have been written in the attempt to clear away some of the many obscurities and misconceptions which pervade the subject of international law. The preface was written in 1919, and it would seem from an examination of the pages that the material was collected before the world war was well on its way, for there are very few references to that war. The work is based on material already handled in the main by prior writers on the subject, but Mr. Foulke has had the advantage of their labors and has cited them freely. His treatment, moreover, is fresh and his style clear and concise. A better knowledge of International Law has been forced upon us by the world war and the problems following in its wake. A new work on the subject is therefore a matter of interest. It is likely, however, that the rapid growth of the subject, due to such war, will necessitate other works incorporating the fruits of that growth.

The American Year Book. A Record of Events and Progress. 1919. Edited by Francis G. Wickware. New York and London: D. Appleton & Company. 1920.

The American Year Book has become so well known that any description of its purpose and scope is no longer necessary. With the publication of the present volume it reaches its tenth issue. It has met with deserved success and its unique position is secure. No matter how closely one has followed the events happening in the different fields of politics, government, history, science and the arts, he needs just such a book as this one to refresh his memory from time to time, and fix the important happenings of the year in his mind. The 1919 number is particularly important because of its admirable survey of peace problems which succeeded the ending of the world war. But the other departments are maintained with the same standard of excellence which has characterized previous volumes.

News of the Profession

THE LAWRENCE COUNTY BAR ASSOCIATION OF PENNSYLVANIA elected A. Martin Graham president at a recent meeting.

FORMER DEPUTY ATTORNEY GENERAL OF DELAWARE DEAD.—Armon D. Chaylor, Jr., of Wilmington, formerly deputy attorney general of Delaware, is dead.

MARYLAND UNITED STATES ATTORNEY RESIGNS.—United States District Attorney Samuel K. Dennis of Maryland has resigned. He was appointed in 1915..

DEATH OF FORMER ATTORNEY GENERAL OF NEBRASKA.—Arthur S. Churchill of Omaha is dead. He was at one time attorney general of Nebraska.

THE IOWA STATE ASSOCIATION OF COUNTY ATTORNEYS met at Cedar Rapids June 23 and 24. H. M. Havner, attorney general, addressed the meeting.

DEATH OF PROMINENT PHILADELPHIA LAWYER.—The death is announced of H. La Barre Jayne of Philadelphia, a member of the firm of Biddle, Paul & Jayne.

THE WAUPACA COUNTY ASSOCIATION OF IOWA has elected John C. Hart of Waupaca president for the ensuing year.

FORMER NEW HAVEN LAWYER DEAD.—George R. Cooley, who practiced in New Haven for forty years, died in Springfield, Massachusetts, recently.

RETIREMENT OF MARYLAND JUDGE.—Judge Allan McLane, a member of the bench on the third judicial circuit of Maryland, has resigned. He was elected a judge in 1914.

MASSACHUSETTS DEATHS.—John C. Sanborn of Methuen and Lawrence, is dead as is William J. Greene of Boston, once a judge advocate general in the national guard.

NEW FEDERAL JUDGE IN NEW YORK.—Frank Cooper of Schenectady, New York, has been appointed a federal judge to assist Judge Ray in the northern district.

DETROIT BAR ASSOCIATION.—At the eighty-third annual meeting of the Detroit Bar Association, Henry C. Walters was elected president and Fred J. Dewey secretary.

DEMISE OF NEW HAMPSHIRE LAWYER.—Judge William B. Fellows of Tilton, New Hampshire, died recently. At the time of his death he was secretary of the New Hampshire Tax Commission.

UNITED STATES COMMISSIONER RESIGNS.—James V. Wharton of Duluth, Minnesota, has resigned as United States Commissioner after serving in that office for eight years.

HIGH COST OF LAW IN ILLINOIS.—Lawyers in Illinois, by virtue of action taken by the Illinois Bar Association, get an advance in minimum fees of 33 1/3 per cent.

MINNESOTA DEATHS.—The death of Albert H. Hall, one of the prominent attorneys of Minneapolis, occurred recently. He was born in Alexandria, Ohio. Another death is that of William H. Adams of the same city. He was once a partner of Judge E. St. Julian Cox.

OKLAHOMA COUNTY BAR ASSOCIATION.—At a recent meeting of the Oklahoma County Bar Association, John H. Shirk was elected to succeed John Tomerlin as president of the association.

GEORGIA BAR ASSOCIATION.—The annual convention of the Georgia Bar Association was held at Tybee Island in May. The convention address was delivered by Dean Roscoe Pound of the Harvard Law School.

DEATHS AMONG ILLINOIS ATTORNEYS.—Judge Charles M. Walker of Chicago, is dead. He was seventeen years on the Circuit bench and was born in Covington, Kentucky. The death of Judge Merritt W. Pickney, formerly of the Juvenile court of Chicago, is also announced.

IOWA BAR ASSOCIATION.—The annual meeting of the Iowa Bar Association was held at Cedar Rapids June 24-25. Emmet Tinley of Council Bluffs delivered the president's annual address.

TENNESSEE LAWYERS WHO HAVE PASSED AWAY.—The Tennessee bar has lost by death the following: Judge Robert R. Caldwell of Nashville, a brother of former Congressman Andrew J. Caldwell, and Judge John F. Rhoder of Memphis.

LEHIGH COUNTY BAR ASSOCIATION.—At the annual spring meeting of the Lehigh County Bar Association Judge Schull of Stroudsburg and Judges Groman and Henniger of Allentown were guests of honor.

NEW CHIEF JUSTICE OF ILLINOIS.—Justice James H. Cartwright of the Illinois Supreme Court, has been named its chief justice, succeeding Justice Frank K. Dunn.

PROMINENT TEXAN DEAD.—Judge George C. Greer, general attorney and trustee of the Magnolia Petroleum Co., died in a Baltimore hospital recently. He lived in Dallas.

THE DAYTON, OHIO, FEDERAL DISTRICT BAR ASSOCIATION and the Montgomery County Bar Association held a picnic at Kilkare Park near Dayton, June 26. Several hundred attorneys from eight counties surrounding Dayton attended.

NEW JERSEY DEATHS.—Judge William H. Vrendenburgh of Freehold, New Jersey, for many years a member of the Court of Errors and Appeals of New Jersey, is dead at the age of 81. He was on the bench from 1897 to 1916. The death of William T. Hilbard of Salem is also announced.

ST. LOUIS BAR ASSOCIATION.—This association at its annual meeting elected for its president Frederick W. Lehmann, former solicitor general of the United States and former president of the American Bar Association. The membership numbers over nine hundred.

KANSAS CITY ATTORNEY BECOMES GENERAL COUNSEL TO RAILROAD.—Samuel W. Moore of the law firm of Lathrop, Morrow, Fox & Moore of Kansas City, Missouri, has been made general counsel of the Kansas City Southern Railroad succeeding Samuel Untermeyer.

CHICAGO BAR ASSOCIATION.—At the annual meeting of the Chicago Bar Association, John R. Montgomery was elected president and William S. Miller secretary. Senator Miles Poindexter addressed the meeting, urging the justification of anti-strike legislation.

OHIO DEATHS among the profession include Raymond B. Retter of Dayton; Caleb B. Matthews of Cincinnati; Judge John G. Reeves of Lancaster, for fifteen years a judge of the Common Pleas Court of Fairfield County; Joseph J. Gill of Steubenville, a former congressman; Robert C. Rodgers of Springfield, and Judge Theodore Shaeffer of Lancaster, formerly a probate judge.

WOMAN MADE UNITED STATES ASSISTANT ATTORNEY GENERAL.—Mrs. Annette Abbott Adams of San Francisco has been appointed by President Wilson an assistant attorney general of the United States. She was before the appointment United States Attorney for the northern district of California. The appointment was made to fill the vacancy caused by the elevation of Assistant Attorney General Frierson to the post of Solicitor General of the United States.

NEW YORK DEATHS.—The New York state bar has lost by death the following: John H. Mosher of Syracuse; Arthur Von Briesen of New York city; John W. Simpson of New York city, senior partner of the law firm of Simpson, Thatcher & Bartlett; Col. Alexander S. Bacon of Brooklyn; Judge Lynn J. Arnold of Albany; Frederick B. Jennings of New York city, a member of the law firm of Stetson, Jennings & Russell; Francis M. Burdick of Utica, formerly Dwight professor of law at Columbia University; Julian T. Davies of New York city, and Charles E. Lydecker of the same city.

ARKANSAS BAR ASSOCIATION.—The twenty-third annual meeting of the Bar Association of Arkansas was held at Hot Springs

early in June. The annual address was made by the president, W. H. Martin of Hot Springs, on "Criminal Jurisdiction in Federal Courts." Roscoe Pound, dean of the Harvard Law School, delivered an address on "A Ministry of Justice." W. F. Coleman of Pine Bluff was elected president and Roscoe Lynn was re-elected secretary.

ILLINOIS BAR ASSOCIATION.—At the annual meeting of the Illinois Bar Association held in Chicago in May, ex-Senator Albert J. Beveridge of Indiana delivered an address on "John Marshall and the Constitution." The following were elected as officers for 1920-21: President, Logan Hay, Springfield; vice-presidents, Silas H. Strawn, Roger Sherman, Chicago, and Bruce A. Campbell, East St. Louis; secretary, R. Allan Stephens, Danville; treasurer, Franklin L. Velde, Pekin; governors, C. M. Clay Buntain, Kankakee, and Ernest L. Kreamer, Chicago.

MARYLAND BAR ASSOCIATION.—The annual meeting of the Maryland Bar Association was held June 24, 25 and 26, at the Hotel Chelsea, Atlantic City. The principal speaker was former United States Senator Albert J. Beveridge, of Indiana, on the subject, "Maryland, Marshall and the Constitution." Another speaker was John Lord O'Brian of Buffalo, who spoke on, "Enforcement of the Law Relating to the Deportation of Aliens." James E. Ellegood of Salisbury succeeded Judge Morris A. Soper as president.

TEXAS BAR ASSOCIATION.—The annual meeting of the Texas Bar Association will be held July 1, 2 and 3 at El Paso. The annual address will be delivered by Judge George T. Page, circuit judge of the United States court at Chicago, and ex-president of the American Bar Association, Justice Greenwood, of the Supreme Court of Texas, will deliver an address on "Aid to the Supreme Court from Lawyers." The bar associations of Arizona and New Mexico are joining with Texas in the meeting.

VIRGINIA BAR ASSOCIATION.—The Virginia Bar Association held its thirty-first annual convention recently at Richmond. Randolph Harrison of Lynchburg, president of the association, read a paper on "The Monroe Doctrine—Its Origin, Meaning and Application." Senator Atlee Pomerene of Ohio delivered an address on "Our Recent Federal Railroad Legislation," and Vice-President Thomas R. Marshall on "Altruistic Evil." The new president is Armistead C. Gordon of Stanton. John B. Minor of Richmond is again secretary and treasurer.

English Notes*

HOLDING COURT ON GOOD FRIDAY.—On March 26, in the Northern Police Court, Dublin, in the case of an ejectment, the suggestion was made that the proceedings should be adjourned for a week, whereupon attention was called to the fact that the day to which the proposed adjournment should extend would be Good Friday. "Your Worship," said a solicitor to a magistrate, "is not Pontius Pilate." "No," rejoined the magistrate, "and I will not follow the precedent." Lord Morley records that when in 1831 Lord Brougham committed the enormity of hearing causes on Good Friday, Mr. Gladstone repeats in his diary, "with deep complacency," a saying of Sir Charles Wetherell, the famous leader of the Bar, who resigned the Attorney-Generalship owing to disagreement with the Roman Catholic Emancipation policy of the Wellington-Peel Administration, that Brougham was the first judge who had done such a thing since Pontius Pilate. On one occasion during the Commonwealth, on the 23rd of April, 1641, the House of Commons met on Good Friday, while in 1689 the House of Commons met on Easter Monday as the Puritans and Latitudinarians objected to the usual adjournment.

*With credit to English legal periodicals.

A NEW BOOK BY JUSTICE OLIVER WENDELL HOLMES.—Among books announced for early publication likely to interest members of the profession, special note should be made, says the *Law Times*, of a volume of Collected Papers by Mr. Justice Oliver Wendell Holmes, to be issued by Messrs. Constable, which will include all the veteran jurist's legal papers, and addresses from 1880 to the present time, among others the article on "Early English Equity," from an early number of the Law Quarterly Review, and another striking paper on "The Path of the Law." No one who has read Mr. Justice Holmes's remarkable book on "The Common Law"—a work which to many opened an entirely new view of the study of law—need be told that anything that comes from his pen well repays careful study. To the discussion of legal topics he brings much of the literary charm that is so conspicuous in the writings of his distinguished father. We have spoken of him as the "veteran" jurist; he may well be so called for he has been on the Bench since 1882—first of the Supreme Court of Massachusetts, and, since 1902, of the Supreme Court of the United States, a remarkable record of judicial service, splendidly performed. It may be recalled that in 1916 the editors of the Harvard Law Review, to whose pages he has been a frequent contributor, offered him as a tribute of respect, on the occasion of his seventy-fifth birthday, the various articles in their April number, to which an added interest was given by the reproduction of his portrait as a frontispiece.

UNDUE INFLUENCE AS BETWEEN HUSBAND AND WIFE.—In the recent case of Craig *v.* Lamoureaux (122 L. T. Rep. 208; (1920) A. C. 349), decided by the Judicial Committee of the Privy Council, it appeared that a wife, very shortly before her death, and while she was seriously ill, made a will in favor of her husband, who was instrumental in having it prepared, and in obtaining her execution of it, and under which will he was the sole beneficiary. Lord Haldane, in delivering the judgment of the Judicial Committee, puts the law on the subject of undue influence very clearly. After referring to the principle that a person who is instrumental in framing a document, under which he obtains a bounty, is placed in a different position in law from an ordinary donee, he proceeded as follows: "It is otherwise in case of wills. When once it is proved that a will has been executed with due solemnities, by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence rests on the party who alleges this. It may well be that in the case of a law agent, or of a stranger who is in a confidential position, the courts will scan the evidence of independent volition closely, in order to be sure that there has been thorough understanding of consequences by the testator whose will has been prepared for him. But even in such an instance a will which merely regulates succession after death is very different from a gift inter vivos which strips the donor of his property during his lifetime. . . . There is no reason why a husband or parent, on whose part it is natural that he should do so, may not put his claim before a wife or a child, and ask for their recognition, provided the person making the will knows what is being done. The persuasion must, of course, stop short of coercion, and the testamentary dispositions must be made with comprehension of what is being done." It is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It must be shown that in the particular case the power was exercised, and

that it was by means of the exercise of that power that the will was obtained: (Wingrove *v.* Wingrove, 11 Prob. Div. 81; and Baudains *v.* Richardson, 94 L. T. Rep. 290; (1906) A. C. 169).

IMPLIED WARRANTY AS TO MINERAL WATER BOTTLES.—A point of considerable practical importance, elucidating section 14 of the Sale of Goods Act 1893, was decided recently by the Divisional Court in Geddling *v.* March. By section 14, the general rule applicable to the sale of goods is that "there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale"; but to this general principle, which embodies the rule expressed in the maxim Caveat emptor, there are certain exceptions which are set out in the section. The first of these relates to the case where the buyer makes known to the seller the particular purpose for which the goods are required, and the goods are of a description which it is in the course of the seller's business to supply; in such a case the section provides that there is an implied condition that the goods shall be reasonably fit for such purpose. In the particular case with which the court was concerned, the question was whether this implied condition was limited to the goods which formed the subject of sale, or whether it extended to the container in which the goods were supplied. The goods which were the subject of the contract of sale were mineral waters, which were supplied in the usual way—namely, in bottles—but the bottles themselves were not sold, but merely hired; and one of the bottles, while still containing mineral water, burst in the hands of and seriously injured the plaintiff, who was supplied with it in the way of her trade by the defendant, the wholesale manufacturer of the mineral water. For the defendant it was not contested that the implied condition applied to the contents of the bottle, but it was strenuously contended that it did not extend to the bottle. The court, however, took the view that the implied condition extended to the bottle which the judges said was supplied under the contract of sale. It is doubtful whether the draftsman of the section had such a case in contemplation; indeed, it is probable that by the reference to "goods supplied under a contract of sale" he only intended the goods actually bought; but the court, knowing that certain kinds of commodities, of which mineral water is one, can be the subject of commerce only if contained in proper receptacles, came to the commonsense conclusion that what is necessarily supplied with the goods must, like the goods themselves, be reasonably fit for the purpose for which they are required by the purchaser.

"WORKMAN" INJURED ON WAY TO EMPLOYERS' CANTEEN.—On authority, it seemed tolerably plain that the applicant in the recent case of Sir W. G. Armstrong, Whitworth & Co. Limited *v.* Redford, was entitled to claim compensation in respect of the "personal injury" which she had sustained as "arising out of and in the course of" her employment, within the meaning of section 1 of the Workmen's Compensation Act 1906 (6 Edw. 7, c. 58): (see Blovelt *v.* Sawyer, 89 L. T. Rep. 658; (1904) 1 K. B. 271; Morris *v.* Lambeth Borough Council, 8 W. C. C. 1; and Rowland *v.* Wright, 99 L. T. Rep. 758; (1909) 1 K. B. 963). Two, however, of the five learned Lords—Finlay and Dunedin—before whom an appeal from the decision of the Court of Appeal to the House of Lords was heard, arrived at a contrary conclusion; still, diversity of opinion in workmen's compensation cases is of such common occurrence in the House of Lords that it is almost a matter for surprise if unanimity occasionally exists. In the present case, the majority of three learned Lords, conjointly with the three learned judges of the Court of Appeal, make six approving of an award by the learned County Court judge in favor of the applicant, as against two against the same. And when the facts of the case are considered, it will be recognized that there was ample reason to warrant that award. The applicant slipped as she was descending the steps leading to the canteen which was established by the employers for the use of their workmen. She was returning to her work, which had been interrupted by the excursion to the canteen. There was no question of the applicant being outside the employers' premises when the accident befell her. She met with the accident, therefore, on the employers' premises, although not on that part of those premises where the workshop in which the applicant was employed was situated, but where the applicant was entitled to be as a condition of the contract of service with the employers. The canteen being situated immediately above the offices of the employers and surrounded on three sides by their premises, and being connected by a door with the rest of those premises, was found by the learned County Court judge to form a portion of the employers' premises expressly set apart for the use of their workmen. In the view that was taken by His Honor—a view that was unhesitatingly accepted as entirely correct by the Court of Appeal—the applicant was, in those circumstances entitled to compensation. The House of Lords having by their majority affirmed that decision, it will govern many similar cases where an accident happens to a workman, at a period when his work is being temporarily suspended for his own benefit, but while he is yet on his employer's premises and later on will resume his arrested occupation.

WHAT IS A FUNDED DEBT.—Perhaps few words have a more general signification than the word "fund" or "funds." Derived presumably from the Latin, *fundus*, meaning "the bottom of anything," the words are commonly applied to a sum of money, stock or the like, put by as a source of supply. Hence the expression "money in the funds," meaning the Government funds such as consols, but not floating securities like unfunded Exchequer bills. Having regard to the fact that the word fundus also meant a farm or land (see Co. Litt. 5a), it is conceivable that the words "trust funds" might in some circumstances include land. The meaning of the word "funded debt" arose in the recent case of Attorney-General *v.* South Wales Electrical Power Distribution Company (122 L. T. Rep. 417; (1920) 1 K. B. 552). There a company, being unable to pay the interest on its debenture stock, issued "deferred warrants," in payment of such interest. These warrants themselves carried interest; and the question was whether the transaction amounted to an issue of "loan capital," or the creation of a "funded debt," within the meaning of section 8 of the Finance Act 1899, and it was held that it did not. The statute provided that if a local authority proposed to issue any "loan capital" they should, before the issue thereof, deliver to the Commissioners of Inland Revenue a statement of the amount proposed to be secured by the issue, and such statement was to be charged with ad valorem stamp duty; and in that section "loan capital" was defined as meaning (among other things) "funded debt." Lord Sterndale, M.R., in the course of his judgment said: "It has been rightly said that there is no definition in law of 'funded debt.' Nor do I intend to attempt to give one which is in any way exhaustive. I merely intend to deal with the expression 'funded debt' so far as is necessary for the purpose of the present case. I did take the trouble to see what definitions were given, for the general public, in the best dictionaries, and I found this definition of 'fund,' as a verb: 'To provide a fund; hence to convert a floating debt into a more or less permanent debt at a fixed rate of interest.' I also found the following definition of 'funded:' 'That which has been made part of the permanent debt of the State, with provision for regular payment of interest at a fixed

rate.' Of course that definition overlooks the fact that it needs not be a debt of the State at all; it may be a debt of a company as well as that of the State . .. there must be a making of something into a permanent debt with provision for regular payment of interest at a fixed rate." Lord Justice Atkin said: "To my mind a funded debt includes, at any rate, this conception, that you are substituting, for short obligations, a series of obligations more or less permanent and uniform in character." Lord Justice Younger characterized the transaction as a "statutory moratorium," and entirely agreed with the Master of the Rolls as to the meaning of the words "funded debt." At the present time, when there is a large floating debt, the point is interesting.

SCOTTISH LAW REFORMS.—Readers of Boswell will no doubt recall the frequency with which he and Johnson discussed questions of law, or the ethics of advocacy or other matters touching the administration of justice. On one occasion the conversation drifted on to the subject of law reports, when Johnson delivered himself thus: "The English reports, in general, are very poor; only the half of what has been said is taken down, and of that half, much is mistaken. Whereas, in Scotland, the arguments on each side are deliberately put in writing, to be considered by the court. I think a collection of your cases upon subjects of importance, with the opinions of the judges upon them, would be valuable." Some years after this conversation took place a great Scottish collection of reports was made in Morison's Dictionary of Decisions, and, turning over its pages, one cannot fail to be struck by the disproportionate space allotted to argument and judgment respectively, the judgment oftentimes being confined to the mere "interlocutor," i.e., the formal order, whereas long paragraphs set out the argument in detail and with a wealth of citation from the Roman, Dutch, and French jurists. It was all extremely interesting from the purely academic point of view, but there was just a suspicion that the object of legal debate was rather to afford an opportunity for the display of research by the rival advocates than to decide between the opposing contentions of ordinary litigants. In the fullness of time, therefore, a reformer appeared who passed an Act of Parliament which, by providing that "it shall not be competent to the Lord Ordinary to direct cases or minutes of debates, or other written argument, to be prepared by the parties, whether for the use of himself or of the Inner House," struck a deadly blow at the old learning, and, as someone said, "Pothier, and Voet, and Vinnius, and the Corpus Juris, and all the familiar words of ancient days, occurred no more." Scottish reports gradually became very like those now obtaining in England, save, of course, in the terminology, greater space being devoted to the judgment and less given to the argument. But even the abolition of written arguments has not satisfied the reformers. A demand is made afresh by a writer in the current issue of the *Scottish Law Review* for a revision of the system of pleading still prevailing, which he describes as "antiquated, archaic, and pedantic." Whether this matter is managed better in England may be doubtful, but certainly in some respects the Scottish system might with advantage be altered and greater economy secured by an abbreviated form of pleadings. The summons or writ is unnecessarily cumbrous, and the rambling "condescendence" might advantageously be curtailed. As to the various other reforms of procedure in the Court of Session advocated by the writer in question and whether they would tend towards greater efficieney in the dispatch of business an Englishman is scarcely in a position to decide, but it would certainly be well that the proposals should be carefully considered by those in authority. In one small matter, as to the personnel of English courts, referred to incidentally in his article, the writer is not accurately informed. The associates in the English courts are not, as a rule, members of the Bar. Occasionally barristers are temporarily employed in this capacity, but the members of the regular staff are not barristers.

Obiter Dicta

JUST A GAME.—Lotto *v.* State, 208 S. W. 563.

ONE OF THE PROLETARIAT.—Born *v.* King, 124 N. E. 399.

A UNITARIAN.—Only *v.* Holy Trinity Church, 2 Manitoba 248.

WHY THE SUIT?—Query *v.* Postal Telegraph-Cable Co. (N. Car.) 101 S. E. 390.

NATURALLY!—The case of Beach *v.* Haynes, 207 Mich. 93, was a controversy over the riparian rights of the plaintiff.

SPEAKING OF WHOM?—"It is to be hoped that the reign of this monster is nearly over."—Per Sanborn, J., in United States *v.* Amo, 261 Fed. 106.

WELL! WELL!—In Bryan *v.* Commonwealth (Va.) 101 S. E. 316, Bryan was convicted of unlawfully transporting liquor along a city street. Moreover, he was convicted twice!

SHREWD, PERHAPS, BUT MONSTROUS!—"It has been shrewdly said that, in the administration of justice, it is quite as important that justice *appears* to be done as that it *is* done."—Per Lamm, C. J., in Greene County v. Lydy, 172 S. W. 384.

DID HE MEAN IT?—In the case of In re Adams, 172 N. Y. Supp. 612, it was said by Giegerich, J., that an application for permission to remove dead bodies from a cemetery belonged "to a class of motions that should not be granted without the gravest reasons."

JUSTICE TRIUMPHS AT LAST!—From the facts in Traw *v.* Heydt, (Mo.) 216 S. W. 1009, recently decided, it appears that the defendant beat up her cook when the latter refused to leave on being ordered to do so, and won out in a suit for damages. Congratulations, Mrs. Heydt!

LONDON CLIMATE.—In the case of In re Thorne, 4 Sw. & Tr. 36, 11 Jur. (N. S.) 569, there was involved a will made by an army officer in Africa beginning as follows: "In the event of my death while serving in a horrid climate," etc. The testator later died in London. It was held that the will was effective.

A FRIENDLY ENEMY.—One can easily visualize the plaintiff in Friend *v.* Childs Dining Hall Co., 231 Mass. 65, tripping lightly into the restaurant, with smiles and pleasant greetings for all and eager anticipation written in every line of her face. But how differently she must have departed, for alas, they served stones in her beloved baked beans!

PUNISHING THE PROFESSION.—Exact copy of ad. in London *Law Times* for May 8, 1920:

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OR ANY OTHER REASON.—Said Lumpkin, J., in Tompkins *v.* State, 17 Ga. 360, speaking of the assigning of a false reason for an act as serving to prove the contrary to be true: "A girl,

who gives as a reason why she is not in love, that her beau is no older than herself, is already a victim to the tender passion." In our humble opinion the analogy is not striking. For who ever heard of a woman giving her real reason for doing anything?

PASSING THE BUCK!—In State v. Nunemacher, 84 So. 167, a criminal prosecution for unlawfully selling intoxicating liquor consisting of a bottle of wine, the Supreme Court of Louisiana sidestepped the issue of fact thus neatly: "The bottle of wine was brought up in the original package on the application for a writ of certiorari by defendants. In argument, it was stated that the contents of the bottle were 'vile stuff,' on account of its weakness; and the court, it is supposed, is expected to test the wine for the purpose of determining whether it is an intoxicating liquor or not. The fact whether the liquor was intoxicating or not must be determined by the trial judge or jury alone. This court is without jurisdiction in the matter."

IN RE HARDING.—The pertinent inquiry with respect to the Republican nominee for President is "Can he win?" After casting his horoscope from the law reports, we confess to a somewhat skeptical state of mind. While the cases are not many in number, they are significant. Speaking broadly, he is a loser as against the field (see Harding *v.* Field, 1 N. Y. App. Div. 391) and he cannot be said to have a winning way with people generally (see Harding *v.* People, 160 Ill. 459). He can't beat such a striking personality as the Governor of New York (see Harding *v.* Smith, 11 Pick. 478), nor can he win against any strong candidate whom the Democrats may nominate (see Harding *v.* Strong, 42 Ill. 148). However, it cannot be denied that he has at least a chance, as the judgment in Harding *v.* Hazard, 31 Hun 42, bears testimony.

LORD CULLEN AS A MIMIC.—Of the second Lord Cullen a multitude of stories have come down to us, says the *Law Times*, not so much concerned with his distinction as a judge, but recording his extraordinary powers of mimicry. According to Dr. Alexander Carlyle, familiarly known in Scotland as "Jupiter" Carlyle, Cullen's talent "was not merely an exact imitation of voice and manner of speaking, but a perfect exhibition of every man's manner of thinking on every subject." Boswell, too, who knew him well and who being, as everyone knows, a perfect Adonis himself, felt justified in calling attention to Cullen's ugliness, bears witness to his wonderful mimetic powers. One of the stories connected with an exhibition of his imitative talent, preserved in Kay's "Edinburgh Portraits," is amusing enough. It seems that the then Lord President, having heard of Cullen's attainments, arranged a dinner party to which Cullen, then a young advocate, was invited. After the cloth was removed, Cullen kept the company amused by a succession of imitations of the most eminent practicing members of the Bar. The president was greatly delighted, and hinted that he need not limit himself to the Bar, whereupon Cullen took off each judicial dignitary in turn except, of course, the President himself. "But," said his Lordship, "why am I excepted? I cannot really allow this." Cullen was loth to comply, but, as his Lordship was insistent, he at length yielded, whereupon the Lord President was exhibited to the life. All present were convulsed with laughter except the President himself, who, after an unsuccessful attempt to affect indifference, at last ejaculated with much bitterness, "Very amusing, Mr. Robert—very amusing truly; ye're a clever lad—very clever; but just let me tell you—that's no' the way to rise at the Bar!" Despite this damper and despite his habit of mimicry, Cullen became a successful advocate, and, as has been said, rose to the Bench.

A JUDGMENT WITHOUT REASON.—Many interesting documents emanating from justice of the peace courts have been in times past "embalmed" (to use the expression of a jealous rival editor) in this column of LAW NOTES. Herewith we submit another, sent to us by a Kansas correspondent, and consisting of a judgment with a postscript, as follows:

JOHN YORK
Plff.
vs.
WILLIAM BYERS
Deft.

Before ———, a Justice of the Peace in and for Sherman Township, Leavenworth County, Kansas.

Judgment and Findings of the Court.

I, the above named Justice of the Peace and in the above entitled action, find that the defendant, William Byers, is indebted to the plaintiff, John York, in the sum of Four and 90/100 dollars balance due the said plaintiff for his personal services to and for the defendant, and in the further sum of Seven dollars for damages done to plaintiffs crop by the live stock of the said defendant. Therefore it is Considered, Ordered and Adjudged, by said Justice of the Peace, that the said plaintiff, John York, have and recover from and of the said defendant, William Byers, the sum of Eleven dollars and Ninety cents, together with the costs of this action taxed at Nineteen and 65/100 dollars.

IN WITNESS WHEREOF, I have hereunto affixed my name and title of office at Linwood, Kansas, this 12th day of April, 1920.

———,
Justice of the Peace.

It would consume a great deal of time to explain all the reasons for my action in this case, and would not prove profitable to any one, only as a matter of curiosity. I am ready to make any explanations to any one who may be interested in this case upon request, but only verbally.

Evidently the learned justice does not believe in written opinions. But our curiosity is aroused. Will not some one of our readers, conveniently located, apply in person to His Honor for an explanation of his reasons? We will be glad to publish it for the edification of the bar.

Correspondence

FORGING FINGER PRINTS.

To the Editor of LAW NOTES.

SIR: I have been out of the State and did not read until to-day your editorial in the March, 1920, issue respecting the forging of finger prints. As to Mr. Carlson's ability to forge finger prints (see p. 203) I am more than skeptical. While not denying its possibility, I do not believe that he can or has done it. He sent me his paper months ago and I at once sent him some finger impressions and invited him to submit forgeries. Receiving no answer, I repeated the request but have received no response. We have been acquainted for some time and other letters have always been answered.

Duplicates can be made by photography undoubtedly, and a photo could easily be detected. I am not prepared to say how else a forgery could be perpetrated. It certainly would be no easy task.

MARSHALL D. EWELL,
Handwriting Expert.

Memphis, Tenn.

MINORITY AMENDMENTS TO FEDERAL CONSTITUTION.

To the Editor of LAW NOTES.

SIR: The United States Supreme Court has handed down its decision sustaining the Eighteenth Amendment and the Volstead Act, and though this decision will be disappointing to many its importance cannot be exaggerated, as it clearly indicates the danger that threatens this nation from within.

This decision makes it clear that should the Socialist, Communist, I. W. W. or Anarchist obtain control of two-thirds of the national legislature and of two-thirds of the State legislatures, or should some religious association, it matters not whether it be Buddhist, Catholic or Protestant, gain control of two-thirds of the United States Senate and House of Representatives and also of two-thirds of the State legislatures it may write its political or religious systems into the Constitution and the people must submit or resort to civil war.

Taine in his masterly analysis of the French Revolution shows how 300,000 Jacobins, by their thorough organization, dominated the 26,000,000 people of France, destroyed the Monarchy, established the "worship of the Goddess of Reason" and seriously proposed to reduce the population of France from 26,000,000 to 5,000,000 and did massacre 3,000,000 of people before check was put to their madness.

Arthur Young writing in 1792 ("Travels in France, On the Revolution in France," note 3) says: "We learn by Mr. Payne that General Washington accepted no salary as commander of their troops nor as president of their legislature—an instance that does honor to their government, their country, and to human nature; but it may be doubted whether any such instances will occur two hundred years hence. The exports of the United States now amount to twenty millions of dollars; when they amount to five hundred millions, when great wealth, vast cities, a rapid circulation, and by consequence immense private fortunes are formed, will such spectacles be found? Will their government be then as faultless as it appears at present? It may. Probably it will still be found excellent; but we have no conviction, no proof; it is the womb of Time—'The Experiment Is Not Made.'" The decision of the Supreme Court recalls the words of Arthur Young to mind, and clearly shows that the Constitution of the United States is still only an experiment; and that there is not in the Constitution any safeguards for civil and religious liberty as against the attacks of a bold and aggressive minority—as were the Jacobins of France—as such a minority may by securing control of the National and State Legislatures, so amend the Constitution as to nullify all of its provisions for civil and religious liberty. This decision shows that Amendment X of the Constitution, which was intended as a check or restraint upon the power conferred upon the legislatures of the several states by Art. V of the original Constitution, is a mere string of meaningless words. The way has been open for every doctrinaire, political, social and religious faddist to assail the Constitution with amendments, and the question is, will the barrier be strong enough to resist the floods that will be poured upon it?

Pascagoula, Miss. CHAS. E. CHIDSEY.

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Ratification of Federal Amendments.

THE question of the manner of ratifying amendments to the Federal Constitution has developed a new phase which brings out very sharply the injurious tendency of the ruling of the Supreme Court in the prohibition case. The Tennessee Constitution provides that no amendment to the Federal Constitution shall be ratified by a legislature whose members were elected before the amendment was submitted to the states. The purpose of the provision is obviously to give the people of the state an opportunity to elect their representatives with reference to their views on the measure on which they are to pass irrevocably. The Attorney General of Tennessee has recently rendered an opinion to the effect that the woman suffrage amendment may be ratified by a legislature elected before that amendment was submitted, saying that the decision in the Ohio referendum case clearly establishes that "the power of a Legislature to ratify an amendment to the Federal Constitution is derived solely from the people of the United States through the Federal Constitution, and not from either the people or the Constitution of a State. The power thus derived cannot be taken away, limited or restricted in any way by the Constitution of a State. The provision of the Tennessee Constitution above referred to, if valid, would undoubtedly be a restriction upon that power. If the people of a State, through their Constitution, can delay action on an amendment until after one election, there is no reason why they cannot delay it until after two elections, or five elections, or until the lapse of any period of time they may see fit, and thus practically nullify the article of the Federal Constitution providing for amendments. I am, therefore, confident that if the Tennessee Legislature is called in session it will have the clear power to ratify the amendment, notwithstanding any provision of the Tennessee Constitution." It is probable that this opinion correctly represents the result of the Supreme Court decision and will be sustained if the matter comes into litigation. But a more graphic illustration could not be imagined of the manner in which any form of ratification other than by referendum deprives the people of the right to self-government. The growing recognition of the dangers of the existing method of ratification was well voiced by the Governor of Vermont, who, in refusing to call a special session to act on the Nineteenth Amendment, said of the decision in the Ohio referendum case: "This decision leaves the people at the mercy of any group of men who may lobby a proposal for a change in the Federal Constitution through Congress and then through the Legislatures of the States. If the people of Vermont, in accepting a place in the Union of States, inadvertently lost in whole or in part the right of self-government and conferred it on a Legislature, there is all the more reason why a Legislature should not pass upon a question which has arisen since their election, and upon which their constituents have had no opportunity to express themselves."

Tolerance.

MANY persons will agree with the views of Gov. Clement of Vermont, quoted in the preceding paragraph, while others will agree with the Governor of Tennessee who took the opposite view under the same circumstances. Arguments of some weight can be adduced in support of each position. The one viewpoint which it is difficult to justify is that voiced by the president of the national woman suffrage association, who is reported to have said: "The decision of Gov. Clement is so contrary to the dictates of justice, of common sense and expediency that it convinces me that there is a sinister and far-reaching influence behind it. To uncover that influence and spread it on the record is one of the immediate tasks of suffragists." This is a fair illustration of the spirit which is the bane of democratic institutions, the prevalent readiness to believe and assert that an opinion not in accord with that of the propagandist must arise from imbecility or corruption. It runs through every phase of our public life—the church scorning as "heathen" the nonbelievers of its dogmas, the politician periodically appealing to the voters to save the country from the rascality of the opposing party, the attorney eloquently portraying his client in angelic hues and ascribing the most diabolical motives to innocent acts of his adversary, the labor agitator denouncing all employers as capitalistic monsters battening on the blood and tears of wage slaves. The fact is, of course, that no man and no organization is wholly without error or wholly without virtue. The ideal contest would be such a fair, honest and temperate discussion as would sift out the error and save the truth of each. But at present each wages an intolerant war of extermination, with the result that the victor stands committed to his errors as well as to his virtues. By those errors he is in turn undone, and the success of the opposite party repeats the

same history, the ascertainment of the nonpartisan truth being meanwhile furthered not a particle. The difficulties of our system are not, after all, inherent; neither do they yield to any single remedy. What is needed is some means of putting to work all the good elements of human nature. We are able to solve all our problems. The only problem after all is just to get along together, to curb our selfishness, since there is enough for all. If we could have in our political assemblies, in our legislative halls, in our court rooms, a little more tolerance and a little less bitterness, a little more willingness to recognize the merits of the other man's viewpoint even while urging the greater merits of our own, the making and the enforcement of law would become more a search for truth and less a struggle for partisan advantage, and most of the problems which now loom so large would be found to be mere trifles magnified by being seen through the mists of misunderstanding.

The Non-Partisan League Case.

While on principle the power of the Federal Supreme Court to pass on the validity of state laws is open to serious question, the matter becomes almost academic in view of the manner in which the power has been exercised in recent years. The legislation passed by the Non-partisan League in North Dakota and sustained in *Green* v. *Frazier,* 40 Sup. Ct. 499, would have horrified the bench of twenty years ago. In brief the legislation in question provided for state banks, state warehouses, mills, and elevators financed by state funds raised by a bond issue, and also a state home building association similarly financed. The court said: "In many instances states and municipalities have in late years seen fit to enter upon projects to promote the public welfare which in the past have been considered entirely within the domain of private enterprise. Under the peculiar conditions existing in North Dakota, which are emphasized in the opinion of its highest court, if the state sees fit to enter upon such enterprises as are here involved, with the sanction of its Constitution, its Legislature and its people, we are not prepared to say that it is within the authority of this court, in enforcing the observance of the Fourteenth Amendment, to set aside such action by judicial decision." This decision makes plain what has been more than once said in Law Notes that there is no Constitutional barrier against the program of the ultra radical. The barrier, if it exists, must be found in the sober sense of the American people. It is well that it is so, for the people are entitled to any laws they wish and to no better government than they make for themselves. In government as in all else it is only by experiment that theories may be tested. If the North Dakota laws work well they will be perpetuated and imitated, while if they work badly they will soon be repealed. It is only when theories are put in the Constitution so as to be difficult of abrogation that any experiment in which a majority concurs is really dangerous.

Sedition in the Schools.

The protests which have been made in many quarters against regulations by statute or by administrative officers aimed at the Americanization of the public schools, seem, so far as they are made in good faith, to proceed on a theory which is entirely erroneous. It is not, as some seem to believe, a question of restraint on the freedom of thought or speech. A school teacher as an individual may think or say what he (or she) pleases to exactly the same extent as any other individual. The school teacher as a paid servant is bound to perform his service in the manner directed by his employer or quit the employment. A school teacher as an individual may believe that the world is flat, that two and two make five, that Russia is the best governed nation in the world, or any other absurdity that may appeal to him. He has no right whatever to impart these individual vagaries to the children under his charge contrary to the orders of the authorized representatives of their parents. The school teacher differs not at all in the right to individual freedom from a private employee, yet no salesman was ever heard to complain that his constitutional rights were impaired by an order that he should not laud the goods of a competitor as superior to those of his employer. There is of course a high sounding theory that the obedience of a teacher should be to truth only and that intellectual progress is stifled if he is in any way fettered in his quest therefor. In the first place the proper order of procedure is for the teacher to discover a new truth if he will and then maintain it to the point of general acceptance before he assumes the responsibility of impressing it on immature and undiscriminating minds. Furthermore, whatever may be the status of an instructor in a university of national scope, the idea of a public school teacher as a pioneer in the realms of science and government is simply ludicrous. The fact is that the average public school teacher of the type which calls for regulation is a mediocre half-educated person who, like all of that class, is always seeking to impress his (or her) undigested views of religion and politics on others at every opportunity. Parents, sending their children to school under compulsion of law, are entitled to have their instruction confined to established facts. They are entitled to have the instruction of their children in doubtful and controversial matters imparted by agencies of their own choosing. These considerations justify the exclusion from the schools of sectarianism, woman suffrage, prohibition, the use of tobacco and the like as to which regulation has in the past been lax or wholly absent, and most certainly demand the rigid exclusion of all doctrines destructive of our governmental system. There must always be a free forum for the discussion of every phase of political and economic questions, but that discussion should be addressed to the voters of the nation and not to its children. Most teachers have sufficient sense of propriety to observe voluntarily the obvious rule; those who have not are entitled to no sympathy if it is forcibly impressed on them.

Implied Exceptions in Speed Laws.

In *State* v. *Gorham,* 188 Pac. 457, it was held that a sheriff in pursuit of a criminal was not within an ordinance regulating the speed of motor vehicles. The court said: "It is not meant to be asserted, of course, that there are no restrictions upon the speed a sheriff or a peace officer may travel in the pursuit of a fleeing criminal. Such officers may abuse their privileges in this respect as well as in others and must answer for such abuse. What is meant to be said is that the statutory

regulations as to speed do not apply to them, and that for an abuse of their privileges in this respect they must answer in the manner they are required to answer for other abuses of privilege." The decision, while novel as to the particular facts involved, finds support in the cases holding that speed regulations are not applicable to fire apparatus. See *Hubert* v. *Granzow,* 131 Minn. 361, and note, Ann. Cas. 1917D 565. These decisions, like that in *State* v. *Burton,* 41 R. I. 303, L. R. A. 1918F 559, which applied a similar rule to a Naval Reserve dispatch bearer, seem to rest on the view that the public interest served by speed in these exceptional cases is greater than that protected by the general terms of the regulation. This reasoning opens a nice question as to the effect of a purely private necessity. The physician going to attend an emergency call presents a case so strong that it is ordinarily recognized by police officers and magistrates. Other occasions might easily be imagined of equal urgency. If the question is to be considered as one of comparative necessity, the place where the alleged violation occurred must also be taken into account. An emergency may justify high speed on a clear road which would not warrant the risk involved in the same speed on a crowded street. It would seem also that the court in the Gorham case need not have gone to the length of holding that for a violation of his privilege the officer would be liable only as for misconduct in office. The purpose would be better secured by a rule that the privilege is a qualified one, leaving a liability under the ordinance in case of an abuse of the privilege. Such a rule, making the reasonableness of the speed in view of the emergency a question of fact in every case, would sacrifice no public interest and would put the courts in a position to deal justly with every exigency, public or private.

Impartial Jurors.

The aphorism of Lord Coke that a juryman in a criminal case must "stand indifferent as he stands unsworn" has been of necessity subjected to many "interpretative reservations" in late years. With the development of modern journalism twelve men who were absolutely indifferent on any question of general interest and importance would ordinarily be mentally unfit to sit on a jury. In cases arising under state and local prohibition laws this difficulty has been frequently encountered, and the rule established in those cases would seem to be that a juror is competent if he has formed no opinion of the guilt of the accused as to the particular offense charged, without regard to his opinions on the business in which he is engaged or as to the association fomenting the prosecution. But in *State* v. *Brooks,* 188 Pac. 942, the Montana court held that a talesman who testified to entertaining a violent prejudice against the organization known as the I. W. W. was incompetent to sit on the trial of a member of that order for distributing a seditious pamphlet. It is hard to see how, under that ruling, a jury can ever be obtained in such a case. Is there an intelligent man in the country who has not heard of the I. W. W.? And having heard of it, what kind of a man is he who has no prejudice against it? Let a man but belong to an organization sufficiently infamous and under such a rule he is exempt from trial except by a jury of his own associates. The fact is that the law respecting the impartiality of jurors is not in the most satisfactory condition. In theory the courts cling to the old idea of absolute indifference, but when that theory breaks down in the face of some crime of peculiar notoriety they do the best they can under the circumstances. This is none too satisfactory a method and leads to many reversals of apparently just convictions. Probably the best possible solution would be to commit the entire matter to the discretion of the trial court. The ease with which a jury is secured in England compared with the weeks often consumed in the same process in the United States would seem to indicate that we have something to learn about this detail in the administration of the criminal law.

Condoning Misconduct of Attorney.

In a recent Oklahoma case (*White* v. *Harrigan,* 186 Pac. 224) the court held that the fraud shown by the evidence was so gross as to warrant setting aside a deed though the representations in question were of law rather than of fact. The person making the representations was at the time accompanied by his attorney, a fact adverted to by the Court as giving his statements weight in the mind of the victim. The opinion concludes as follows: "Neither of the attorneys appearing for the defendants in this case was their attorney at the time the deed of August 26, 1916, was executed, in which the finding here is that a fraud was perpetrated on plaintiffs." This statement is unobjectionable, but it directs attention to the fact that throughout the opinion the name of the guilty lawyer is carefully suppressed. A summary of the testimony of each witness is given by the court, but while other names are freely used the counsel is always designated as "the attorney," "his lawyer" or the like. Even in stating his testimony, which by the way the trial court found to be false, the same form of expression is used. While of course the record may have disclosed facts justifying this course, it is hard to explain it on the facts appearing in the opinion. The fraud was gross, the participation of the attorney therein was in his professional capacity and was one of the elements in the success of the fraud. Under those circumstances one would expect a court not only to state the name of its unworthy officer but to add some words of condemnation of his conduct. Looking over the cases which involve the discipline of attorneys for misconduct, it appears that there is one particular wherein the ethical rules are inadequately enforced. Unfair dealing with a client is sharply scrutinized, unbecoming conduct to the court fittingly condemned. But unfairness tending toward downright dishonesty by an attorney in the service of a client is all too infrequently made the subject of censure. It is admitted as a matter of theory that an attorney should do no more than to secure the legal rights of his client so far as it can be done in a honorable manner. But there are far too many who seek to serve the client's interest in any manner possible, doing for him what they would scorn to do for themselves. It is on this fact that the loss of confidence in the profession is based. Of course the popular opinion rests on exceptional instances and not on the general conduct of the profession. But those instances are authentic and more numerous than they should be, and the court which fails to take note of them and visit thereon not only condemnation but condign pun-

ishment loses an opportunity to do a great service to the administration of justice.

The Judicial Oyster.

AN appellate judge once advised his brethren on the trial bench to "go to the meek and lowly oyster, to consider its ways and be wise, and to keep the judicial mouth shut." *Edwards* v. *Mt. Food Const. Co.,* 64 Oregon 315. For the purely negative purpose of avoiding technical grounds for reversal the advice is doubtless sound, but the sedulous manner in which it has been observed has done much harm to the administration of justice in the United States. A comparison of English with American law reports shows the former to be almost wholly free from rulings on trivial, frivolous or well settled points. The reason is that an English advocate who sought to urge such points as appear in almost every American opinion would be stopped by the court, and would suffer seriously in his professional reputation after a few such experiences. The preparation of an article published in this issue disclosed that in the United States it has appeared in hundreds of criminal cases that confessions offered in evidence were procured by illegal practices police officers, yet in scarcely a case is there the slightest animadversion on this official misconduct. The recent English reports show hardly an instance of the extortion of a confession. This argues no superior fairness or humanity of English police agents, but is due to the fact that if anything of the kind appeared on an English trial the judge would comment on it in such fashion that its repetition in that district would be most unlikely. There is rarely an evil which the students of our judicial procedure have pointed out—unwarrantable delay, undue length of trials, frivolous and dilatory objections, the disposition of some lawyers to regard a trial as a game to be won by strategy irrespective of justice, which needs a statutory solution. Many of our trial judges are, in the parlance of the ball field, playing for the percentage table, a practice which never won a pennant, or anything else worth winning.

Federal Divorce Laws.

THE agitation occasionally started in favor of a federal divorce law, while it is another illustration of the tendency to infringe on the rights of local self-government, presents some exceptional considerations. In one sense the matter is one of interstate concern because of the difficulties arising from a person divorced in one state coming into another where the divorce is not deemed to be valid. It must be admitted, however, that most of these difficulties arise from the fact that the courts of a few states have, with respect to divorce decrees, construed the life out of the "full faith and credit" clause of the Constitution. The difficulty with federal regulation arises from the fact that the marriage relation enters into the social structure of each state so intimately that it would be disastrous if each was not at liberty to regulate it according to its own views; views which, as expressed in existing statutes, vary from absolute denial to extreme laxity. The question is yet further complicated by the fact that there is a minority to whom the question is a religious one, and it is these who most frequently urge federal law, having in mind of course a law which will express their views on the subject. Religious views, whatever they may be, can be enforced by ecclesiastic means on the members of the communion. But when religious views, whatever they may be, are enforced by public law on the general public a fundamental principal of American liberty is violated. Like every question which involves a balancing of evils, the divorce question is a difficult and delicate one. From the viewpoint of the state instability of domestic relations is an evil. From the standpoint of the individual there is no ground for divorce recognized in any state which is not an evil to the injured spouse. How far individual unhappiness should be borne to avoid disturbance in the social structure is not a question which can be decided offhand. Only by allowing to each state the power to determine the question according to its own views and then exercising a great deal of judicial discretion in passing on individual cases can the difficulties be minimized.

Strict or Liberal Divorce Laws.

ON the question whether the law should be strict or liberal in allowing divorce, it seems to be a general rule that men theorizing on the subject are prone to advocate strict limitations, while men confronted with the facts of an actual case are for enough liberality to cover that case. For example in *Bourne* v. *Bourne,* 185 Pac. 489, which was not an action for divorce, Judge Thomas in a dissenting opinion set out some statistics as to the increase of divorce and said inter alia: "Is not this condition destructive of the family and does it not strike at the very foundation upon which our government stands? Is it not true that the nation, whose family life decays, rots at the core and dries up the springs of all social and civic virtues?" But, coming down from the four dimensional space of rhetoric into more definite realms, in the recent case of *Fletcher* v. *Fletcher,* 13 Sask. L. R. 51, it appeared that the plaintiff, a Canadian soldier, returned at the close of the war from active service in France and found his wife living in adultery. As stated by the trial judge: "The misconduct has continued and she is evidently living with the co-respondent as his wife; having in a most callous way entirely overlooked her duty to the petitioner and their children, as well as used his moneys, provided for her and the children's maintenance, to the advancement of the co-respondent." Just what decay of family life, what drying up of the springs of social virtue results from granting him a divorce? The situation might perhaps be more clearly understood even by lawyers if translated into terms of medicine. It is to the interest of the public that every man should be in the possession of all his limbs; a cripple is more or less directly a public burden. But the remedy is not for surgeons to refuse to operate in cases of gangrene or blood poisoning. The remedy is an intelligent effort to eliminate as far as possible injury and infection. There have been cases where reconciliation would have resulted had not divorce been readily available. There have likewise been cases where a limb would have been saved had surgical aid been out of reach. Divorce courts are surgeons dealing with the cases which have gotten beyond cure. Preventative and curative measures rest with other agencies, and neither prevention nor cure will ever be accomplished by abolishing the surgeon.

The Single Standard of Morals.

A MAN who has kept himself prominent in the public eye for twenty-five years without ever espousing a rational measure, is reported as now advocating the establishment, by constitutional amendment, of a single standard of sexual morality. It would be interesting to know just where and how our law recognizes any double standard. Some traces of sex discrimination were at one time discernible in the law, originating in part in British traditions designed to guard the inheritance of estates and in part in an inability to distinguish between religion and Jewish law. These, however, have now entirely disappeared. The illegality of a custom of police officers to set up a double standard as to certain crimes was sharply pointed out in *People* v. *Edwards,* 180 N. Y. S. 631, the court saying: "Men caught with women in an act of prostitution are equally guilty, and should be arrested and held for trial with the women. The law is clear, and the duty of the police is to act in pursuance of the law. The practical application of the law as heretofore enforced is an unjust discrimination against women in the matter of an offense which, in its very nature, if completed, requires the participation of men. Is the public purpose not to enforce the law? If so, it is hypocrisy to permit the law to remain upon the statute books. As long as the law is upon the statute books it must be impartially administered without sex discrimination." There is practically no sexual offense which is made a crime in the woman and not in the man; there are several such offenses (*e. g.* seduction) where the male participant is solely amenable to the law. The double standard of morals is quite firmly fixed in social conventions; and there it may or may not be a good thing. But if social conventions are to be regulated by the Constitution American politics is going to take on some unwonted features, and an amendment fathered by the same representative of the proletariat throwing all social entertainments open to the public may be expected.

DO THE EIGHTEENTH AMENDMENT AND THE VOLSTEAD ACT SUPERSEDE STATE PROHIBITIONS AND REGULATIONS?

THE Federal Supreme Court having adjudged the Eighteenth Amendment to the Federal Constitution to be of controlling force throughout the United States, and having also held the Volstead Enforcement Act to be constitutional at least in so far as it designates the alcoholic content of "liquors" that determines them to be "intoxicating" within the meaning of the organic amendment, a question now of universal interest is whether the Federal Amendment and the Enforcement Act supersede all State constitutional, statutory and other prohibitions and regulations of the subject-matter.

The Eighteenth Amendment upon becoming effective by its inherent force invalidated every Act of Congress and every provision of a State Constitution, law or regulation that conflicted with the prohibitions commanded by that paramount organic provision.

Since January 16, 1920, when the Eighteenth Amendment to the Federal Constitution became effective, "the Congress and the several States have concurrent power to enforce" the paramount organic prohibitions of "the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes"; and all Federal and State legislation upon the particularly designated subjects must be "appropriate" "to enforce" the prohibitions specifically commanded by the supreme organic law. Federal legislation or State, organic or statutory law violating or permitting a violation of the specifically defined Federal organic prohibitions, is invalid, whether enacted before or since the Eighteenth Amendment became effective January 16, 1920. The Congress and the several States have "concurrent power to enforce" the organic prohibitions "by appropriate legislation"; and it is the duty of each to perform severally this governmental function. But neither can compel the other to exercise this "concurrent power *to enforce.*" The grant of "concurrent power to enforce" does not take from the Congress its inherent power to define within organic limits the alcoholic content of beverages that make them "intoxicating liquors," subject to the specified prohibitions contained in the paramount federal organic amendment.

The provision of the Eighteenth Amendment conferring upon "the Congress and the several states . . . concurrent power to enforce" the commanded prohibitions, is in effect a grant of power to the Congress and to the States severally, since without such provision the States, under the existing Federal Constitution, could not regulate imports or exports of or interstate commerce in the subject-matter of the prohibitions, and *perhaps* the Congress, without the express provision, could not regulate purely intrastate or domestic transactions in the subject-matter.

The second section of the Eighteenth Amendment confers *express* power upon "the Congress and the several States," the only indefinite or undetermined feature of the provision being the intended meaning of the word "concurrent" as used in defining the "power" conferred upon "the Congress and the several States to enforce" the ordained prohibitions.

It has been adjudicated by the Federal Supreme Court that the conferred "concurrent power" "does not enable Congress or the several States to defeat or thwart the prohibition, but only to enforce it by appropriate means"; that "concurrent power" does not mean joint power, or require that legislation by Congress, to be effective, shall be approved or sanctioned by the several States or any of them. "Concurrent power" as used has no reference to "lines which separate or distinguish foreign and interstate commerce from intrastate affairs." See *Rhode Island* v. *Palmer,* 40 Sup. Ct. 486.

The Federal Amendment and the Enforcement Act are the supreme law of the land, though by express provision of the amendment "the Congress and the several States have concurrent power to enforce this Article by appropriate legislation." The "concurrent power to enforce" has reference to making effective the national organic prohibitions contained in the "Article" of amendment. The authority to define within organic limitations the alcoholic content of "intoxicating liquors," the stated traffic in which "for beverage purposes" is "prohibited" by the organic amendment, apparently does not come

within the "concurrent power to enforce" the prohibitions and therefore is in the Congress alone, and not in the States concurrently with Congress. As the Volstead Act has defined the alcoholic content that determines the "intoxicating" character of "liquors," such determination while it stands is controlling on the States in the exercise by them of the "concurrent power to enforce" the prohibitions commanded by the dominant organic law. Regulations as to the methods and means of enforcing the stated prohibitions of traffic in the subject-matter as such subject-matter is validly defined by Congress, may be provided by the States severally, though such regulations "to enforce" the prohibitions may differ from those prescribed by Congress, provided such regulations do not in purpose or effect interfere with or antagonize Congressional regulations of the subject. The power "to enforce" being "concurrent" in "the Congress and the several States," it is apprehended that if State regulations "to enforce" the prohibitions as stated in the supreme law, are efficacious, they will not be held to be invalid though they may be less exacting and severe than those provided by Congress; and it is also apprehended that in view of the "concurrent power to enforce," where a particular offense in violating the commanded prohibitions has been duly redressed by a State, a trial and punishment for the same offense will not be required or permitted under the Federal regulations. An interesting question is whether under the "concurrent power to enforce" the commanded prohibitions, statutory or other regulations prescribed by the States before or without reference to the Federal Amendment, are available as means "to enforce" the organic prohibitions? It would seem that if such State regulations are in form and effect appropriate "to enforce" the prescribed *organic* prohibitions, they may be utilized, since it is the prohibitions commanded by the organic amendment and not by Congress that the several States have "concurrent power to enforce," and the amendment does not require the "appropriate legislation" to be enacted subsequent to the adoption of the organic amendment. In enforcing the National organic prohibitions, the Congress and the several States may within constitutional limitations, prescribe and enforce other prohibitions as proper incidents in making the organic prohibitions effective (see 226 U. S. 192; 245 U. S. 304; 249 U. S. 454; 251 U. S. 264; 77 So. Rep. 533; 81 So. Rep. 529). But such incidental statutory prohibitions are not effective in sovereignties other than those enacting them. The procedure "to enforce" the organic prohibitions must not violate organic rights to due process and equal protection of the laws, or any other organic guarantee of personal and property rights.

Tallahassee, Florida. J. B. WHITFIELD.

THE THIRD DEGREE.

THE time when the torture of an accused person to extract a confession was a conventional proceeding belongs to no very remote period in the history of English law. The development of Anglo-Saxon institutions not only discarded the practice but established the doctrine, novel in European judicature, that a person accused of crime is presumed to be innocent and is entitled to stand silent and put the government to its proof. But, deeply as this theory is embedded in our governmental system, there are strong forces of human nature that work continually against it. Given a heinous offense, strong reason to suspect a particular person, and no convincing proof of his guilt, the natural tendency of the police authorities is to try to procure a confession by any means available. The resultant practice and the viewpoint by which it is justified are well stated by a former assistant district attorney of New York City (Arthur Train: "Courts, Criminals and the Camorra") as follows: "The accused is usually put through some sort of an inquisitorial process by the captain at the station-house. If he is not very successful at getting anything out of the prisoner the latter is turned over to the sergeant and a couple of officers who can use methods of a more urgent character. If the prisoner is arrested by headquarters detectives various efficient devices to compel him to 'give up what he knows' may be used—such as depriving him of food and sleep, placing him in a cell with a 'stool-pigeon' who will try to worm a confession out of him, and the usual moral suasion of a heart-to-heart (!) talk in the back room with the inspector. This is the darker side of the picture of practical government. It is needless to say that the police do not usually suggest the various safeguards and privileges which the law accords to defendants thus arrested, but the writer is free to confess that, save in exceptional cases, he believes the rigors of the so-called third degree to be greatly exaggerated. Frequently in dealing with rough men rough methods are used, but considering the multitude of offenders, and the thousands of police officers, none of whom have been trained in a school of gentleness, it is surprising that severer treatment is not met with on the part of those who run foul of the criminal law. The ordinary 'cop' tries to do his duty as effectively as he can. With the average citizen gruffness and roughness go a long way in the assertion of authority. Policemen cannot have the manners of dancing masters. The writer is not quarreling with the conduct of police officers. On the contrary, the point he is trying to make is that in the task of policing a big city, the rights of the individual must indubitably suffer to a certain extent if the rights of the multitude are to be properly protected. We can make too much of small injustices and petty incivilities. Police business is not gentle business. The officers are trying to prevent you and me from being knocked on the head some dark night or from being chloroformed in our beds. Ten thousand men are trying to do a thirty-thousand-man job. The struggle to keep the peace and put down crime is a hard one anywhere. It requires a strong arm that cannot show too punctilious a regard for theoretical rights when prompt decisions have to be made and equally prompt action taken. The thieves and gun-men have got to be driven out. Suspicious characters have got to be locked up. Somehow or other a record must be kept of professional criminals and persons likely to be active in law-breaking. These are necessities in every civilized country. They are necessities here. Society employs the same methods of self-protection the world over. No one presumes a person charged with crime to be innocent, either in Delhi, Pekin, Moscow or New York."

At the session of the International Association of Chiefs of Police in 1910 (See Wigmore, "Principles of Judicial

Proof," p. 550 et seq.), some of the speakers denied that any means other than "interrogation" were ever resorted to. Others admitted and justified more strenuous measures. The Police Chief of Memphis, Tennessee, for example, narrated how a captain of police took a man suspected of murder into the cellar of the police station and shortly came back with a confession. He added: "Now I don't know what Captain O'Haver did to secure the information he desired. He is here himself among you, probably he will tell. But I want to say this to the Association, as I said to Captain O'Haver the next morning, 'whatever you did was right. You acted (as you said) the same as you would had you had a rattlesnake in your power that could talk and would not, to make it tell where its companion was, who had attempted to rob and murder an honored citizen of Memphis.' It is just possible that the 'third degree' in all its severity was exercised in this particular case. And I would like to see the member of this Association who would gainsay that Captain O'Haver was not fully justified in any measure he resorted to to gain the information he so desired. I simply recite this case to show that at times heroic methods must be resorted to to gain desired ends. You may call it whatever you please, the 'third degree' or any other kind of degree, but it had the desired effect."

A few instances which have been established by proof to the satisfaction of a court may serve as corroboration, only a few recent cases selected almost at random being referred to. Most of the cases dealing with physical violence have been ignored as being possibly exceptional. In *State* v. *Powell,* 266 Mo. 100, it appeared that "nine officers, for the most part police, collectively, or individually, or in pairs or trios, 'sweated' defendant continuously from two o'clock in the afternoon till one o'clock next morning, at which time, after the police captain Stone and others of the nine apparently in Stone's presence, had told defendant it would 'be best for him to tell the truth,' he made and signed the alleged confession in evidence." In *People* v. *Prestidge,* 182 Mich. 80, the "sweating" process of continual interrogation was resorted to, and as to its result the court said: "The respondent states that during the time of the examination he was very nervous and nearly crazy. It is not incredible that he should have been in that condition at the end of two or three hours of grilling such as he received. It is needless to argue that a statement made under such pressure is voluntary, whether it is true or false." In *Ammons* v. *State,* 80 Miss. 592, the facts are sufficiently remarkable to warrant full quotation. This case, be it remembered, came before the court in the year of Grace 1902. The Court said: "The chief of police testified that the accused made to him a 'free and voluntary' statement. The circumstances under which he made it were these: There was what was known as a 'sweat-box' in the place of confinement. This was an apartment about five or six feet one way and about eight feet another. It was kept entirely dark. For fear that some stray ray of light or breath of air might enter without special invitation, the small cracks were carefully blanketed. The prisoner was allowed no communication whatever with human beings. Occasionally the officer, who had put him there, would appear, and interrogate him about the crime charged against him. To the credit of our advanced civilization and humanity it must be said that neither the thumbscrew nor the wooden boot was used to extort a confession. The efficacy of the sweat-box was the sole reliance. This, with the hot weather of summer, and the fact that the prisoner was not provided with sole leather lungs, finally, after 'several days' of obstinate denial, accomplished the purpose of eliciting a 'free and voluntary' confession. The officer, to his credit says he did not threaten his prisoner, that he held out no reward to him, and did not coerce him. Everything was 'free and voluntary.' He was perfectly honest and frank in his testimony, this officer was. He was intelligent, and well up in the law as applied to such cases, and nothing would have tempted him, we assume, to violate any technical requirement of a valid confession—no threats, no hope of reward, no assurance that it would be better for the prisoner to confess. He did tell him, however, 'that it would be best for him to do what was right,' and that it 'would be better for him to tell the truth.' In fact, this was the general custom in the moral treatment of these sweat-box patients, since this officer says, 'I always tell them it would be better for them to tell the truth, but never hold out any inducement to them.' He says, in regard to the patient, Ammons, 'I went to see this boy every day, and talked to him about the case, and told him it would be better for him to tell the truth; tell everything he knew about the case.' This sweat-box seems to be a permanent institution invented and used to gently persuade all accused persons to voluntarily tell the truth. Whenever they do tell the truth—that is, confess guilt of the crime—they are let out of the sweat-box. Speaking of this apartment, and the habit as to prisoners generally, this officer says, 'We put them in there [the sweat-box] when they don't tell me what I think they ought to.' This is refreshing. The confession was not competent to be received as evidence. 6 Am. & Eng. Enc. Law, p. 531, note 3; Id., p. 550, note 7; *Hamilton* v. *State,* 77 Miss. 675 (27 So. 606); *Simon* v. *State,* 37 Miss. 288. Defendant, unless demented, understood that the statement wanted was confession, and that this only meant release from this 'black hole of Calcutta.' Such proceedings as this record discloses cannot be too strongly denounced. They violate every principle of law, reason, humanity and personal right. They restore the barbarity of ancient and medieval methods."

The facts involved in *Hall* v. *State,* 65 Ga. 36, arose in a ruder day. In that case the officer to whom the confession was made testified: "I took Joe along, and asked him to tell me all about the circumstances of Murchison's death, and Joe said he knew nothing about it. I pressed him to make a statement, and he declined to make any. I finally pulled out my pistol—I think I had it out all the time while with them, as I was assisting Bond in guarding them—and I pointed the pistol near his head and fired it off right at (by) his head. I told him I was going to kill him if he did not tell me all about the circumstances of the killing of Murchison. I cocked my pistol again, and said I missed you that time, but the next time I'll get you. He said hold on, he would tell all of it, and did so. Bond came in immediately afterwards, and that is the statement that he refers to. I kept the pistol out, and if he would slack up I would threaten him again and spur him up. He was in a tremble, seemed much excited, and begged me not to kill him."

The police attitude toward the extortion of a confes-

sion is well illustrated in the case of *Jackson* v. *State,* 50 Tex. Cr. Rep. 302, where an officer after testifying that several suspected negroes were hung up by the neck, whipped, and thrown on a brush pile and threatened with burning, testified further: "Q. Didn't you know it was a violation of the law? A. No, not when we were trying to uphold the law." It is true that, in each of the cases cited, the court held on appeal that the confession extorted should not have been received, and granted a new trial. The comfort to be derived from that fact is, however, greatly lessened by the reflection that for every case so reversed there have doubtless been a dozen where the funds for appeal were not obtainable and the victim of the third degree went to prison on evidence illegally extorted from him.

But even in the cases which have undergone the scrutiny of an appellate court there are many which leave a suspicion that the boasted privileges of the American citizen were of little avail. Thus in *Iverson* v. *State,* 99 Ark. 453, the prisoner testified that a written confession was signed by him only after he had been struck and threatened by police officers. The officers stoutly denied all intimidation and the reviewing court of course could not disturb the finding on conflicting evidence. A similar situation was presented in *State* v. *Armstrong,* 203 Mo. 554, and in many other cases which might be cited. Perhaps in each of these cases the claim of duress was false, but who can know? No matter what means are used to extort a confession, the accused can produce nothing but his own testimony, while in the nature of things officers who will grossly violate the law to get a confession will not always stick at perjury to get it into evidence.

The situation involves evils both practical and theoretical. It is never well to maintain a rule of law as a mere pretense. Clearly law is better executed when its theory and its practice are consonant. If our law as to the rights of persons accused of crime has the merits which courts have attributed to it, it is intolerable that petty administrative officers should systematically violate it. If the law is not practical, if it is impossible thereunder to give adequate protection against crime, its revision should come from authorized sources and not be left to the discretion of detectives and rural sheriffs. We are in a poor position to force the ultra radical to present his proposed reforms in a regular and constitutional manner when it is a matter of common knowledge that no such requirement is enforced on the sworn officers of the law. "The struggle to keep the peace and put down crime is a hard one anywhere," says the police captain in the words of Mr. Train and he forthwith puts a suspected crook through the third degree. "Granted," says the labor agitator. "So is the struggle for a livelihood. I will do as the law does and not as it says," and he goes forth to slug a "scab" or derail a locomotive. What is the difference in the two cases and where will lawlessness stop if its efficiency is once admitted as a justification?

Even from the practical viewpoint it will not do to say that since every man who confesses must be guilty the violation of his technical legal rights may be regarded as being of no particular importance. One of the reasons for the discarding of the ancient methods of inquisition was that torture tended to produce confession from innocent men, while hardy and stubborn criminals would endure the utmost extremity rather than confess. To a less degree the "sweating" process even without physical violence produces a similar result. Its psychology was thus stated by Balzac (Lucien de Rubempré, quoted in Wigmore's Principles of Judicial Proof, p. 547): "Iron yields to reiterated striking, or to a certain continuance of pressure; its impenetrable molecules, purified by man and made homogenous, segregate, and, without being in fusion, the metal has not the same power of resistance. Blacksmiths, locksmiths, tool makers, all men who work constantly in this metal, express that condition by a technical word. 'The iron is retted,' they say, appropriating a term which belongs properly to flax or hemp, the fiber of which is disintegrated by retting. Well, the human soul, or, if you choose to say so, the triple energy of body, heart, and mind, is found in a condition analogous to that of iron as the result of repeated shocks. It is then with men as it is with flax or iron: they are 'retted.' . . . It is in this state that confessors and examining judges often find great criminals. The terrible emotions caused by the court of assizes and by the 'toilette' almost always bring even the strongest natures to what may be called a dislocation of the nervous system." This "dislocation of the nervous system" coupled with the well-known efficacy of the power of repeated suggestion is as admirably adapted to produce a false confession as the rack and the thumb screw.

But in considering the remedy for this dangerous condition of official lawlessness, it must be remembered that the very fact that the law is habitually violated by officers who are conscientiously trying to do their duty to the public argues strongly that the law should be changed. It is a situation somewhat similar to the habitual disregard by juries of the instructions in personal injury cases which preceded the adoption of a more just rule of liability in the workman's compensation acts. There is doubtless a considerable amount of merit in the police contention that a rigid adherence to the presumption of innocence and a punctilious regard for the rights of an accused person with respect to self-crimination would seriously impair the power of the public authorities to protect life and property against crime. The admitted superiority of European detective systems is due chiefly to the fact that they rely on study and scientific method rather than on the "gruffness and roughness" extolled by Mr. Train, but it is nevertheless true that they are aided by a legal system which exalts the state and pays little regard to individual privileges. While there are many things in the European system which would not be tolerated by the American people it is not possible that we are confined to the alternative of a lawless police or an impotent police.

While the writer makes no claim of having solved the problem he suggests that a considerable step toward its solution would be taken by making the accused a compellable witness both before the examining magistrate and on the trial, and excluding absolutely all confessions, declarations or admissions made out of court and after the commission of the offense. By this means the "third degree" would be abolished and the police witness swearing to an admission which never was made would be eliminated. At the same time every advantage to be derived from a full and strict examination of the accused would be preserved under such judicial supervision as to protect it from abuse. Public justice would be protected from the

assertion by a person shown to be in some way connected with a crime of the right to refuse all information, while innocent persons would be protected from the extra-judicial practice of extorting confessions by producing a "dislocation of the nervous system."

It may be that an examining magistrate under the suggested plan will reproduce the proceedings of a French "Juge d'Instruction" which are supposed by some in France to operate oppressively on the accused. An interesting satire on such proceedings may be found in a translation by Mr. Berkeley Davids from a French work of fiction published in LAW NOTES for February, 1914, at page 208. It is probable, however, that the differences between the Anglo-Saxon and the Gallic temperaments will rid the proceeding of the features offensive to us, though in so doing they may rob it of some of its efficiency. An inquisition before a magistrate will never, at its worst, reach so low a level as one conducted by detectives in the back room of a police station. Moreover, it will be legal and above board. It is time to have done with the hypocrisy of professing one thing and practicing another; of listening with gratified ear to declarations as to how the liberties of American citizens are protected by law while closing the eyes to the fact that those liberties are daily violated in defiance of law. If too much protection is given by law to persons accused of crime it should be withdrawn by law. If that protection is consistent with the public welfare, the law by which it is given should be rigidly enforced. In either event the practice should conform to the will of the people and not to the view of some petty administrative officer.

W. A. S.

ÆSTHETIC OR SENTIMENTAL PURPOSE AS "PUBLIC USE" WITHIN MEANING OF LAW OF EMINENT DOMAIN.

CAN the state in the exercise of the power of eminent domain take or delegate the power to others to take private property solely because of the fact that it is associated with the life of some person, famous because of his deeds as a soldier or statesman, or because of his literary attainments? In other words, is land taken for the sole purpose of preserving the home or birth place of a famous author or statesman taken for a "public use" within the meaning of the doctrine of eminent domain? According to recent press reports the attorney general of Connecticut has ruled that it is and therefore that such land may be condemned. The question arose in connection with the former home of "Mark Twain" in which he is reported to have written the immortal "Huckleberry Finn." Personally, the writer, as one of those to whom the famous author has given many hours of unalloyed delight, is in hearty sympathy with the movement, but from a strictly legal standpoint the right to exercise the power of eminent domain for such a purpose would not seem to be clearly established. Unfortunately there are no decided precedents to guide us and the question has to be determined by a study and application of the general principles and rules appertaining to the doctrine of eminent domain. The homes of many of our famous men are to-day held and sacredly preserved for the benefit of the public, but in almost every instance they were acquired by purchase or gift. Such was the case with the birth-place of Lincoln. Mt. Vernon, the home of Washington was acquired by purchase, while Arlington, the home of Lee, was seized and confiscated by the government during the Civil War. A few years ago a movement was started to have the government acquire Monticello, the home of Jefferson, by purchase if possible, and if not by condemnation. The matter was dropped, however, either from lack of public interest or because of a doubt of the power of the government to compel an unwilling private owner to sell his property for such a purpose. That the object could have been accomplished by condemning the property for a public park is unquestioned, but the right to take the property solely in order to preserve the home of one of the country's famous men was questioned by some of the foremost lawyers of the country, and as will be seen there is no recorded case in which the exercise of the power has been based solely on such a ground.

While the law protects the citizen in his ownership of property, all property is held subject to the superior rights of the sovereign who may for the common welfare take it over whenever it sees fit, subject only to certain self-imposed restrictions. This power, inherent in the state, is known as the power of eminent domain and has been defined by Mr. Justice Cooley to be "the rightful authority which exists in every sovereignty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience and welfare may demand. The authority springs from no contract or arrangement between the government and the citizen whose property may be appropriated, but it has its foundation in the imperative law of necessity, and is recognized, and may be defended and enforced, upon the ground that no government could perpetuate its existence and further the prosperity of its people, if the means for the exercise of any of its sovereign powers might be withheld at the option of individuals." *People* v. *Humphrey,* 23 Mich. 471. Two restrictions or conditions attending the exercise of this power are universally recognized. First, the owner must receive just compensation, and second, the use for which the property is taken must be a public one. It is in the interpretation and construction of the second limitation on the power that the courts have found most difficulty, and it is with this phase of the subject that this article treats, as the right under discussion is dependent entirely on the extent to which the term "public use" may be carried.

While the cases and the text books abound in definitions of a public use, there is no definition of a public use that has yet been formulated to which resort may be had as a certain criterion. To know what is a public use which authorizes the exercise of the power of eminent domain recourse must be had to cases rather than definitions, to uses which have been held to be public. "Under the Roman law, things for public use were divided into two kinds only: 1. Those destined for the common use of mankind, and which everyone might freely use, such as rivers, seas, the banks of rivers and the seashore. These things were destined by nature for public use. 2. Those things which public policy deemed necessary and appro-

priate in spiritual or temporal affairs. In the last mentioned class were embraced the streets, highways, market places, the places where courts of justice were held, colleges, town-houses and other public places." *Commercial Bank of New Orleans* v. *New Orleans,* 17 La. Ann. 190. However, the term is one of constant growth, varying and expanding with the growing needs of a more complex social ever, the term is one of constant growth, varying and expanding with the growing needs of a more complex social order and any definition must be such as to give it a degree of elasticity capable of meeting new conditions and improvements. But there are certain essentials upon which all are agreed. As was stated in *Varner* v. *Martin* 21 W. Va. 534: "First, the general public must have a definite and fixed use of the property to be condemned, a use independent of the will of the private person or private corporation in whom the title of the property when condemned will be vested, a public use which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the Legislature; second, this public use must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience; third, it must be impossible, or very difficult at least, to secure the same public uses and purposes in any other way than by authorizing the condemnation of private property." With the first and third of these requirements little difficulty is encountered, and while the authorities are unanimous in their sanction of the principle embodied in the second they are by no means agreed in its application. It is easy to lay down the rule that in order to constitute a public use the property taken must be needful for the public. As was said by Mr. Justice Cooley in *People* v. *Humphrey,* 23 Mich. 471: "The right being thus found to rest upon necessity, the power to appropriate in any case must be justified and limited by the necessity; and whenever in any instance the government or its officials shall attempt to seize and appropriate that which cannot be needful to the due execution of its sovereign powers or the proper discharge of any of its public functions, the same means of resistance and legal redress are open to the owner that would be available in case of a like seizure by lawless individuals: Matter of Albany Street, 11 Wend., 151. Any employment of the power for other purposes than to enable the government to exercise and give effect to its proper authority, effectuate the purpose of its creation and carry out the policy of its laws, could not be rested upon the justification and basis which underlie the power, and consequently would be wholly unauthorized and inadmissible." Tiedeman in his work on Limitations of Police Power declares public use to be synonymous with "public good." On this branch of the subject he says: "While the term public use was originally employed in the law of eminent domain as meaning a use by some governmental agency, the ever increasing complications of modern civilization have compelled an application of the right of eminent domain to other than public or governmental uses, and the meaning of the term public use was broadened from time to time in order to cover these new applications of the right, until now the term is synonymous with public good." Similar general statements have been made by the courts, and while public good, benefit or advantage has been taken into consideration by the courts in determining what was a "public use" it has in no case been carried to the extent of justifying the condemnation of property for purely artistic or æsthetic reasons, and in some instances the theory that "public use" is synonymous with public benefit or advantage has been denied.

Of the many uses for which private property has been taken for the public benefit that which most nearly resembles the use under discussion is the taking of property for park purposes. That such a use is a public one within the meaning of the rule that private property taken by eminent domain must be taken for a "public use" is too well settled to need citations of authority to support it. While not exactly on all fours with the preservation of the home or birth-place of some notable man, the benefit derived from public parks may be said to be more nearly of a similar nature as distinguished from the more direct and material benefit conferred by the construction of water works, drainage systems, canals, railroads and the like. A careful search of the authorities discloses no case in which the public use essential to the exercise of the power of eminent domain depended solely on the peculiar value attaching to property because of its association with the life of some man famous because of his deeds as a soldier or statesman, or because of his literary attainments. It is only by analogy that we may reach any conclusion on this phase of the subject and it is from those cases dealing with the taking of property by the state for park purposes that we may expect to receive the most help. Even this extension of the doctrine of eminent domain may be said to be of comparatively recent origin, as in earlier days mere beauty or adornment—an appeal to the artistic tastes of the people—was not considered of sufficient benefit to the public to justify the use of the power. As was said by Nichols in his work on Eminent Domain: "It was felt in former times that land could be taken only to be used by the public for necessary and useful purposes and not for public pleasure and æsthetic gratification." In support of this statement he quotes Bynkershoek, Quest. Jur. Pub., lib. ii. c. 15 as follows: "Since the subject then is bound to part with his property for both reasons, as I said, must he also lose it for purposes of public pleasure or æsthetic gratification or even public decoration alone? I should not think so, nor did the Roman senate think so in the case of Marcus Licinius Crassus, who objected to leading through his farm an aqueduct which the prætors were building and which was said to have no other occasion than public pleasure and decoration." And the American cases have more than once recognized the early limitation on the exercise of the power of eminent domain. In *Boston, etc., Mill-Dam Corp.* v. *Newman,* 12 Pick 467, 23 Am. Dec. 662, the court said: "The principle is, that the lands of individuals are holden subject to the requisitions of the public exigencies, a reasonable compensation being paid for the damage. It is not taking the property of one man and giving it to another. At most, it is a forced sale, to satisfy the pressing want of the public. Now this is as it should be. The will or caprice of an individual would often defeat the most useful and extensive enterprises, if it were otherwise. Property is nevertheless sufficiently guarded by the constitution. The individual is protected in its enjoyment, saving only when the public want it, not merely for ornamental, but for some necessary and

useful purposes. Then indeed the owner must part with it for an equivalent." And the Supreme Court in *Shoemaker* v. *United States,* 147 U. S. 282, called attention to the former restriction as follows: "In the memory of men now living, a proposition to take private property, without the consent of its owner, for a public park, and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power." In many of the recent cases, however, beauty and adornment have been accorded consideration in determining the question what is a public use, but in no case has this phase of the subject alone been declared sufficient to sustain the taking of the property of a private individual against his will. As was said in *Woodstock* v. *Gallup,* 28 Vt. 587: "If it appeared, upon the face of the report, that the prevailing ground with the commissioners, in establishing the highway, was that of ornament and improvement of the court-house grounds, we should regard it as an insufficient basis upon which to lay the highway. . . . But in the present case, we understand the prevailing motive and ground of action with the commissioners, in laying the road, was the public convenience and private necessity, and the matter of ornament merely incidental and accessary. In that view, . . . it does not seem to us objectionable." In at least one instance it has been held that land may be condemned for the purpose of preserving the scenic beauty of a river and a park on the ground that the taking for such a purpose was a taking for a "public use." *Bunyan* v. *Commissioners of Palisades Interstate Park,* 153 N. Y. S. 622, wherein it was said: "It is contended, first, that this condemnation is purely for æsthetic purposes, to preserve the scenic beauty of the Hudson river, and that such use is not a public use, authorizing the appropriation of land under the right of eminent domain. . . . It will be borne in mind that not only public parks existed both south and north of the land in question, but that said parks are intended to include various strips of land between them. The land in question adjoins the Hudson river, which is in itself a public highway as well as a public park, utilized by the public for rest, recreation, and enjoyment, the same as any other public park. If land were sought to be condemned for park purposes, it could hardly be objected that part of the land was unadaptable therefor as being rugged and steep, of which practical use could not be made by the public. It is adaptable as incidental to the park of which use could be made. Such inaccessible land might also be condemned for adornment and to preserve the scenic beauty, as incidental at least to such a park. Whatever technical averment may be made that the land is not adaptable to the public use, if the term 'public use' be so extensive as seems to be indicated in the authorities cited, there can be no substantial doubt that the shutting down of this quarry and the removal of its accessories do present some opportunity for adornment and improvement of scenic beauty, so that the courts must hold that the land is adaptable to a public use. This must then be ruled as a question of law." It is to be noted, however, that the real purpose involved was a park purpose, the æsthetic purpose being incidental thereto.

The case which more nearly affords authority for a taking such as is under consideration is *United States* v. *Gettysburg Electric Ry. Co.,* 160 U. S. 668, wherein it was sought to condemn land for the purpose of preserving a famous battlefield. The purpose as more particularly stated in the Act of Congress making the appropriation was as follows: "Monuments and Tablets at Gettysburg. For the purpose of preserving the lines of battle at Gettysburg, Pennsylvania, and for properly marking with tablets the positions occupied by the various commands of the armies of the Potomac and of Northern Virginia on that field, and for opening and improving avenues along the positions occupied by troops upon those lines, and for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps and other organizations, with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets, each bearing a brief historical legend, compiled without praise and without censure, the sum of twenty-five thousand dollars, to be expended under the direction of the Secretary of War." In holding this to be a public purpose within the meaning of the doctrine of eminent domain it was said: "The end to be attained by this proposed use, as provided for by the act of Congress, is legitimate, and lies within the scope of the Constitution. The battle of Gettysburg was one of the great battles of the world. The numbers contained in the opposing armies were great; the sacrifice of life was dreadful; while the bravery and, indeed, heroism displayed by both the contending forces rank with the highest exhibition of those qualities ever made by man. The importance of the issue involved in the contest of which this great battle was a part cannot be overestimated. The existence of the government itself and the perpetuity of our institutions depended upon the result. Valuable lessons in the art of war can now be learned from an examination of this great battlefield in connection with the history of the events which there took place. Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of Congress, or even take possession of the field of battle in the name and for the benefit of all the citizens of the country for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon everyone who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States, through its representatives in Congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition. Such action on the part of Congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were

made. The greater the love of the citizen for the institutions of his country the greater is the dependence properly to be placed upon him for their defense in time of necessity, and it is to such men that the country must look for its safety. The institutions of our country which were saved at this enormous expenditure of life and property ought to and will be regarded with proportionate affection. Here upon this battlefield is one of the proofs of that expenditure, and the sacrifices are rendered more obvious and more easily appreciated when such a battlefield is preserved by the government at the public expense. The right to take land for cemeteries for the burial of the deceased soldiers of the country rests on the same footing and is connected with and springs from the same powers of the Constitution. It seems very clear that the government has the right to bury its own soldiers and to see to it that their graves shall not remain unknown or unhonored. No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred. It is needless to enlarge upon the subject, and the determination is arrived at without hesitation that the use intended as set forth in the petition in this proceeding is of that public nature which comes within the constitutional power of Congress to provide for by the condemnation of land." Even that case, however, does not cover the point in question exactly. In that case were embodied considerations national in their character, necessarily of great interest to all the people, marking, as it does, one of the most momentous epochs in our national history. The fame of an individual, unconnected with the government, however great it may be, cannot for a moment be likened in its value to the people to such an historical event.

The only theory on which the right to condemn private property in order to preserve the home or birth-place of a famous citizen, is that by which the term "public use" is construed to be synonymous with public benefit, utility or advantage and this use has been frequently questioned by the courts as a basis for the exercise of the power of eminent domain. Obviously if the doctrine is to be extended in this manner the enactment of laws on the subject will reflect the passing popular feeling, and their construction will reflect the various temperaments of the judges, who would thus be left free to indulge their own views of public benefit or advantage. By a very slight effort of imagination one can picture the weird results that would flow from the unrestrained operations of such a law. Imagine the scorn with which your dyed-in-the-wool Republican would view a movement to spend the public money in order that that old Democratic fraud "Bill Jones" might be held up to posterity as embodying all the virtues which the coming generations should emulate. It could only be equaled by that with which a true and tried Democrat would view an effort to perpetuate the sayings and teachings of some Republican abnoxious to him. The mind could run riot in its picturing of saints and sinners for whom their admirers might call on the power of eminent domain, from the birth-place of presidents down to the prison walls which now incarcerate a candidate for that high office—from the breeding farm of a Man-of-War down to the burial spot of "Tootsie," my lady's pet champion poodle. It would be unending and appalling. Viewed from the serious side, the establishment of such a doctrine would undermine all rights in private property. As was said in *Pennsylvania Mutual Life Ins. Co.* v. *Philadelphia*, 242 Pa. 47, 49 L. R. A. (N. S.) 1062: "If, however, public benefit, utility, or advantage is to be the test of a public use, then, as suggested by the authorities, the right to condemn the property will not depend on a fixed standard by which the legislative and judicial departments of the government are to be guided, but upon the views of those who at the time are to determine the question. There will be no limit to the power of either the legislature or the courts to appropriate private property to public use, except their individual opinions as to what is and what is not for the public advantage and utility. If such considerations are to prevail, the constitutional guarantees as to private property will be of small moment." Surely, it would seem that one who by his life and deeds has taken rank above his fellows, would necessarily have drawn to him admirers enough to furnish the means to keep his memory green. At any rate no one can well question that the voluntary action of such admirers is a safer means than the enlistment of the power of eminent domain whereby the property of an individual is taken against his will.

Minor Bronaugh.

Cases of Interest

Failure to Comply with Bulk Sales Law as Preventing Recovery by Seller of Purchase Price.—In Escalle *v.* Mark, (Nev.) 183 Pac. 387, reported and annotated in 5 A. L. R. 1512, it was held that the provision in the Nevada Bulk Sales Law that failure to comply with the provisions of the law as to notice renders the sale fraudulent and void does not prevent a recovery by the seller of the purchase price. The court said: "It is true that the statute says that when there is a failure to comply with § 1 of the act the sale shall be 'fraudulent and void'; but did the legislature mean that a sale should be absolutely 'void' as between the parties, regardless of the fact that no creditor was prejudiced thereby? We think not. . . . It is the common knowledge that the main purpose of the law is to protect the wholesaler. Prior to the passage of the law, it was a common practice for the retailers to sell their stock of goods in bulk, pay no one, and leave the man who sold them the goods without recourse. Such practices became so disastrous to the wholesalers that they were driven to the necessity of procuring legislation which would afford them protection against unscrupulous retail merchants. The Bulk Sales Law is the result. . . . This being the purpose of the law, how can it be successfully urged, as contended by appellant, that we should hold that such a sale as here in question was absolutely void? It is true that the statute says a sale shall be void when the terms of the act are not complied with; but to our minds, when construed in the light of the purpose of the statute, it was clearly the intention of the legislature that the sale should be voidable only. It is not pointed out what protection would or could be afforded anyone by placing any other construction upon the law. But all

rules of construction aside, it seems to us that no other conclusion can be reached, from a reading of the entire act itself, especially § 4 thereof (Rev. Laws, § 3911). This section provides that, if the vendor produces and delivers a written waiver of the requirements of the act as to notice to creditors, from at least a majority in number and amount of his creditors, the provisions of the act shall not apply. If it was the purpose of the legislature in enacting the law to protect any but creditors, the section just referred to is a most remarkable one. In fact, we cannot escape the conclusion, from a consideration of this very section, that the sole purpose of the law is to protect creditors. If such was not the intention, the legislature would never have embodied § 4 in the law, because it would manifestly have made the act inconsistent in its operation."

RES IPSA LOQUITUR DOCTRINE AS APPLICABLE TO OVERTURNING OF AUTOMOBILE.—In Klein *v.* Betten, (Wis.) 172 N. W. 736, reported and annotated in 5 A. L. R. 1237, it was held that in an action for injury to a passenger in an automobile through the overturning of the car, where the evidence does not show whether the accident was caused by negligent driving or the blowing out of a tire, the case cannot be submitted to the jury on the theory that the doctrine of res ipsa loquitur is applicable. The court said: "Plaintiff claims that the doctrine of res ipsa loquitur is applicable to the situation, and that the case should have been submitted to the jury. This doctrine may be stated to be that, when both the apparatus and the operation of it are within the control of the defendant, and the accident is one which ordinarily could not happen except by reason either of defect in the apparatus or negligence in the operation, a presumption of one or the other arises sufficient, from the happening of the accident, to justify a verdict against the defendant. Liability in this case is not predicated upon any defect of the automobile. Liability is predicated solely upon the negligent operation of the car. The facts proved are that an accident happened at a place where the road was smooth and in good order. Plaintiff contends that proof of this fact raises an inference of negligence in the operation of the car. When the car was righted, after the accident, the left-hand front tire was found to be deflated by reason of a blow-out of the inner tube. It is not at all beyond the realm of possibility that the accident might have happened by reason of this blow-out. It is claimed on the part of the plaintiff that a blow-out could not have caused the accident unless the car was going at an excessive rate of speed. There is no proof of that fact in the record, and we cannot take judicial notice that a blow-out of the front tire of a Ford automobile, running at 15 miles an hour, could not produce an accident such as this. It is familiar knowledge that the blow-out of the front tire of an automobile is a dangerous occurrence, the degree of danger, of course, depending upon the rate of speed, and, we apprehend, somewhat upon the character of the car. So we have here evidence showing simply an accident. Granting that the accident might have been the result of negligent operation of the car, the evidence certainly discloses a possibility that the accident might have been the result of the blow-out. . . . It is the duty of the plaintiff to prove negligence affirmatively; and, while the inferences allowed by the rule or doctrine of res ipsa loquitur constitute such proof, it is only where the circumstances leave no room for a different presumption that the maxim applies. When it is shown that the accident might have happened as the result of one of two causes, the reason for the rule fails, and it cannot be invoked."

POWER OF HUSBAND TO DEFEAT ANTENUPTIAL AGREEMENT BY GIVING AWAY HIS PROPERTY.—It seems that a man who has entered into an antenuptial agreement with a woman who becomes his wife, to give her by will a proportional part of his estate, cannot make gifts either absolutely, conditionally, indirectly, or otherwise for the main purpose of defeating his agreement and preventing it from operating for the benefit of the wife. It was so held in Eaton *v.* Eaton, 233 Mass. 351, 124 N. E. 37, reported and annotated in 5 A. L. R. 1426, wherein the court said: "The circumstances under which an antenuptial contract is made import a purpose that it shall confer real rights and impose substantial obligations. It is an implied term of such an agreement that it shall be fairly carried out, and that it shall not be performed in hate, trickery, perversity, or distrust. The inference rationally to be drawn from the conditions attendant upon an antenuptial agreement is that it is designed to give something of value to the wife, and that it is not an empty form. It is more consonant with the situation to infer that if the parties intend that power shall be reserved to the husband wholly or in large measure to deprive the wife of property rights by making gifts for that purpose during life, and thus leave nothing or much less than might rationally have been expected for the will to operate on, it should be expressed in the instrument, than it is to deduce the reservation of such power contrary to the whole spirit of the instrument and the nature of the transaction. The right secured to the wife by implication is that she shall be treated fairly and rationally in the matter of distribution of his property by the husband by gifts during his life. The true rule, fairly to be deduced from the weight of authority and resting on sound reason, is that a man who has entered into an antenuptial agreement with a woman who becomes his wife, to give her by will a proportional part of his estate, may, without breaking his agreement, make gifts during his life in good faith and reasonable in amount, having regard to all the circumstances; but he cannot make gifts either absolutely, conditionally, indirectly, or otherwise for the main purpose of defeating his agreement and preventing it from operating for the benefit of his wife. The motive in such a case affects the validity of the transaction because it determines 'the extent of a privilege to infringe upon the admitted right of another.' Leonard *v.* Leonard, 181 Mass. 458, 461, 92 Am. St. Rep. 426, 63 N. E. 1069. The adoption of any other rule, in substance, would put it in the power of a husband to strip himself during life of all his property, make his antenuptial agreement a barren instrument, and leave his wife penniless. A result like that would be contrary to every inference arising from the relation of the parties and the purpose of an agreement."

CIVIL LIABILITY FOR USING THREATENING OR ABUSIVE LANGUAGE.—In Brooker *v.* Silverthorne, (S. C.) 99 S. E. 350, reported and annotated in 5 A. L. R. 1283, it was held that to render actionable a threat causing fear, it must be of such a nature and made under such circumstances as to affect the mind of a person of ordinary reason and firmness so as to influence his conduct, or it must appear that the person against whom it was made was peculiarly susceptible to fear, and that the person making the threat knew and took advantage of the fact that he could not stand as much as an ordinary person. Said the court: "Plaintiff alleges: That on October 27, 1916, she was night operator at the telephone exchange at Barnwell. That defendant called the exchange over the telephone and asked for a certain connection, which she promptly tried to get for him, but, upon her failing to do so, he cursed and threatened her in an outrageous manner, saying to her: 'You God damned woman! None of you attend to your business.' That she tried to reason with him, telling him that she had done all that she could

to get the connection he wanted, but he continued to abuse and threaten her, saying to her: 'You are a God damned liar. If I were there, I would break your God damned neck.' That the language and threat of defendant put her in great fear that he would come to the exchange and further insult her, and that she was so shocked and unnerved that she was made sick and unfit for duty, and had to take medicine to make her sleep. That for weeks afterwards, when defendant's number would call, she would become so nervous that she could not answer the call. And that her nervous system was so shocked and wrecked that she suffered and continues to suffer in health, mind and body on account of the abusive and threatening language addressed to her by defendant. . . . If it should be conceded that the language of defendant contained a threat, it was not of such nature or made under such circumstances as to put a person of ordinary reason and firmness in fear of bodily hurt. And it is not alleged that plaintiff was not a person of ordinary reason and firmness and that defendant knew it; and, in the absence of such allegation, it will not be presumed. A person of ordinary reason and firmness should have known that the profane and vulgar language alleged to have been used by defendant was the result of a momentary fit of passion, caused by his failure to get the connection he asked for, and that he had no intention of doing or attempting to do plaintiff any bodily hurt. But the words used did not amount to a threat. Defendant said: 'If I were there, I would break your . . . neck.' But he was not there, and plaintiff knew it; and there is nothing in what he said expressive of an intention to go there and injure plaintiff. Webster defines a 'threat' as 'the expression of an intention to inflict evil or injury on another.' The law dictionaries give practically the same definition. A threat, therefore, looks to the future. As Judge Cooley says, in the passage above quoted, "a threat only promises a future injury.' Here there was no expression of an intention to injure in the future, and therefore no threat. The language attributed to defendant—especially when used by a man to a woman—merits severest condemnation and subjects the user to the scorn and contempt of his fellow men. But it is not civilly actionable. Diligent search has failed to discover any case or authority to the contrary, but many in support of the conclusion which we have reached."

Liability of City for Typhoid Infection from Contaminated Water Supply.—In Stubbs *v.* Rochester, 226 N. Y. 516, 124 N. E. 137, it was held that the fact that a city's contaminated water supply was the source of typhoid fever in a citizen might be found from evidence that he drank water near the point of contamination, that some sixty other cases developed in that vicinity, and that his habits were such as to tend to exclude another probable source, together with testimony by his physician that such contamination was the source of his illness. In the course of a very interesting opinion the court said: "The important question in this case is, Did the plaintiff produce evidence from which inference might reasonably be drawn that the cause of his illness was due to the use of contaminated water furnished by defendant? Counsel for respondent argues that, even assuming that the city may be held liable to plantiff for damages caused by its negligence in furnishing contaminated water for drinking purposes: (*a*) The evidence adduced by plaintiff fails to disclose that he contracted typhoid fever by drinking contaminated water; (*b*) that it was incumbent upon the plaintiff to establish that his illness was not due to any other cause to which typhoid fever may be attributed for which defendant is not liable. The evidence does disclose several causes of typhoid fever, which is a germ disease, the germ being known as the typhoid bacillus, which causes may be classified as follows: *First.* Drinking of polluted water. *Second.* Raw fruits and vegetables in certain named localities, where human excrement is used to fertilize the soil, are sometimes sources of typhoid infection. *Third.* The consumption of shellfish, though not a frequent cause. *Fourth.* The consumption of infected milk and vegetables. *Fifth.* The housefly in certain localities. *Sixth.* Personal contact with an infected person by one who has a predilection for typhoid infection and is not objectively sick with the disease. *Seventh.* Ice, if affected with typhoid bacilli. *Eighth.* Fruits, vegetables, etc., washed in infected water. *Ninth.* The medical authorities recognize that there are still other causes and means unknown. This fact was developed on cross-examination of physicians called by plaintiff. . . . Counsel for respondent asserts that there was a failure of proof on the part of plaintiff, in that he did not establish that he contracted disease by drinking contaminated water, and, in support of his argument, cites a rule of law that when there are several possible causes of injury, for one or more of which a defendant is not responsible, plaintiff cannot recover without proving that the injury was sustained wholly or in part by a cause for which defendant was responsible. He submits that it was essential for plaintiff to eliminate all other of seven causes from which the disease might have been contracted. If the argument should prevail and the rule of law stated is not subject to any limitation, the present case illustrates the impossibility of a recovery in any case based upon like facts. One cause of the disease is stated by counsel to be 'personal contact with typhoid carriers or other persons suffering with the disease, whereby bacilli are received and accidentally transferred by the hands or some other portion of the person or clothes to the mouth.' Concededly, a person is affected with typhoid some weeks before the disease develops. The plaintiff here resided 3 miles distant from his place of employment, and traveled to and from his work upon the street car. To prove the time when he was attacked with typhoid, then find every individual who traveled on the same car with him, and establish by each one of them that he or she was free from the disease, even to his or her clothing, is impossible. Again, the evidence disclosed that typhoid fever is caused by sources unknown to medical science. If the word of the rule stated is to prevail, plaintiff would be required to eliminate sources which had not yet been determined or ascertained. I do not believe the rule stated to be as inflexible as claimed for. If two or more possible causes exist, for only one of which a defendant may be liable, and a party injured establishes facts from which it can be said with reasonable certainty that the direct cause of the injury was the one for which the defendant was liable, the party has complied with the spirit of the rule."

Storing Gasolene and Kerosene as Negligence.—In Kress *v.* Lane, (Iowa) 171 N. W. 571, reported and annotated in 5 A. L. R. 1376, it was held that merely storing gasolene and kerosene in barrels in a frame building was not such negligence as to render one liable for loss by fire of adjoining buildings, due to the explosion of the oils when the building in which they were was set afire without negligence on the part of the one so storing the oil. The court said: "In the first the plaintiff claims a recovery on the theory that the defendants maintained a nuisance. In the second count the same facts are stated and a claim of liability based thereon on the theory of negligence. There is no allegation in the petition that the defendants were in any manner responsible for the setting of the fire which caused the explosion of gasolene. The naked proposition upon which the petition rests is that the defendants were guilty of

an actionable wrong in that they stored nine barrels of gasolene and six barrels of kerosene in a frame building upon the premises, and that such wrongful storing of such quantity of these inflammable substances was the proximate cause of the burning of the plaintiff's house, in that the fire caused an explosion and thereby enlarged the conflagration. It is not claimed that any statute or ordinance was violated. The claim of nuisance is predicated upon the highly inflammable character of the substances. The second count predicates the claim of negligence upon the large quantity of these inflammable substances and upon the fact that they were stored in a 'frame building near the alley.' There is no complaint otherwise as to the method of storage. It is not alleged that the gasolene was confined in defective containers. Nor is there any claim that the presence of the gasolene or kerosene had anything to do with the starting of the conflagration. Nor is there any claim that the defendants had anything to do with the starting of the fire. The fair implication of the petition is that the fire was 'set' by other persons. We think it quite clear that the mere possession of the gasolene and kerosene in question, without more, was not an actionable wrong. In Walker *v.* Chicago, R. I. & U. R. Co., 71 Iowa, 658, 33 N. W. 224, a question of possession and storage of dynamite was involved. In that case it was held that the possession and temporary storage of dynamite by the defendant, if done in a reasonable and prudent manner, did not constitute a nuisance, and was not wrongful. The fact that dynamite is subject to explosion by contract and concussion was an element of danger which does not appear in this case. Gasolene is concededly a dangerous substance if used, stored, or exposed negligently. Properly used, it is not highly dangerous. For proper use, it has become one of the pressing necessities of the community. Thousands of gallons of it are daily in course of transportation into and through every town in the state. It is, of course, highly inflammable, and will not stand exposure to the torch of conflagration. If it be so exposed either by wilful or negligent act, such is the actionable wrong. If gasolene is to be used, it must be stored and handled in some manner and in some quantities. If it be exposed to fire even in small quantities, disastrous consequences are likely to follow. But it should not be thus exposed, and no one is ignorant of that fact. It being averred in the petition that fire was 'set' to the building in which the gasolene was stored, such act was a wrongful one, and was the proximate cause of the resulting conflagration. If the quantity of gasolene thus stored in the building had been contained in the tanks of automobiles stored in a garage, a like result would have followed the setting of fire to the garage. Could it be said in such a case that the owners of the garage or the owners of the automobiles were liable for the consequential damage because they were responsible for the presence of the gasolene? We reach the conclusion that no cause of action against the defendants can be predicated on the mere presence and storage of the gasolene, in the absence of allegation that the method of storage was negligent or wrongful, and that such wrongful method of storage operated as a direct and proximate cause of the conflagration itself. The mere fact that it increased the conflagration would not of itself be sufficient. All combustible material necesarily does that. Even a frame building, when exposed to the conflagration, aids the spreading of it to other buildings."

"A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist."—Per Swayne, J., in Von Hoffman *v.* Quincy, 4 Wall. 554.

News of the Profession

THE ROCHESTER BAR ASSSOCIATION of New York held its annual outing in June, the place selected being Montreal.

SEATTLE BAR ASSOCIATION.—At the annual meeting of the Seattle Bar Association W. G. McLaren was elected president to succeed Charles H. Winders.

COUNTY ATTORNEYS OF IOWA CONVENE.—The state association of county attorneys of Iowa met in June and elected for president Carl Riepe, county attorney for Des Moines county.

DEMISE OF TEXAS LAWYER OF PROMINENCE.—A. B. Davidson of Austin, Texas, died recently. He had been a lieutenant governor of the state and also a state senator.

ERIE COUNTY BAR ASSOCIAITION.—Arthur W. Mitchell is the new president of the Erie County (Pa.) Bar Association. He succeeds John B. Brooks. He practices at Erie.

MISSOURI JUDGE DIES.—Judge A. M. Hough, former judge of the Cole County Probate Court and a past grand master of the Masonic Grand Lodge of Missouri has passed away.

NEW JUDGE IN PENNSYLVANIA.—William M. Hargest of Harrisburg, deputy attorney general since 1909 has been appointed judge of the Dauphin county court succeeding the late Judge George Kunkel.

WOMAN ASSISTANT TO ILLINOIS ATTORNEY GENERAL.—Miss Ada M. Cartwright, daughter of Chief Justice Cartwright of the Illinois Supreme Court, is an assistant to Attorney General Brundage of that state.

THE KENTUCKY BAR ASSOCIATION held its annual meeting July 14 and 15 at Henderson. Lewis Apperson of Mt. Sterling, the retiring president, made an important address as did Senator Selden P. Spencer of Missouri.

CHICAGO LAWYER BECOMES JUDGE OF VIRGIN ISLANDS.—Lucius J. M. Mimin, a Chicago lawyer, has been appointed judge of the United States District Court in the Virgin Islands. He was born in Sweden.

DEATH OF WELL-KNOWN LAW WRITER.—Otto Erickson, formerly a member of the Buffalo bar and for a number of years a member of the editorial staff of the Edward Thompson Company, is dead. He was educated at Wesleyan university, Middletown, Connecticut.

NEW UNITED STATES CIRCUIT JUDGE IN THIRD DISTRICT.—J. Warren Davis, formerly United States District Judge, has been appointed a United States Circuit Judge in the third judicial district. He succeeds Judge Haight.

DEATH OF MINNESOTA LAW PROFESSOR.—Judge A. C. Hickman, professor emeritus of the University of Minnesota, has passed away. He became professor of law at the university in 1896 and was for a time acting dean of the law school.

NEW YORK LAWYERS WHO HAVE DIED recently include former Judge Ernest Hall of the Supreme Court, Albert Delafield, Clinton S. Harris, Alexander T. Mason, Walter D. Clark, Henry H. Parson, Virtus L. Haines and Richard Lang, all of New York city; also Eugene Cary of Buffalo.

IOWA DEATHS.—Judge J. C. Cook of Cedar Rapids is dead. He was a former congressman and judge. The death of E. P. Andrews of Hampton is also reported.

OHIO BAR ASSOCIATION.—The annual meeting of this association was held July 6-8 at Cedar Point. Among the speakers

were Senator Charles S. Thomas of Colorado and Sir James Aikins, governor of Manitoba and president of the Canadian Bar Association.

DEATHS AMONG DISTRICT OF COLUMBIA LAWYERS.—Herman J. Schulters, a well-known Washington city attorney, is dead. He was born in Richfield, Wisconsin. The death of J. J. Darlington, formerly of Rome, Georgia, is also announced.

THE NEW JERSEY BAR ASSOCIATION.—The annual meeting of this association was held in Atlantic City June 12. The retiring president, Walter H. Bacon of Bridgeton, deplored the fact that the annual dinner and social features of the meeting were the chief ends of the organization.

INDIANA DEATHS.—The demise of William C. Purdum of Kokomo, Indiana, is reported. He was a judge of the Howard Circuit Court from 1911 to 1917. The death of Judge Lawson M. Harvey, an associate justice of the Supreme Court is also reported. Shaffer Peterson of Decatur, a well-known attorney of Northern Indiana is also dead.

THE WISCONSIN BAR ASSOCIATION will hold its annual meeting at Milwaukee, Sept. 28-30. The principal speakers will be former Senator Albert J. Beveridge of Indiana and Paul S. Reinsch, a former minister to China and now attorney for the Chinese Republic at Washington.

THE MARYLAND BAR ASSOCIATION held its annual meeting at Atlantic City, July 1-3. The retiring president, Judge Soper, was succeeded by James E. Elligood of Salisbury. The toastmaster at the annual banquet was Judge T. Scott Offutt of the Maryland Court of Appeals and Albert J. Beveridge of Indiana was one of the speakers.

ASSISTANT UNITED STATES ATTORNEYS IN FLORIDA.—William M. Christie of Jacksonville has been appointed assistant United States district attorney succeeding Fred Botts resigned. Damon Yerkes of the same city has been appointed an additional assistant United States attorney.

THE TEXAS BAR ASSOCIATION met at El Paso, July 1, Judge W. L. Eltes of Texarkana presiding. United States Circuit Judge George T. Page of Chicago spoke on "Civilization and Liberty" and Judge Thomas G. Greenwood of the Supreme Court on "Aid to the Supreme Court from Lawyers."

THE PENNSYLVANIA BAR HAS LOST BY DEATH the following: Watson D. Hinckley, president judge of Warren county; George Kunkel, judge of the Dauphin county court; Judge S. J. M. McCarrell of Harrisburg; Wilbur F. Sadler, former judge of the Cumberland county court; James M. Walters of Johnstown; George W. Jacobs of Norristown; James H. Roberts of Philadelphia; H. M. Houser of Lancaster.

ILLINOIS DEATHS.—Former Judge Phillip Sidney Post of Chicago, vice-president of the International Harvester Company, is dead. He was a trustee of Knox College. Other deaths include Judge Henry E. Burges of Aledo, a former partner of Congressman William J. Graham; Arthur Dyrenforth of Chicago, a graduate of Harvard in 1896; Harry Rubens of Chicago, a native of Austria, general counsel of the United Breweries Company; Judge George W. Thompson of Galesburg.

MICHIGAN DEATHS AMONG THE PROFESSION.—Recent deaths among the profession in Michigan, include Robert M. Montgomery, a former Chief Justice of the Michigan Supreme Court and at the time of his death the presiding judge of the United States Court of Customs Appeals at Washington; Richard A. Watts of Adrian, a former judge of the Lenawee Circuit Court; Theodore F. Shotwell of Detroit; I. L. Hubbell of Belding; Frederick W. Knowlton of Constantine, Circuit Judge of the Branch and St. Joseph county district.

NORTH CAROLINA BAR ASSOCIATION.—The twenty-second annual convention of the North Carolina Bar Association was held in Asheville, June 29 to July 1. Addresses were made by Roscoe Pound, dean of the Harvard Law School; Hampton L. Carson, president of the American Bar Association; William P. Bynum, retiring president, and others. During the closing minutes of the convention Thomas W. Davis of Wilmington, for fifteen years secretary of the association, was elected president. Other officers elected were: A. B. Anderson of Raleigh, secretary-treasurer; S. Porter Graves of Mount Airy, R. H. Sykes of Durham and James E. Woodward of Wilson, vice-presidents. E. S. Parker, Jr., of Graham and Mark Brown of Asheville were chosen as members of the executive committee.

IOWA BAR ASSOCIATION.—The 26th annual convention of the Iowa Bar Association was held at Cedar Rapids, June 24-25, Emmet Tinley of Council Bluffs, the retiring president, presided. Much time was given to a consideration of bills drawn by the Iowa Code Commission for presentation to the next legislature. Dean W. R. Vance of the University of Minnesota spoke on "The Minneapolis Court of Conciliation"; Judge Harry Olson of Chicago was another speaker. Officers were elected as follows: President, Charles M. Dutcher, Iowa City; vice-president, Jesse A. Miller, Des Moines; secretary and treasurer, H. C. Horack, Iowa City; librarian, H. A. Small, Des Moines; executive committee, J. C. Calhoun, Keosauqua; J. F. Devitt, Muscatine; B. F. Swisher, Waterloo; D. D. Murphy, Elkader; C. H. Vanlaw, Marshalltown; William L. Lewis, Montezuma; U. S. Alderman, Nevada; N. S. Stephens, Clarinda; D. L. Ross, Council Bluffs; L. M. Kamory, Webster City; H. A. Evans, Sioux City. Waterloo was chosen for next year's convention.

PENNSYLVANIA BAR ASSOCIATION.—The annual convention of the Pennsylvania Bar Association was held at Bedford Springs, June 22-24. Justice Simpson of the Supreme Court was one of the leading speakers. Officers were elected as follows: President, Paul H. Gaither, Westmoreland; vice-presidents, Frank C. McGirr, Allegheny; H. S. Dumbauled, Fayette; N. Sargent Ross, York; Alonzo T. Searle, Wayne; J. Butler Woodward, Luzerne; executive committee, H. W. Chamberlain, Northumberland; Watson R. Davidson, Franklin; Edward B. Farr, Wyoming; John M. Harris, Lackawanna; Henry Hipple, Lycoming; George Hay Kain, York; Evan C. Jones, Luzerne; William J. Kyle, Greene; Robert P. Shick, Philadelphia; William Watson Smith, Allegheny; J. Borton Weeks, Delaware; Harmar D. Denny, Jr., Allegheny; Vernon Hazzard, Washington; L. E. Torrey, Erie; Arthur Hagon Miller, Philadelphia; Daniel W. Kaercher, Schuylkill; Robert W. Darragh, Beaver; Ralph J. Baker, Dauphin; E. Carroll Schaeffer, Berks; John D. Keith, Adams; James W. Fox, Northampton. The sessions ended with the annual banquet at Bedford Springs Hotel. Edward J. Fox of Easton was toastmaster.

English Notes*

AN OLD LAW BOOK.—Although law publishing is being carried on under greater difficulties even than the publication of general literature, there are some kinds of old law books which are participating in the general rise in prices. At the present time eight years of the Year Books of Edward IV., bound up in

*With credit to English legal periodicals.

one volume, are being offered by a bookseller for £550. They were printed between the years 1492 and 1496 by Richard Pynson, and are, therefore, typographical rarities. Of two years there are copies in the British Museum as well as the John Rylands Library, but the remainder are only found in the latter. This volume belonged to a Thomas Wytham, possibly the Chancellor of the Exchequer of that name, and in modern times to Lord Romilly, whose bookplate is in it. At this price it is almost certain to cross the Atlantic.

BULL-BAITING.—The death of a famous Spanish matador may make it of interest to recall the fact that bull-baiting, now an offence visited with severe penalities (12 & 13 Vict. c. 92, amended by 17 & 18 Vict. c. 60) and reprobated by public opinion, was, little more than a century ago, a very popular amusement in Great Britain, whose abolition by law was opposed with success by two statesmen who filled the position of Prime Minister. During the whole of the eighteenth century bull-baiting was a popular English amusement. In Queen Anne's time it was performed in London twice a week at Hockley Hole, and there was no prominent town to which it did not extend. It was regarded on the Continent as peculiarly English. The tenacity of the English bulldog, which would sometimes suffer itself to be cut to pieces rather than relax its hold, was a favourite subject of national boasting, while French writers pointed to the marked difference in this respect between the French and the English taste as a conclusive proof of the higher civilization of their own country. It is curious, however, that Rousseau and Burke, who so seldom agreed, appear to have looked with warm favour on bull fights. In the historical portion of the Annual Register of 1786, which, after it had ceased to be written wholly by Burke, was for many years under his superintendence and inspection, there is a most curious passage on the advantage of bull fights, which had in the previous year been suppressed in Spain except in cases where the profits were assigned to charitable or patriotic purposes. Among those who at a later period patronised and defended bull-baiting were Windham and Parr, and even Canning and Peel opposed the measure for its abolition by law.

JOSEPH STORY.—The appearance of a new English edition—the third—of Story's classic treatise on Equity is fresh testimony to the enduring fame of the distinguished American jurist. Every lawyer has at least some acquaintance with the various works that came with extraordinary rapidity from his active brain—treatises that bear on every page the marks of extensive reading, carefully digested and set forth with lucidity and literary grace; but not so many perhaps are acquainted with the extremely interesting biography of Story written by his son, who starting in the law abandoned it for sculpture. It is worth while turning over the pages of this life to get a glimpse of the jurist's career and to observe the esteem in which he was held not only in his own country, but also in England and on the Continent. Letters appreciative of his work from English judges and French and German jurists are numerous. Among others Baron Parke sent several letters thanking Story for his elucidation of various branches of the law. In some ways Story must have been a man to Parke's heart's content, for we are told that during his early days at the Bar he became keenly interested in the study of the old feudal law, and devoted himself assiduously to the mastering of those intricate and technical rules which govern the law of real property. The Year Books, which the average practitioner regards with dismay, made a strong appeal to the youthful Story; so, too, did the old reporters with their strange jargon compounded of Latin, French, and English; in short, he made himself a thorough black-letter lawyer. But, keen student of law though he was and ever ready to give counsel to those about to enter the Profession, he was not a "mere lawyer"; he was ever insistent upon a wide culture. For himself he enjoyed the classics, ancient and modern, with a hearty zest. He became a justice of the Supreme Court in 1811, at the early age of thirty-two, a position which some years later he conjoined with that of professor of law at Harvard. Our kin beyond the sea do well to be proud of their great judge and legal writer, Joseph Story.—*Law Times.*

PREVENTION OF PERFORMANCE OF CONTRACT BY LAW OF PLACE OF PERFORMANCE.—A difficult question, as it was regarded by the Court of Appeal, was raised in the recent case of Ralli Brothers *v.* Compañia Naviera Sota y Aznar, viz.: What are the rights of the parties to a charter-party, when the performance thereof, or of part of it, is prevented by the law of the country in which the performance was to take place? In the present case, the charter-party, which was in respect of a cargo of jute, was an English contract, and was to be governed by, and to take effect according to, English law. But Spain was the place in which the contract was to be performed. The obligation of the charterers was to pay on delivery in Spain. And by a Spanish decree having the force of law as to the rate of freight on jute a maximum was specifically fixed, which maximum was lower than the freight specified in the charter-party. Whether the shipowners were entitled to demand from the charterers the contractual freight, or only the freight limited by Spanish law, was what Mr. Justice Bailhache, and subsequently the learned judges of the Court of Appeal—Lord Sterndale, M.R., and Lords Justices Warrington and Scrutton—had to determine. The charter-party contained an exception clause whereby "arrests and restraints of princes, rulers, and people," were (inter alia) excepted. That was considered by Mr. Justice Bailhache—his decision being affirmed by the Court of Appeal—to be an answer to the shipowners' claim for the contractual freight. The Spanish decree, his Lordship thought, imposed an equal disability on both contracting parties, so that neither of them could sue the other, and it would be equally illegal for the shipowners to receive as for the charterers to pay in Spain a freight in excess of the legal limit—the maximum fixed by the Spanish decree. The performance of the contract, in other words, was rendered illegal by the law of the place of its performance. In Dicey on the Conflict Laws (2nd edit., p. 553) it is laid down that a contract is in general invalid in so far as the performance of it is unlawful by the law of the country where the contract is to be performed. And that statement of the law was approved and applied in the present case.

SCOPE OF EMPLOYMENT OF WORKMAN INJURED THROUGH DISOBEDIENCE OF ORDERS.—The tests which were examined by Lord Dunedin in the famous case of Plumb *v.* Cobden Flour Mills Company (109 L. T. Rep. 759; (1914) A. C. 62) are doubtless familiar to all practitioners in workmen's compensation cases. As his Lordship there remarked, the first and most useful test in ascertaining whether an accident to a workman did or did not arise "out of and in the course of" his employment, within the meaning of section 1 of the Workmen's Compensation Act 1906 (6 Edw. 7, c. 58), is contained in the expression "scope" or "sphere of employment." It was used by Lord Justice Collins (as he then was) in the case of Whitehead *v.* Reader, (84 L. T. Rep. 514; (1901) 2 K. B. 48), which was decided under the old Act of 1897. The learned judge formulated the test by asking whether an order which was disobeyed by a workman, who has suffered injury through his disobedience thereof, limited the

sphere of his employment, or was it merely a direction not to do certain things or to do them in a certain way within the sphere of that employment. For there is a clear distinction to be drawn between an order which defines what work shall be done by a workman, and an order which defines how that work shall be done. The most recent illustration of that important distinction appears from the case which came lately before the Court of Appeal of Foulkes *v.* Roberts (122 L. T. Rep. 169). It was a case which bore a remarkable resemblance in certain respects to that of M'Cabe *v.* Henry North and Sons Limited (6 B. W. C. C. 504) There a youth, no part of whose duty whatever was working at a machine, endeavoured to adjust it himself, instead of reporting the defect to the foreman, despite an order to the effect that he must always do so. In consequence, he deprived himself of his right of compensation. In the present case, much reliance was placed by the employer upon that authority. The contention was that the prohibition to touch the machine if anything went wrong put the workman outside the scope or sphere of his employment, as was held in M'Cabe's case (ubi sup.). But in a most instructive manner, the learned judges of the Court of Appeal in the present case pointed out the distinction between it and the earlier authority. The workman was, therefore, held to be entitled to compensation inasmuch as he had work to do with the machinery whereby he was injured, and did not, as in M'Cabe's case (ubi sup.), take upon himself to adjust a machine with which he had no concern. It is true that he was guilty of "serious and wilful misconduct." But as he suffered "serious and permanent disablement," that fact became immaterial.

Lord Guthrie, by whose death the Bench of the Court of Session has sustained a severe loss, did much, like his junior colleague, Lord Sands, to maintain the literary tradition of Scottish lawyers—judges and advocates alike. From early days not a few of the judges sought distinction in letters as well as in law. In the latter half of the eighteenth century Lord Kames wrote copiously on the philosophy of law and on criticism, and, although his style left something to be desired and prompted Goldsmith's pungent remark regarding one of his books that it was easier to write it than to read it, yet he kept the lamp of literature burning and transmitted the light to the succeeding generation—that of Scott, Jeffrey, Cockburn, who, each in his own sphere, added a new luster to Scottish letters. Contemporaneously with these, or following them shortly, came John Gibson Lockhart, John Wilson (Christopher North), Archibald Alison, and, still later, John Hill Burton, Henry Glassford Bell, Lord Neaves, George Outram, and many lesser lights. With regard to Lord Guthrie's own association with letters, one recalls his share in the admirable memoir of his distinguished father, the Rev. Dr. Thomas Guthrie, the great Free Churchman and pioneer of the Ragged School movement in Scotland; his edition of John Knox's History; a monograph on the Knox house, Edinburgh; and, what proved more generally attractive, a series of recollections of his old college friend Robert Louis Stevenson, published recently in the *Juridical Review*. Guthrie and Stevenson took the law classes at Edinburgh University at the same time. Although Stevenson did not carry away much from the prelections of the professor, he at least, as he proudly recalled, picked up some of learning's crumbs, such as the knowledge that emphyteusis is not a disease nor stillicide a crime. Lord Guthrie has told us that he had the curiosity to examine Stevenson's Latin thesis—this is required from every candidate for the Scots Bar—in which, it is not surprising to learn, he found more of Ulpian than of Stevenson. Of late years Lord Guthrie was the tenant of the cottage at Swanston, a few miles out from Edinburgh, where Stevenson spent part of his youth, and there everything that recalls the famous novelist has been preserved with pious care by the deceased judge. In addition to his other literary work, Lord Guthrie, it is said, had been engaged for some time in the preparation of a history of the Scottish judges, and we can only express the hope that his representatives may be able to have it completed and given to the world. Such a biographical collection is much to be desired, the labors of earlier compilers being now woefully out of date.

Bequests to Charities in General Terms.—When judges have to determine whether a particular bequest is a charitable one, within the meaning of the law, they are often placed in considerable difficulty by the state of the authorities. The recent decision of Mr. Justice Eve in Re Bennett; Gibson *v.* Attorney-General (122 L. T. Rep. 578)—hereinafter referred to—is a good illustration of this. On the one hand, in Blair *v.* Duncan (86 L. T. Rep. 157; (1902) A. C. 37), where a testatrix directed that one-half of the residue of her estate should be applied for "such charitable or public purposes as my trustee thinks proper," it was decided by the House of Lords (affirming the decision of the Second Division of the Court of Session, Scotland) that the direction was void for uncertainty. The decision turned mainly on the fact that the words "charitable or public purposes" were to be read disjunctively; and in Houston *v.* Burns (118 L. T. Rep. 462; (1918) A. C. 337) the same principle was applied. There the gift was "for such public benevolent or charitable purposes" in connection with the parish of L., or the neighbourhood, as the trustees should think proper, and it was held that the purposes were to be read disjunctively, and that the gift failed for uncertainty. Lord Finlay dissented from the dictum of Lord Romilly in Dolan *v.* Macdermot (L. Rep. 3 Ch. 678) to the effect that a bequest for such public purposes, in a particular place, as the trustees should select would be good. On the other hand, in Dolan *v.* Macdermot (L. Rep. 3 Ch. 676), where the bequest was "for such charities and other public purposes as lawfully might be in the parish of T.," it was decided by Lord Cairns, a great judge (affirming the decision of Lord Romilly, M. R.), that it was a good charitable gift, not because it was confined to public purposes in a particular parish, but because it was in effect a gift to be laid out in charities for the benefit of the parish of T. And in Re Allen; Hargraves *v.* Taylor (93 L. T. Rep. 597; (1905) 2 Ch. 400), where the gift was "upon trust for such charitable, educational or other institutions of the town of Kendal, and also for such other general purposes for the benefit of the town of Kendal, or any of the inhabitants thereof, as my said trustees shall in their absolute uncontrolled discretion think fit," it was held by Mr. Justice Swinfen Eady (as he then was) that it was a good charitable bequest. Reference may be made to one other authority—namely, the leading case of the Commissioners for the Special Purposes of Income Tax *v.* Pemsel (65 L. T. Rep. 621; (1891) A. C. 583)—in which Lord Macnaghten said that charity in its legal sense comprises four principal divisions, namely, trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads. In Re Bennett the testatrix gave her residuary estate upon trust to apply the same for the "benefit of the schools and charitable institutions and poor and other objects of charity or any other public objects in the parish of Farringdon." Mr. Justice Eve, after referring to the foregoing authorities, came to the conclusion that there was nothing in Houston *v.* Burns to overrule the decision in Dolan *v.* Macdermot, which he accordingly followed, and held that the whole

residuary estate of the testatrix was applicable for charitable purposes. His Lordship considered that the word "or" in the bequest was not used disjunctively; and that the words "other public objects" in the will must be ejusdem generis with the specified ones. Attention may shortly be called to another decision on charities by the same judge, namely, Re Rayner; Cloutman *v.* Regnart (122 L. T. Rep. 577). There a testatrix, who died in 1919, gave to the governors of a limited company certain shares therein, and directed that the income thereof should be applied for the education of children of employés for five years and upwards in the company's employment, such children to be of a certain age, and to be selected by the governors as the most worthy and deserving. The testatrix also gave other shares in the company to the governors and directed that the income thereof should be employed for employés who had been in the employment of the company for a certain period preceding their becoming permanently incapacitated from continuing to earn their living, and not in receipt of more than 10s. per week from any other source. It was held that the object of the first gift being educational, and of the second the alleviation of poverty, the gifts were in each case good charitable gifts, distinguishing the case from Re Drummond; Ashworth *v.* Drummond (111 L. T. Rep. 156; (1914) 2 Ch. 90) on the ground that in that case the court was not able to construe the gift as restricted to the relief of the poor people within the meaning of the Statute of Elizabeth.

Obiter Dicta

INDICTMENT PENDING?—Palmer *v.* Lodge, 109 Atl. 125.

HEAVEN AND HELL.—Goodman *v.* Fried, 55 Ill. App. 362.

STONING THE PROPHETS.—Firestone *v.* Christ, 2 Pa. Co. Ct. R. 413.

"WHEN A FELLER NEEDS A FRIEND."—Commonwealth *v.* Briggs, 8 A. L. R. 363.

A PROPER PENALTY FOR BAD MUSIC.—In Music *v.* Commonwealth, 216 S. W. 116, the appellant was condemned to death.

SOME LAW!—"When a marriage has been consummated in accordance with the forms of law it is presumed," etc.—See Wenning *v.* Teeple, 144 Ind. 189.

CONCERNING P—GS.—"Notoriously, 'blind pigs' neither squeal aloud nor see openly who their keepers are."—Per Bronson, J., in State *v.* Burcham, 176 N. W. 657.

JUST A SAMPLE.—The case of Aktieselskabet Korn-og Foderstof Kompagniet *v.* Rederiaktiebolaget Atlanten, 250 Fed. 935, suggests the kind of cases with which the new court of the League of Nations will have to deal.

SENSIBLY SAID!—"There are many occasions when it is far better to allow a trustworthy, roadwise horse to find the road in the dark than to attempt to direct it. There is a horse sense exhibited at times which is more reliable than the combined five senses of one who is driving in the dark."—Per Orlady, J., in Hamill *v.* Christiana Borough, 49 Pa. Super. Ct. 371.

WELL, JUST HOW LONG IS IT NOW?—Says the London *Law Times* of June 5: "There was promulgated last week a law in France extending the period during which artists may exercise their proprietary rights over their works. At present *la propriété artistique* is during the life of the author and for fifty years after his death. The present law extends this right for a period equal to that allowed by the laws now in force."

TOUGH ON THE OFFICE BOY.—In a recent address by Chief Justice Olson of the Chicago Municipal Court, the following quotation from a medical report was made: "Where we have combined defect, as where dementia praecox co-exists with intelligence defect, it is called pfropfhebephrenia." "I'd hate to have that," said the office boy. "Why?" we asked. "Because," he replied, "I could never tell anyone what was the matter with me."

MATRIMONIAL BANKRUPTCY AS IT WERE.—"It is also charged in defendant's cross-bill and argued by counsel that plaintiff's motive in marrying defendant was solely a commercial one, unmixed with any tinge or touch of sentiment, and counsel argues that the proofs show that she was a 'matrimonial profiteer.' It is rather to be inferred from counsel's argument that he thinks the failure of this marriage compact, instead of being classed among the domestic tragedies, should have been classed with and reported among the weekly commercial failures."—Per Bird, J., in Koebel *v.* Koebel, 176 N. W. 552.

A MARK TWAIN STORY BY AN ENGLISHMAN.—Apropos of the late Lord Guthrie, a writer in the London *Law Times* recalls the following little-known story of Mark Twain: "Lord Guthrie was a great lover of travel, and the two meeting, both being literary men, a friendship resulted. When Lord Guthrie wrote his book on John Knox, he sent a copy to Twain, who thanked him in characteristic Huckleberry Finn vein, saying that reading the book had greatly increased his knowledge of John Knox, for up to that time all he knew about the 'great reformer was a somewhat discreditable incident of him throwing a cutty stool at Jenny Geddes,' who, *en passant*, it may be observed lived a century later than Knox."—Again *en passant* it may be observed that it was Jenny herself who threw the stool. We wonder whether the anachronism was the only part of the joke that the Englishman got!

IN RE COX.—They call him "Fighting Jimmie" out in Ohio. Possibly he gained the appellation from an early pugilistic bout (Cox *v.* Jeffries, 73 Mo. App. 412), but his scrapping proclivities have certainly not departed with age, as witness the recent Democratic convention Cox *v.* Wilson, 24 N. Car. 234; Cox *v.* Bryan, 81 Md. 287; Cox *v.* Palmer, 60 Miss. 793; Cox *v.* Davis, 102 S. E. 236; Cox *v.* Edwards, 14 Mass. 492). He has apparently fought even with the man who made his nomination sure (Cox *v.* Murphy, 82 Ga. 623), and right at the present time he is engaged in the biggest scrap of his life (Cox *v.* Harding, 11 La. 354). Incidentally we might mention that he seems to have taken up the cudgels for the workingman (Cox *v.* Rich, 24 Kan. 20) but not for the farmer (Cox *v.* Plough, 69 Ind. 311) and that he has not enlisted in the ranks in behalf of Irish freedom (Cox *v.* Ireland, 4 Pac. 457).

NOT RECOMMENDED, HOWEVER, AS A PRECEDENT.—In Maloney *v.* Town of Cohasset, 125 N. E. 563, an action against a municipality for personal injuries, the following letter to a town official was held to be a sufficient notice of the injury within the statutory requirements:

"Cohasset, Dec. 5, 1914.

Mr. Wm. O. Souther:

I have been advised to sue this town of Cohasset for an accident which happened to me, last Saturday afternoon on Pond street sidewalk; here I am and all my business at a rest and myself with my head cut, done up in a bandage and a sprained wrist, and a lovely black eye and my side all bruised.

Mr. Souther, before I make any attempt I have concluded to write you in regards to this accident, which could very easy have been avoided, but was probably overlooked; but at the same time I think your attention should be called to prevent further accidents. Mr. Souther, I would be pleased to hear from you at once and also wishing you and your family a very happy New Year and many of them to come,

Very respectfully,

MARY E. W. MALONEY, Box 396."

THE UNWELCOME FLY.—Not since January, 1917, when the cat broke in, have we been able to announce an addition to the *Obiter Dicta* menagerie of dogs, mules, horses, geese, and the like. But now cometh the fly, and we are compelled to admit him, albeit unwillingly. Says the Supreme Judicial Court of Maine in a very recent case: "It is a matter of common knowledge that the common house fly has come to be regarded by the enlightened understanding, not only as one of the most annoying and repulsive of insects, but one of the most dangerous in its capacity to gather, carry, and disseminate the germs of disease. He is the meanest of all scavengers. He delights in reveling in all kinds of filth; the greater the putrescence the more to his taste. Of every vermin, he above all others is least able to prove an alibi when charged with having been in touch with every kind of corruption, and with having become contaminated with the germs thereof. After free indulgence in the cesspools of disease and filth, he then possesses the further obnoxious attribute of being most agile and persistent in ability to distribute the germs of almost every deadly form of contagion."—See Williams *v.* Sweet, 110 Atl. 316.

Correspondence

JUDICIAL NULLIFICATION.

To the Editor of LAW NOTES.

SIR: Noting your remarks in March number under head of "Judicial Nullification," I venture to call your attention to an article of my own in the proceedings of the American Bar Association for 1883 entitled "How far Questions of Public Policy may enter into Judicial Decision." It may interest you to know that others in the past thought along the same lines. I doubt if there has ever been a period in our political history when such views as you express have not been entertained by thoughtful men.

Galveston, Tex. ROBERT G. STREET.

WHEN DOES A MAIDEN LADY BECOME "OLD"?

To the Editor of LAW NOTES.

SIR: In your June issue I note in describing a case concerning a "maiden lady forty-five years of age," you thereafter describe her as "the old lady." Kindly let me know at which particular age you consider she passed into that class.

Also, would you consider a forty-five-year-old bachelor an old man?

Wausau, Wis. CLAIRE B. BIRD.

[*Note.*—No one of the editorial staff of LAW NOTES is willing to answer this letter for publication. Perhaps some of our readers may be more liberal in expressing their opinions.—*Ed.*]

WHO WAS THE PLAGIARIST?

To the Editor of LAW NOTES.

SIR: Will you kindly give space necessary to settle the question of the genesis of, "I would have a ship of stone with sails of lead, the wrath of God for a gale, and hell for a port."

The *New Republic* in its issue of December 24th, 1919, at page 120, quoted it as from a public address given by Dr. John Wesley Hill, and published in the Sandusky *Daily Register*, and then in its issue of March 10th, 1920, by way of the deadly parallel, gave the impression that General Leonard Wood had "borrowed" from the minister.

But the fact that Emery A. Storrs, a Chicago lawyer of some note, as may be recalled in the course of a speech at Ottawa, Illinois, during the presidential campaign of 1872, said: "Mr. Sumner bring on that tremendous storm that in 1854 swept over this whole country like a whirlwind! Why, he would have been borne on the wings of that wind as easily as ever a feather was floated on the breeze. If he or anybody else had undertaken to stop it, they had better have been in a boat of stone, with sails of lead, and oars of iron, the wrath of God for a gale, and hell for a port," shows that the right to "borrow" was not exclusive in any one.

Albany, N. Y. JOHN T. COOK.

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Trials for Sedition.

A METROPOLITAN journal in a recent editorial points to the conviction of William Brosse Lloyd and his associates as a vindication of the jury system. There are few men who have followed the course of the prosecutions for sedition during the war who think that the jury system needs any vindication in that particular. Those prosecutions left much to be desired in the matter of vindicating the law and protecting the nation, but the fault did not lie with the juries. Humiliating as the fact is to the legal profession, our inability to cope successfully with domestic treason was shown to be due to the weakness of our system of criminal jurisprudence. It was to be expected that the prosecutions for sedition would actually land in prison but a few of the offenders. It has long been known that our criminal law is the laughing stock of the higher class of professional criminals, and that it is so is due to the judges who administer the law and to the lawyers who made it and who practice it. The fault is certainly not with the juries. The criminal courts suffer from themselves and from the men who practice before them. It is not even the law that is so much to blame. The Supreme Court of the United States, it is believed, affirmed every conviction of sedition that came before it for review. But the records of the inferior courts are filled with new trials and reversals, all honest, all conscientious, but most of them the product of the habit of regarding the administration of justice as a technical little game in which the rules are more important than the outcome. Behind each reversal stood a lawyer urging every quibble and technicality at his command to the end that an avowed enemy of his country might go unwhipped of justice. Compare, for example, almost any opinion of the Circuit Court of Appeals in a sedition case with Casement's Case [1917] 1 K. B. 98, Ann. Cas. 1917D 468. The prominence of the accused and the collateral excitement involved in the Irish question made a case more notable than any arising in the United States, but there was in the Court of Appeal no quibbling about indictment, evidence and instructions. Counsel argued the one question arising on the merits—whether a charge of treason could be based on acts outside the realm. The court passed on it and the traitor died on the gallows. Now that the passions of war have subsided and the threat of a foreign foe has passed, it is time for the legal profession to take stock of the situation; to face the bald fact that in the stress of war the courts and the profession itself notably failed. Many thoughtful men have recognized the need for a reorganization of our legal system and a thorough overhauling of our rules of procedure. The dissatisfaction with the result of many criminal prosecutions growing out of the war should not end in mere criticism but should give impetus to constructive reform.

The Pardoning Power.

THE pardoning power as it now exists in the United States is in the main descended directly from the like power of the kings of England and as a result it is something of a misfit amid republican institutions. The concept of the King's mercy which is above the law is natural and logical enough in a monarchy. But the idea of a representative having a delegated power to exercise the mercy of the people will scarcely stand critical examination. Mercy is an emotional quality; it is human and not at all official. If mercy in the true sense is exercised by an American executive it is his own and not that of his constituents. The moment the superlegal entity ruling by divine right is eliminated, the idea of mercy as distinct from law is logically destroyed. With its disappearance there enters, as more appropriate to a republic, a new concept—mercy not distinct from but a part of the law. The considerations which call for its exercise are not emotional but are founded in justice—new evidence exonerating the convict or mitigating his guilt, the unduly harsh working in a particular case of a general rule of law, evidence of such reformation and restitution as shows that the convict will be more useful to society outside prison walls than within them. These comprise, in the main, the only reasons why a pardon should ever be granted, and there is not one of these grounds which the average executive is competent to pass on. Each of them is recognized by the newer ideals of criminology as being of the very essence of the proper administration of the criminal law. Accepting the modern idea that every sentence should be imposed with regard to the facts of the particular offense and the character and antecedents of the particular offender, the agency which imposed the sentence is obviously the only one fitted to pass on its modification. No executive can gain the information necessary to a proper exercise of the pardoning power except by the aid of some investigating agency, and better results could be secured by devolving the matter on a permanent agency—a court equipped as every criminal court should be, with a staff of experts in penology and psychopathy. With this transition of authority the pardon procured by influence and the pardon

granted from mere softheartedness would be relegated to deserved oblivion, and the law would lose the remnants of its ancient cruelty in its new humanitarian functions.

The Proposed Federal Parole Act.

AFTER dragging hopelessly for many years in the rear of all modern thought in matters of criminology, Congress at its last session made some effort toward the enactment of prison reform measures, and a parole and probation bill was in May reported favorably out of the House Committee on Judiciary. While the bill was not reached at that session it probably represents about the form which will be taken by legislation in the near future. It gives to federal judges the power to release on probation, and that provision alone would justify its enactment. In addition it provides an entirely new system of parole to replace the present well-nigh unworkable one. At present an application for the parole of a federal prisoner must go to a board consisting of the warden, the prison physician and the federal superintendent of prisons. This board has advisory power only, its report going to the Attorney General, who after receiving reports from the judge, district attorney, etc., acts on the report. See 8 Fed. Stat. Ann. [2d Ed.] 297. The vice of the system is, of course, that it vests the power to parole in a busy official remote from the scene, acting on a cursory review of written reports. The bill under consideration puts the entire matter in the hands of a parole board for each prison consisting of three citizens not connected with the prison management or the department of justice and residing within fifty miles of the prison. In practice this board may of course be humane or callous, careful or perfunctory, impartial or moved by political considerations. In many instances it will doubtless work badly, but in theory the system seems as good as can be devised to get an intelligent consideration of each case. The possibility of abuse by reason of the personal equation is one that inheres in every form of official action. Perhaps the most objectionable feature of the bill is the provision in the first section confining the right to parole to a convict "whose conduct in prison has been such that he has not lost any of the commutation allowance provided by law for good conduct." The right to apply for parole should of course be limited to convicts whose conduct in prison has been good, but a requirement of perfect conduct is too exacting. In every walk of life our human frailty requires some measure of allowance, and a single breach of discipline should not kill all hope of parole. Moreover a single bad mark against a convict may be due to the hostility of an unfit guard whose action was sustained by the warden in the interests of discipline and should be open to explanation before the parole board in the case of one whose conduct has been in the main exemplary. But whatever its imperfections the bill represents so marked an advance over existing methods that its passage at an early day is to be hoped for.

The Public Defender.

WE commend to the attention of the profession a story by Arthur Train, in a recent issue of the *Saturday Evening Post,* dealing with the fate of a penniless youth, unjustly accused of crime and falling into the hands of a police court shyster. Mr. Train is a former assistant district attorney of New York county, and the author of several books dealing with the administration of the criminal law. The situation presented in the form of fiction he has previously set out in more serious vein (The Prisoner at the Bar, pp. 72-77), but in the more popular form of presentation the facts may appeal to many who have not taken the time to study the subject seriously. They are facts and not the imaginings of a writer of fiction. Citing as authority the reports of commissions from several states the author of the Carnegie Bulletin on "Justice and the Poor," says of the police court shyster: "They know how to strip a prisoner and his relatives of every last cent. For one whose conscience permits him to magnify the crime, the sureness of conviction (unless he is paid to defend), the severity of the judge, and the horrors of prison, the process is simple and produces results. They have procured fees in devious ways, ranging from compelling the mortgage to some shark of all the household goods to forcing the prisoner's wife to sell herself on the streets. That this degradation exists in connection with the administration of criminal justice is common knowledge." How is it possible for such conditions to exist in a civilized community? A clue may be found near the end of Mr. Train's story, narrating how the newspaper account of the exposure of the shyster was cut to a brief paragraph, because it wasn't "news." The public is not interested. Life is too complex and strenuous to pay more than passing attention to something outside the zone of our own activities. Since this evil does exist in our larger cities, and we are unable or unwilling to give it personal attention, the least we can do is to provide a public officer whose business it is to put an end to that particular evil.

As Others See Us.

A WRITER in a recent issue of the Canada *Law Journal* after referring to the procedure on the dismissal of certain appeals by the Supreme Court of Canada says: "Such a course finds its parallel only in the practice which obtains in a few state courts in the United States where counsel, in objecting with reason to a question being put, is met by the summary ruling 'objection overruled.'" The practice is of course so common that it has never occurred to the average American lawyer that there is anything arbitrary or unjustifiable in it, and it comes with something of surprise that it should be so regarded by a lawyer from a jurisdiction where the powers of judges are supposed to be far more extensive than in the United States. The fact seems to be that our English brethren, while they have magnified the prerogatives of the bench, have not done so at the expense of the bar. The discourtesy with which young attorneys are often treated by American trial judges would be apt to be resented in England as an affront to the entire bar. English counsel do not often permit the judge to forget that they are as much ministers of justice as he: also they do not often forget it themselves. Which of these facts is cause and which effect some better informed student of the British system must answer. Viewed from the coign of the public mission of the bar, it is true that if counsel advance reasons they are entitled to have them answered by reason. From this viewpoint the judge is a co-operator with counsel in an effort to do justice in

the case; counsel occupy a quasi-official station which entitles them to more than a mere curt decision. The duty of a trial court to give more than a bare decision differs only in degree from the like duty of an appellate court. In theory the criticism of our procedure seems perfect. But like many another theory its practical operation is not so satisfactory. Every practitioner is acquainted with the argumentative and explanatory judge, before whom trials are protracted by interminable wrangling while the real issues are lost to sight. The fact that English trials proceed with much more free co-operation between court and counsel than in our practice, and at the same time with much greater expedition, is due to conditions of long growth which it is impossible to transplant at once. The American bar has not the dignity or the independence which it should have or which is enjoyed by the profession elsewhere. The statement that an attorney is an officer of the court is rarely made except as a prelude to the imposition of some penalty on him by the court. There should be an advance toward a self-governing bar taking a prominent part in the establishment and interpretation of rules of procedure. But, as a prelude to that change, there must be a growing recognition at the bar that privileges connote duties not only to the client but to the public.

The Great Panacea.

THE bar has been hearing for many years that with the arrival of woman suffrage discriminations against women in the law would be speedily corrected, and doubtless have wondered more than a little just what those discriminations are. Scanning the demands made by the feminist organizations on the recent national political conventions for some reference to a grievance of a legal nature the secret is revealed. The legalized shame put on womankind by tyrant man consists in the fact that an American woman loses her citizenship by marriage to an alien. Of course an alien woman gains American citizenship by marriage to a citizen, but no particular complaint seems to be made of that. It certainly quenches whatever optimism a man may have about the influence of women in politics to see petitions written, gatherings harangued and sex antagonism aroused over a contention which is not only without the slightest merit but which granting its merits is most trivial. In the first place the number of American women who marry aliens is negligible. In the second place an American woman who marries a man so attached to a foreign land that he will not consent to become naturalized morally as well as legally expatriates herself and is entitled to no sympathy whatever. Moreover, on the merits of the question, once divided allegiance in the family is admitted many another division will follow in its train. The view that the family is a social unit is one of peculiar value to woman, and one on which feminine attack is rash and ill advised. However loudly we may prate of absolute equality, the bald fact remains that the disability attendant on maternity places the female at an economic disadvantage and requires for her some measure of economic protection. For that protection she must render some form of recompense, and should be the last to rebel at the doctrine of family headship in the husband which is the best device thus far evolved to afford that protection. There remains also the contingency of war, which alone should be decisive of the question. It is inconsistent with any modern idea of the family that husband and wife should become alien enemies and if there is to be an enforced uniformity of citizenship that of the spouse who is liable to military duty should of course control.

Imitation of Finger Prints.

SOME months ago LAW NOTES commented on the declaration of a well-known expert that finger prints could be counterfeited by mechanical means. The possibility of fastening a crime on an innocent man by such means was entertainingly developed in a recent number of a well-known weekly magazine. But in LAW NOTES for July a handwriting expert and microscopist of national repute declares his disbelief in the power to produce such an imitation. The doctors having thus disagreed it is permissible for a layman to speculate a little. Both Mr. Carlson and Mr. Ewell speak generally of "finger prints," but of course there is a great difference between a print taken under expert supervision and with the use of the most approved materials and a print left accidentally on metal, glass or varnished wood at the scene of a crime. A print of the latter sort is ordinarily partial and imperfect, and frequently blurred or broken by some slight motion at the time it was made. It is inevitably faint, preserved only by dust, moisture or the oil exuded from the skin, and must be carefully brought out by mechanical means to make even microscopic examination feasible. It is on finger prints of this class that reliance is ordinarily placed in criminal cases. For example, the finger print which was in *Parker* v. *Rex,* 14 Com. L. R. 681, said to be an unforgeable signature and held to be of itself sufficient to sustain a conviction, was the print of one finger of the left hand resulting from the casual handling of a bottle in a shop which had been broken into. The prints admitted in a prosecution for murder in *State* v. *Cerciello,* 86 N. J. L. 309, were found on the handle of a hatchet, and they were connected with the accused by comparison with prints accidentally made by him on paper while signing his name. It would seem as a matter of common sense that a person possessed of a genuine finger print might make therefrom a rubber stamp which would produce, not a perfect imitation, but one which under the disadvantageous circumstances already referred to could not be detected. If it is true that a superstition of the infallibility of finger-print evidence has grown up, it is to be hoped in the interest of justice that some competent expert will make a full investigation of the subject and demonstrate just what are the possibilities of fraud or error. The legal profession is now deeply indebted to the really scientific expert in handwriting, microscopy and kindred sciences, and this debt could be greatly increased by research along the line suggested.

Alas, Poor Yorick!

IN the July issue of the Virginia *Law Register* the editor lays a wreath of eloquence on the coffin of old Col. State Rights. "We shall," he concludes, "remain that antiquated fossil a citizen of Virginia forced into citizenship of the United States by the Fourteenth Amendment and loyal to the present without ever forgetting to be loyal to the past." Our sympathy for the

mourner is, however, somewhat alleviated by doubt as to the existence of the corpse. The prohibition amendment, referred to as having dealt a mortal blow to state sovereignty, owes its existence to the fact that it was ratified by the legislatures of all the states which were of old most insistent on state rights. But, says this modern Mark Antony, there is the decision sustaining the migratory bird treaty. "See what a rent the envious Casca made." That decision amounts to no more than that the federal government, which must stand behind its treaties even to the point of war, has the power to enforce them on its citizens. But no longer can the scion of old Virginia gather his dusky retainers about him and go forth to the slaughter of meadow larks and robins in their annual pilgrimage across the Old Dominion. Of course the editor of the *Review* would do nothing of the kind, but it irks him to have Congress reinforce the dictates of his own conscience. Truly we have fallen on evil days. But why in the midst of this lamentation is there no word of thankfulness for the decision which nullified the child labor law? The inroads which have been made on the extreme doctrine of state independence, other than those resulting from a constitutional amendment, are the inevitable result of the growth and development of the country. The increasing complexity of commercial organization and the invention of means of communication which have almost obliterated time and space have made national concerns of many things which once were purely local, and the law has to some extent kept pace with the progress of civilization. But there never has been a time in our constitutional history when the federal supreme court gave so broad a scope as is now allowed to the police power of the states, as witness for example the decision recently commented on in LAW NOTES, sustaining the semi-socialistic legislation of North Dakota. The old tradition of a state sovereignty which permitted a state to do what injury it would to the inhabitants of other states has passed; the United States is a nation and not a loosely bound federation of petty sovereigns. But the right of each state to regulate its internal affairs, to make its own experiments in governmental and industrial polity, was never so fully conceded as now. A better and broader theory of state rights is emerging from the decisions of the past decade, in the development of which the legal profession can find full scope for its energies. Let us be children of the dawn and not elders of the twilight.

The Perjured Witness.

THE man of whom it was said that "faith unfaithful made him falsely true" had little advantage in point of complex perfidy over the witness whose conduct gave rise to the question passed on in the recent case of *Fried* v. *New York, etc., R. Co.,* 165 N. Y. Supp. 495. The action was for personal injuries, and the plaintiff had a verdict for $75,000, which was set aside on an affidavit of the principal witness for the plaintiff that he had committed perjury on the subornation of the plaintiff's attorney. On behalf of the plaintiff it was however shown that the witness was then under the influence of the representatives of the defendant company and had left the state, and that the defendant had paid considerable sums to the wife of the witness. On this showing the court made it a condition of the grant of a new trial that the testimony given by the witness on the first trial might be read as his testimony on the second trial. This order was affirmed in the case cited. A dissenting judge said: "Something so strange as that seldom, if ever, has been seen in a court of justice—a man testifying as a twofold witness at the same trial, now in his proper person, now through former declarations; his word set against his word; his oath disputing and dishonoring his oath; and thereupon a jury, by some mystery of fathoming, selecting the truth of which it deems the duplex witness conscious. It even surpasses a paradox. I am opposed to such process for racking off perjuries and ascribing to the filtrate probative value, and above all to entering on the record that it is the man's testimony, although it must be known, if he dispute it, that it is not. A man's shadow may be in obscure semblance of himself; but what a man, not a party, has uttered in the past, should not be recorded as something that he is presently saying, while, under a new oath taken, he then and there brands it as infamous." Graphic as is this portrayal of the situation, the common sense view seems to be that of the majority of the court. The witness was of course venal and perjured; there was evidence that he had been tampered with by each side in turn. Under those circumstances the only fair thing to do was to put the whole matter before the jury and let it decide when, if ever, the witness told the truth and what weight should attach to his several statements as to the issues in the case. The practical result of a contrary holding would be to give all the advantage to the last party to gain control over the purchasable witness. It is a pity, however, that the opinion did not conclude with an order for a searching inquiry which would land the persons responsible for this unsavory transaction in prison for contempt.

Publication of Legal Notices.

THERE has recently been sustained in North Dakota by an evenly divided court (see *Daly* v. *Beery,* 178 N. W. 104) a statute requiring the designation by a state commission of an official paper in each county of the state having the sole right to publish legal notices in that county. One of the judges deeming the act to be invalid placed his decision on the grounds that its title was insufficient and its provisions were changed during passage, agreeing that it violated no provision of the federal constitution. In support of the act it was said, after stating the terms of the previous law: "The result was, as we all know, that in the publication of many legal notices, such as mortgage foreclosures, summons, etc., publication thereof was, designedly, often made in some newspaper in a distant part of the county from where the person entitled to have notice resided. This has often resulted in great loss of property and property rights to the debtor or the one entitled to receive such notice. To have one official newspaper in the county in which all legal and official publications must be made is, to a large extent, to eliminate the evil and injustice which too often resulted from permitting legal publications to be made in any newspaper in the county. For this reason chapter 188 tends to preserve and protect property and property rights, and prevents them from being invaded or taken away without notice or due process of law." The evils thus referred to are familiar to every

practitioner, and the measure in question seems a sound one. It is of course possible that the designation will in some instances be induced by considerations of politics or other improper influence, but so long as the charges are properly regulated by law the only evil effect will be the loss of some small revenue by other publishers, which is a matter of little importance compared with the benefit in the saving of rights now frequently cut off by publication of notice in some obscure journal remote from the residence of the person to be charged thereby."

THE LEVER ACT—AND AFTERWARDS

AMONG the numerous provisions of the so-called "Lever Act," the one of greatest present importance is that contained in section 4 of the original act (Fed. Stat. Ann. 1918 Supp. p. 183) and repeated in section 2 of the amendment of October 22, 1919 (Fed. Stat. Ann. Pamph. Supp. No. 21, p. 12) making it a criminal offense to "make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries."

The cases passing on this provision, while in conflict as to whether it is sufficiently definite to be effective, are agreed that a regulation against profiteering in necessaries is within the war power of Congress, and that the act is in force during the purely technical state of war now existing. *U. S.* v. *Spokane Dry Goods Co.,* 264 Fed. 209; *Weed* v. *Lockwood,* 264 Fed. 453; *U. S.* v. *Rosenblum,* 264 Fed. 578; *U. S.* v. *Oglesby Grocery Co.,* 264 Fed. 691; *U. S.* v. *Swedlow,* 264 Fed. 1016. As was said in *U. S.* v. *Oglesby Grocery Co.,* supra: "The war powers of Congress must be held to be equal to whatever is necessary to successfully prosecute a war and maintain the public safety. In modern wars, not only armies and peoples, but industries, must be mobilized. Every citizen and every dollar must fight. Economic control is as important as military. Disaster and discontent at home are as fundamental and vital as in the field. The powers of Congress, in time of war, are comparable to the police powers of the states in time of peace, and equally incapable of fixed limits. No doubt is entertained of the original power to make this legislation. It is contended that the war power has expired, and this exercise of it has fallen by the cessation of war. An armistice was signed with Germany on November 11, 1918, and active fighting then ceased. The original act says that its provisions 'shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President.' No such proclamation has been made by the President. Instead numerous proclamations have been made by him since the armistice in enforcement of this act. The Congress, itself, on October 22, 1919, amended the very section of it here in issue, and on December 31, 1919, enacted that its provisions as to domestic sugar should continue until June 30, 1920, and as to other sugar until December 31, 1920. The Congress and the President are the constitutional judges of states of war and peace and their decisions should be abided in patience by people and courts. No such abuse of constitutional power or neglect of constitutional duty is here apparent as to require interference by the courts. *Hamilton* v. *Kentucky Distilleries, etc., Co. et al.* (October Term, 1919) 251 U. S. 146, 40 S. Ct. 106, 64 U. S. (L. ed.)——."

The real question as to the validity of the act is whether the provision quoted is sufficiently definite to create an offense; whether a prohibition of "unjust or unreasonable" charges creates any standard which the courts can apply. In two cases the provision has been held to be ineffective on that ground. *U. S.* v. *Cohen Grocer Co.,* 264 Fed. 218; *Detroit Creamery Co.* v. *Kinnane,* 264 Fed. 845. In the case last cited it was said: "What is an unjust rate or an unreasonable charge? In determining this question, what elements are to be taken into consideration? What is the test, or standard, or basis which is to be used in attempting to ascertain whether this statute has been violated? The statute itself furnishes no assistance in the way of answering this question. Is the reasonableness or justice of a rate to be determined by the amount of profit derived therefrom? If so, what percentage of profit from the business of selling a certain article makes the rate or charge in handling or dealing in that article unreasonable, and therefore unlawful and criminal? If such profit is derived from a business devoted to the sale of several kinds of articles, how is the portion of such profit properly chargeable to each of such articles to be determined, so that the person engaging in such business may know whether or not he is a criminal? What elements enter into the question whether any particular charge is just or unjust, reasonable or unreasonable? What relation to the reasonableness of a rate have the cost of labor, the cost of machinery and of raw material, the cost of overhead charges, and the other expenses of production? How is the amount properly chargeable to these expenses to be fixed and ascertained? To what extent are differences in market conditions in different places to be considered? Is the existence or absence of competition to be taken into account? Is any allowance to be made for losses and misfortunes which affect costs and profits? To whom must a rate or charge be unjust, to be 'unjust' within the meaning of this statute? Is it the effect which a rate or charge has upon the seller, or which it has on the purchaser, which renders it reasonable or unreasonable? These and other questions which readily suggest themselves naturally and perhaps necessarily enter into a consideration of the nature of the proper test or standard by which the criminality of any act under this statute must be determined. To the statute itself we look in vain for answers to any of such questions. It furnishes no means for the guidance of courts, juries, or defendants in determining when or how the statute has been violated. No standard or test of guilt has been fixed. We are left to the uncontrolled and necessarily conjectural judgment, or rather conclusion, of each particular jury, or perhaps court, before which the accused in any given case may be on trial for his liberty. Making, as it does, the question of guilt dependent upon this mere conclusion or opinion of the court or jury as to whether the rate or charge involved be just or unjust, reasonable or unreasonable, I cannot avoid the conclusion that this statute is too vague, indefinite, and uncertain to satisfy constitutional requirements or to constitute due process of law."

The argument thus advanced seems weak and hypercritical. As was said by Mr. Justice Holmes in *Nash* v. *U. S.* 229 U. S. 373, 33 S. Ct. 780, 57 U. S. (L. ed.) 1232: "The law is full of instances where a man's fate depends on his estimating rightly, that is as the jury subsequently estimates it, some matter of degree." Reasonable restraint of trade, reasonable ground for believing in danger from an assault, reasonable force in the resistance to a trespass—the law is filled with instances where no more definite criterion is offered to the citizen and he must decide at his peril. A parent may correct a child "reasonably"; an officer may use "reasonable" force in making an arrest; and each is liable if a jury disagrees with him on the issue of reasonableness. So it is not surprising that the weight of authority is to the effect that the provision in question is sufficiently definite to sustain an indictment. See *Weed* v. *Lockwood,* supra; *U. S.* v. *Rosenblum,* supra; *U. S.* v. *Oglesby Grocery Co.,* supra. The interpretation of the act was well stated in the Oglesby Grocery case as follows: "The words used by Congress in reference to a well-established course of business fairly indicate the usual and established scale of charges and prices in peace times as a basis, coupled with some flexibility in view of changing conditions. The statute may be construed to forbid, in time of war, any departure from the usual and established scale of charges and prices in time of peace, which is not justified by some special circumstance of the commodity or dealer. Evidently increased costs of production and transportation would justify a corresponding increase in price, and necessarily increased expenses in the conduct of business would justify an increased charge for handling; but the existence and sufficiency of the justification is left, in each case, to the courts. This does not differ, in substance, from the situation arising under the Georgia homicide statutes which forbid generally the killing of a human being, but admit of justifications and mitigations which are measured finally by the opinion of juries. The dealer knows what was, in time of peace, usual and customary. Within that limit he is safe. He judges of the justification for departure from it at his own risk."

So in the Rosenblum case it was said: "Obviously, it would be impossible for Congress to fix any definite standard, any fixed rate, as the measure for determining an unjust or unreasonable rate or charge. This because profits must always depend upon a number of varying elements, including time, place, and circumstance. A fixed standard in practical operation would necessarily prove unjust and unreasonable in the extreme. The words used by Congress were of common use and of well-known meaning. The merchant in passing upon the question of what is an unjust and unreasonable rate or charge deals with the actual, not with an imaginary condition other than the facts. Since, as the Supreme Court has said, 'between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust,' the only alternative, if profiteering is to be lawfully condemned, was to place the responsibility upon the dealer. If in doubt, he should keep on the safe side. If for greater gain he takes the risk of violating the statute, he cannot complain if the jury denounces his act as unlawful." A closely analogous authority is *Sears, etc., Co.* v. *Federal Trade Commission,* 258 Fed. 307, 169 C. C. A. 323, 6 A. L. R. 358, wherein in sustaining the authority given to the commission with respect to "unfair methods of competition" the court pointed out that if the expression "unfair methods of competition" was too vague for use, innumerable statutes would fall under the same condemnation; such, for instance, as those which predicate rights and prohibitions on "unsound mind," "undue influence," "unfair use," "unfit for cultivation," "unreasonable rate," "unjust discrimination," "rebates or concessions," "schemes to defraud," and the like.

Another ground of attack has been urged in a single case. The provision against the hoarding of necessaries sustained in *Merritt* v. *U. S.,* 264 Fed. 870, and *U. S.* v. *Swedlow,* 264 Fed. 1016, was attacked in the latter case as class legislation because of the proviso that a withholding by farmers and associations of farmers was not within the act. It is a charitable man who can see in that act anything except a cowardly truckling to a greedy class of profiteers merely because they are numerous, but there is of course so clear a line of distinction that the classification is legally justifiable.

The act seems, therefore, adequate to check profiteering so far as legal prohibition can accomplish that result, and had it been enforced with a tenth of the vigor displayed in the enforcement of the Volstead Act it might have resulted in some considerable relief to the consumer. The evidence in the few reported cases showed flagrant instances of profiteering. In *U. S.* v. *Spokane Dry Goods Co.,* 264 Fed. 209, for example, the court said: "The aggregate cost price of the articles enumerated in the 76 counts of the indictment against the Spokane Dry Goods Company is $836.26, and the aggregate selling price $1823.45, or an average profit of 118 per cent, based on the cost price. The aggregate cost price of the articles enumerated in the 66 counts against the Hill Bros. Shoe Company is $273.52, and the aggregate selling price $650.50, or an average profit of 138 per cent, based on the cost price. The aggregate cost price of the articles embraced in the 70 counts of the indictment against the Culbertson-Grote-Rankin Company is $492.11, and the aggregate selling price $1139.81, or an average profit of 131 per cent, based on the cost price. That such prices or profits are extortionate no one will deny. Of course, if confined to the three stores in question, or to only a few stores, the people have a remedy in their own hands by withholding their patronage, and if they fail to make use of that remedy to the fullest extent they alone are to blame. On the other hand, if these conditions are general, and to continue indefinitely, the people are without remedy, except through governmental action, and I have little doubt that all the powers of government, both state and federal, will grapple with the evil, and that a remedy will be found well within constitutional limitations. It is to be hoped that such recourse will not be found necessary, as all history shows that the course of legislation, like the sum of human existence, is made up of extremes rather than of means, and if repressive measures are resorted to the day of sunshine for the transgressors may be turned into days of gloom, if not despair."

But whatever of virtue or possibilities the act possesses is of short duration. The present technical state of war must end at the farthest within a year, and no court has

sought to uphold the act except as an exercise of the war power. But profiteering and the economic situation which makes it possible are not so short lived, and even the small measure of relief which the Lever Act has afforded will be missed when it is taken away. Some form of price regulation in necessaries seems quite inevitable. Not only is the much vaunted law of supply and demand practically nullified by combinations, but as a law it is wholly unethical. A "heathen" philosopher once maintained that it was unethical for a shipowner bringing a cargo of grain into a famine stricken port to exact an excessive price or conceal the fact that other ships were on their way, but three thousand years has not brought the world of commerce into accord with his viewpoint. As applied to necessaries there must be moral restraint or legal restraint. It is desirable that the restraint should be to the greatest possible extent moral, for if we enter the field of legal regulation we must face the fact that there is no full relief short of socialism. Backed by the war power of the government the Lever Act has afforded merely a little alleviation. British regulations, enacted by an unrestrained Parliament, produced no greater result, the *Law Times* (London) saying recently: "That the profiteering legislation of last year has proved a hopeless failure is clear beyond a doubt. . . . The true offenders are still untouched and huge profits continue to be extracted from the pockets of the helpless public." As a measure embodying the minimum of legal and the maximum of moral restraint, it is suggested that full provision be made for giving publicity to profits in every department of the business dealing in necessaries. Every retailer dealing in food, clothing, coal or the like should be compelled to give with each purchase a ticket showing the cost of the article sold and the price charged. Wholesalers should be compelled to give to retail customers a price list showing cost and wholesale selling price. This much of legal regulation should be so framed as to have "teeth." Failure to make the required statement or making an untruthful statement should be punishable by a long term of imprisonment without the alternative of a fine, coupled with a heavy forfeiture to go to the informer. With full information thus secured, the rest could be left to moral restraint. The man who exacts an excessive profit would be subject to no legal penalty. No legislature would assume to say at what price he shall part with what he has lawfully acquired. His liberty would be in no manner interfered with by law. But while he exercised that liberty every veil of hypocrisy and deceit would be stripped from him. He would be compelled to stand before his fellow townsmen for just what he was. Some there are, of course, so shameless that such an exposure would not move them so long as they got the money, but there are enough who would value the respect of their fellow men above excessive profits that competition would bring the others to fair prices.

One thing is certain, the American people will not continue indefinitely to suffer from profiteering. In proportion as they have been long suffering they will be drastic when their patience is exhausted. We do not want to repeat with our merchants the history of our railroads. They became corporate brigands, preying on the people at will, until the reaction produced regulation which drove them to the verge of bankruptcy and seriously impaired the commercial efficiency of our nation. It behooves sober-minded men, both dealers and consumers, to co-operate in a solution which will leave individual liberty unimpaired, lest the pinch of hunger brings on us that extreme radicalism which carries ruin in its train.

W. A. S.

"ACTUAL SERVICE" WITHIN MEANING OF LAW RELATING TO WILLS OF SOLDIERS AND SAILORS.

Of the many novel and interesting legal questions arising out of the late war which the profession has been called on or will be called on to solve, not the least is that relating to the rights and privileges of soldiers and sailors with respect to wills. While apparently no American case involving this question has yet reached the courts of record, when we consider the millions that Uncle Sam sent abroad and the additional millions called to the colors and in training in camps in this country we may confidently expect that the courts will soon be called on to construe and effectuate the wishes of our service men as to the disposition of their goods expressed in the informal manner allowed soldiers and sailors. Of the various phases of this question, that relating to what constitutes actual military service as a prerequisite to the making of such a will will doubtless furnish the chief bone of contention, and it is with this aspect of the question that this article deals. As has been said, no American case in point arising out of the late war has yet been reported, but the English and Canadian reports afford us numerous precedents, and as it was through the common law that the doctrine was brought to this country a review of those cases should be of help in determining the present status of the law.

By the ancient common law of England, an oral will was as valid in respect to personal estate as a written instrument. But as the art of writing became more common, the opportunities for fraud in connection with the establishment of oral wills caused them to be looked on with disfavor, and the original Statute of Frauds (29 Car. II, ch. 3) surrounded the making and establishment of oral or nuncupative wills with many restrictions. That statute, however, made the following exception in favor of soldiers and sailors: "Provided always that notwithstanding this act, any soldier being in actual military service or any mariner or seaman being at sea, may dispose of his movables, wages, and personal estate as he or they might have done before the making of this act." The same exception was preserved in the English Statute of Wills and is in force at the present time in most jurisdictions. The exemptions accorded the military classes from the ordinary rules with respect to wills may be said to have had its beginning in the early civil law. The Roman soldier was indulged with unusual rights and immunities in making his will, but ultimately the privilege was limited to soldiers on an expedition or engaged in battle or siege. This condition may be said to be the foundation of the various modern statutes, practically all of which provide that in order that a soldier may invoke their provisions, he must be "in actual service," or as limited by the code of Justinian "in expeditione," which terms have been declared to be synonymous.

As has been said the principal question arising in con-

nection with soldiers' and sailors' wills is whether the conditions exist under which the law permits such wills to be made. In other words what is meant by a soldier being in "actual service" or "actual military service." In common parlance a soldier is understood to be in actual military service whether he be in camp, garrison, hospital, at home on furlough, on the march or engaged in actual battle. Yet these various military positions have been very differently viewed by the courts in regard to the power of making wills. As an aid to the solution of this question we naturally turn first to the reason for the law. It is at once apparent that the underlying reason for the privilege extended to the military classes in respect to wills is their lack of opportunity, due to the hazardous nature of their employment, to observe the formalities which are usually considered as requisite to a testamentary disposition of property. As was said in *Hubbard* v. *Hubbard,* 12 Barb. (N. Y.) 148: "The imminent dangers, the diseases, disasters, and sudden death, which constantly beset soldiers and sailors; the utter inability, oftentimes, to find the time or the means to make a deliberate and written testamentary disposition of their effects, seem, at all times, to have made them a proper exception to the operation of a rule, which the wisdom of later times has found is expedient, if not absolutely obligatory, to apply to all others."

While the courts are not agreed in all cases as to just exactly what does constitute actual service there are some elements with respect to which there is no dispute. Thus it is generally stated that in order that a soldier may invoke the privilege of making a will without the usual formalities his country must be at war. Thus in an American case arising out of the civil war it was said: "The term service in its restricted sense is the exercise of military functions in the enemy's country in the time of war, or the exercise of military functions in the soldier's own state or country in case of insurrection or invasion, and in this sense the words of the statute, 'actual military service,' should be understood." *Van Deuzer* v. *Gordon's Estate,* 39 Vt. 108. However, even the criterion that a state of war must be in existence does not seem to be absolute. In a recent English case, *Anderson* v. *Downes,* 885 L. J. P. 21 (p. 49), 114 L. T. N. S. 519, 60 Sol. J. 254, 32 Times L. Rep. 242, it appeared that a member of a local ambulance corps was warned for service on the 2nd of August, 1914, and on the following day he wrote out an unattested paper leaving all his possessions to his fiancée. War with Germany was declared on the 4th of August and he was drowned at sea on the 30th of October. While the precise question was not decided, the case going off on the construction of the English Wills Act providing for the disposition of his property by "any mariner or seaman being at sea," the court took occasion to say: "In order to come within the exceptions of this section, a soldier must be in actual military service, and if the deceased had been a soldier, or if those words applied to sailors or mariners, it might have been argued successfully that he came within the exceptions."

The chief difficulty arises, however, in cases where, although the country is in a state of war, the soldier or sailor is not at the moment engaged in actual military duties. Of course there is no question in cases where he is engaged in actual combat, but to limit the exceptions made in his favor to such cases would be practically to destroy the very object sought to be accomplished. Thus, as was said in *Leathers* v. *Greenacre,* 53 Me. 561: "The term expedition is not to be confined to that movement of the troops which immediately precedes the actual conflict and shock of battle. To limit the soldier's privilege to those excursions from camps or quarters in the enemy's country which are designed to bring on an immediate engagement, would be to defeat it for the most part, except as to mere nuncupations, the proof of which resting in the breasts of those who are similarly exposed may never be made available to the soldier's friends." The true test as to whether a soldier is engaged in actual military service has been said to be the doing of something, the taking of some step, at the time when he made his will to bring himself within the words of the statute. *Hiscock's Goods,* 84 L. T. N. S. 61, 70 L. J. P. 22, where it was said: "For a man to be 'in actual military service,' it is necessary, first, that there should be a state of war in existence; and, secondly, that the man should be for that purpose in some place where otherwise he would not have been. It would be going too far to say that he was in actual military service as soon as he had received his orders. But as soon as he had done anything under those orders, actual military service might be said to have commenced. That is the test which commends itself to me. In holding thus I am only following the case of *Bowles* v. *Jackson* [1 Spinks 294] where the real question raised was whether the soldier had taken any step in consequence of his orders. As soon as the first step has been taken, although the step may be a small one, a man is in actual military service." The same judge in a later case, *Gattward* v. *Knee,* 71 L. J. P. 34, 86 L. T. N. S. 119, 18 Times L. Rep. 163, 4 British Rul. Cas. 895, applying this test to a member of a regiment which had been ordered to mobilize for active service, said: "I have no doubt myself that mobilization, giving to that word the effect which I understand it to carry, may be fairly taken as a commencement of that which in Roman law was expressed by the words, *in expeditione.* These words meant something more than the English words, 'on an expedition,' because it is quite clear that when a force begins in a sense to engage in or to enter upon active service, it would be said to be *in expeditione.* I thought, when deciding the case cited, and I still think, that it is a fair test to ask whether or not the person whose testamentary dispositions are in question has done anything; but I am of opinion that if the order for mobilization has been received, although the man himself may have done nothing under it, yet that order so alters his position as practically to place him *in expeditione.* Such an order goes beyond a mere warning. I do not think a mere warning for active service would be sufficient; but when a force is mobilized I understand this to be that it is placed under military orders with a view to some step being taken forthwith for active service. That is what happened in the present instance—within nine days after the order to mobilize was given the force embarked for South Africa." A somewhat contrary view was taken in an American case, *Leathers* v. *Greenacre,* 53 Me. 561, though the English view would certainly seem to commend itself to patriotic citizens. In the Maine case the court said: "Doubtless if Leathers had written this letter after he had been mustered into the service of the United States, but while he remained in barracks at

Augusta, or while thus quartered at any permanent military depot or station in one of the loyal States not exposed to the incursions of the enemy, before he had crossed over into Virginia with his regiment to take part in the hostilities existing there, and before he had begun to move under military orders against the foe, we should feel bound to say that this was no valid will and that it is not entitled to probate as such. But having marched into the enemy's country, from which he never returned, being encamped among a hostile population, and acting in conjunction with soldiers who were confronted by the rebel army, although he was in winter quarters, and not at the time of writing occupied with any present movement of the troops, but was apparently on some service detached from his own regiment, we cannot say that he was not a soldier *in actual service, engaged in the great expedition* which cost so many lives." In another American case it was held that a soldier home on furlough could not make a valid oral will. *Smith's Will,* 6 Phila. (Pa.) 104. The court in that case, basing its opinion on the ground that there was no want of opportunity to make a regular will, said: "As we conceive, it may more properly be defined to be those who are engaged *in the active duties of the field,* whether it be on the march, in the temporary camp, the battle, siege, or bivouac, but never can apply to the soldier who is in regular quarters or at his customary home on leave of absence. In that case the reason of the exception ceases, and consequently the law does not apply. When on active duty, he cannot have the aid of counsel and direction; when at home he can, whether he be a soldier or civilian. That which was intended as a privilege for the soldier arising from necessity, would, if carried to extremes, be found to be anything but a benefit. The most solemnly executed wills might be utterly revoked and destroyed, and new ones set up in their stead by mere word of mouth, depending on the frail testimony of slippery memory. A loose word spoken to a comrade, vaguely understood, or badly remembered, might divert personal effects to a large amount from their legal disposition, and thus perhaps set up at a distant period of time. For it must be borne in mind, that the statute of Charles II and our own act of Assembly are not guarded as was the code of Justinian, or the most of those of modern Europe. They confined this legal disposition of the soldier's intention to the period of three months from the time of making it, and if it be continued longer it must be repeated or renewed. Ours is unlimited in time and indefinite in amount, provided it is confined to personal estate. Such declarations, unless subsequently revoked, might be set up as a will on the death of the soldier, although he long since had been discharged from the service and returned to his home; for if once valid, it would so remain until altered or annulled. This dangerous power makes it necessary to give the statute a very strict construction, and confine it within the limits to which it was intended to apply." A somewhat similar case arose in England during the recent war and it was there held that though on leave at the time of making her will an army nurse was a soldier in "actual military service" within the provisions of the Wills Act. *In re Stanley's Goods,* 85 L. T. P. 222, p. 192, 114 L. T. N. S. 1182, 60 Sol. J. 604, 32 Times L. Rep. 643. However it further appeared in that case that the nurse was under orders to embark on a ship in a short time and it was apparently on this ground that the decision was based, the court saying: "As the deceased, at the time she wrote the letter of the 8th Oct., was under orders to embark, I think that brings her within the section. The Act of Parliament refers to 'any soldier being in actual military service' and to 'any mariner or seaman being at sea.' I am not sure in which category the deceased should be regarded. I do not think that it very much matters. She was under contract with the War Department, and was employed by that department to serve at sea. I shall treat her as a 'soldier being in actual military service.'"

What shall be considered an expedition or actual service has been said to be in some measure a question of fact depending on the circumstances of the particular case. According to the early English cases and the American cases arising out of the civil war the term was given a rather strict construction, but the tendency of the later English cases is toward a more liberal interpretation. Thus it has been held that a soldier under orders to report to a regiment about to sail for South Africa in anticipation of the Boer war was engaged in actual military service. *Gordon's Goods,* 21 Times L. Rep. 184. The same was held to be true of a soldier in barracks on the day of sailing for the Boer war. *Stafford* v. *Stafford,* 19 Times L. Rep. 185. In *Hiscock's Goods,* 70 L. J. P. 22, 84 L. T. N. S. 61, 17 Times L. Rep. 110, it was held that a volunteer who had gone into barracks during a war preparatory to joining the field forces was in actual service. In *Limond* v. *Cunliffe,* [1915] 2 Ch. 240, 84 L. J. Ch. 833, 59 Sol. J. 613, it was held that an army officer, who at the conclusion of a military campaign against a native tribe on the frontier of India remained as a member of a military escort of a party engaged in the delimitation of the frontier, was in actual military service.

With respect to nuncupative wills it would seem that the soldier has the advantage of the sailor, for the various statutes generally provide that sailors' wills must be made while the testator is "at sea," a term less elastic than "actual service." However, the tendency is to construe the phrase with some latitude though the courts vary radically in their interpretation of it. In a recent English case, *Anderson* v. *Downes,* 85 L. J. P. 21, 114 L. T. N. S. 519, 60 Sol. J. 254, 32 Times L. Rep. 248, the court, adopting the strict construction, held that a sailor who made an informal will after being warned for active service, but before actual embarkation, was not "at sea" within the meaning of the statute. The court said, however: "If Anderson had been at sea at any time prior to the day on which he wrote out the document in question it might have been argued with some chance of success that he came within the section." It is difficult, however, to see how prior actual sea service could have made any difference when the decision was based on a literal construction of the term "at sea." An early American case, *Guin's Will,* Tuck. (N. Y.) 44, goes even further in its strict construction of the term. In that case it was held that a sailor on board a ship in the Mississippi river lying above the ebb and flow of the tide was not "at sea."

However, the courts as a rule have been more liberal in their interpretation of the term. Thus it has been held that a sailor would be considered to be "at sea" while on board his ship lying at a dock, *Ex p. Thompson,* 4 Bradf. (N. Y.) 154; or in a harbor preparatory to sailing, *Pat-*

terson's Goods, 79 L. T. N. S. 123. And it has been said that the cases appear to go to the length of holding that when a person has joined a vessel and has commenced a voyage in it, a will made in the course of such voyage will be within the meaning of the statute, although such will is in fact made on shore. *McMurdo's Goods,* L. R. 1 P. & D. 540, 37 L. J. P. 14, 17 L. T. N. S. 393, 16 W. R. 283. The injustice done the sailor by the English Wills Act of 1837 has been recognized by Parliament, and by section 2 of the act of 1918 the seaman is put in the same position as a soldier with respect to the making of a will.

What view the American courts will take in cases arising from the late war cannot be said, but it is reasonable to believe that they will follow the more liberal rule adopted by the modern English cases rather than the strict construction applied in the cases following the civil war.

M. BRONAUGH.

A MAP WITH FORGED INDORSEMENTS.

ROBERT LOUIS STEVENSON has somewhere declared that a map is an inexhaustible fund of interest for any man with eyes to see and twopence worth of imagination to understand with; and, as everyone knows, it was around a purely artificial map with harbors that pleased him "like sonnets" that he wove that wonderful story that has entranced multitudes of young and old alike—his Treasure Island. Only the other day, too, Mr. W. P. James in a new book has with intimate knowledge and enthusiasm chanted afresh the praises of the atlas, and has shown how the most stay-at-home person can with the aid of a map, plus imagination, journey pleasantly and inexpensively without stirring from his easy chair. Lawyers, as such, do not usually look at a map through rose-colored spectacles. To them its main interest is whether it is admissible or inadmissible in evidence—a matter of importance, no doubt, but not one charged with romance. Even, however, regarded from this prosaic aspect, a map has before now been invested in litigation with an extraordinary importance. This happened in a famous Scottish trial nearly eighty years ago, in which the resources of scholarship and exact technical knowledge brought to nought the ingenious devices manufactured to bolster up the claim which had been put forward to the Earldom of Stirling. The whole story of the attempt of Alexander Humphreys, otherwise Alexander, claiming the title of Earl of Stirling, with great estates in Scotland and British North America, and the right to create Nova Scotia baronets, is one of the most remarkable ever unfolded in a court of law. The claimant sought to establish his claim as the representative of the Stirling family in a civil action, and, having failed to satisfy Lord Cockburn, the judge who tried the case, of his descent, apparently set to work afresh to secure evidence that would supply the missing links in the chain. Through his wife he became acquainted with a Mademoiselle le Normand, of Paris, who, as she said, having facilities for acquiring information from public offices, promised her assistance, and in 1837 told the claimant that she had received a document which might be of importance to him. Accordingly she produced and handed to him, amongst other things, an old map of Canada with a number of inscriptions, some written and others pasted on the back, relating to his family and its American possessions. This was the map which played so important a rôle in the subsequent trial for forgery. It bore the printed heading: "Carte du Canada ou de la Nouvelle France . . . Par Guillaume de l'Isle de l'Academie Royale des Sciences et Premier Géographe du Roy. A Paris . . . avec Privilége de sa Maj pour 20 ans 1703." On the back, among other inscriptions was one dated Lyons, the 4th Aug. 1706, by a M. Mallet (of whom nothing was ever heard before), who purported to state that while in Acadia [Nova Scotia] he had seen an ancient charter, dated the 7th Dec. 1639, granted by Charles I to William, Earl of Stirling, of extensive tracts of country in America. Other inscriptions, also written on the back, purported to be by Esprit Flechier, Bishop of Nismes, and Fénélon, Archbishop of Cambray, each dated 1707; others again, some written on the map, others pasted on, purported to trace the claimant's descent from the Earl of Stirling. These inscriptions, with various other documents, were alleged by the Crown to be forgeries, and the claimant was in due course put upon his trial charged with that offense. Whoever the forger actually was, he showed extraordinary ingenuity in his plans, but, like many another skilful criminal, he overreached himself, and the whole structure of chicane and fraud came toppling to the ground. It was proved that someone, thought to be an Englishman, was during the winter 1836-7 frequently at the shop of a Paris print and map seller inquiring for old maps of Canada, and particularly for one with the date 1703, and that after some trouble this map seller was able to procure one similar to the one produced at the trial. There were no writings then on the back of it. It was then shown by the evidence of several official persons from France that the cartographer Guillaume de l'Isle, whose name appeared on the map, was in 1703 only "Géographe," and was not appointed "Premier Géographe du Roy" till the 24th Aug. 1718, so that the map in question could not have come into existence till after the date. But it may be objected, the copy before the court bore the date 1703. That date, it was explained, was the date of the original publication by de l'Isle, and it was retained on all the copies, whenever published, because it was the date from which the privilege originally granted was to run. The copyright was for twenty years from the date of first publication. It being thus established that 1718 at the earliest, and not 1703, was the date of the map relied upon by the claimant, it became easy to dispose of the authenticity of the alleged inscriptions by the Bishop of Nismes and Archbishop Fénélon, for both were dead before 1718—the former having died in 1711 and the latter in 1715. To add to this discomfiture of the prisoner's claims, a dramatic incident happened during the trial. Owing, as was supposed, to the heat of the court, one of the corners of the paper on which a certain inscription on the map was written curled up slightly, enough, however, to disclose the existence of another writing underneath. The attention of the Solicitor-General being called to this fact, he at once made an application to the court for its permission to Mr. Lizars, an eminent engraver who was present, to detach from the map the inscription which was pasted thereon. Permission was granted, and Mr. Lizars, having been duly sworn, left the court with the map and returned very soon afterwards, having executed his purpose without injury to the map or the inscription. It then became apparent that what had been covered up was what the Crown described as "an inchoate abortive forgery" and one of the judges called "a palpable impudent forgery." In face of such evidence, and despite a heroic defence by Patrick Robertson (afterwards a judge), the jury could scarcely do otherwise than find that the various inscriptions on the map which purported to support the claim to the ancient earldom were forgeries, but by a majority

they found it not proved that the prisoner forged them or that he uttered them knowing them to be forged. He was accordingly acquitted. The trial lasted several days and excited great public attention, and the narrative of its various stages as told at length in Swinton's report, or as summarized by Townsend in his Modern State Trials and by Samuel Warren in his Miscellanies, furnishes a romance as fascinating as any work of fiction.

J. S. H. in *Law Times*.

Cases of Interest

CIVIL LIABILITY GROWING OUT OF MUTUAL COMBAT.—It seems that where persons engage in a mutual combat, each may recover from the other all damages caused by injuries received from the other in the fight. It was so held in McCulloch *v.* Goodrich, 105 Kan. 1, 181 Pac. 556, reported and annotated in 6 A. L. R. 386, the court saying: "The plaintiff sued for damages which resulted from injuries inflicted upon her in an assault by the defendant. The petition alleged that the defendant assaulted the plaintiff with an umbrella and dangerously wounded her. The answer contained a general denial of the allegations of the petition, and pleaded assault and battery by the plaintiff. The answer also pleaded self-defense, and that if the defendant did strike the plaintiff with an umbrella it was unintentional, and only incidental to her lawful defense against the assaults of the plaintiff. Judgment was rendered for the plaintiff, and the defendant appeals. The defendant contends that the court erred in giving the following instruction: 'The jury is instructed that if parties fight by mutual consent the aggressions are mutual, and the circumstance of who committed the first act of violence is not material in an action to recover damages for the injuries he received in the fight.' 'If the conduct of the parties to a mutual combat constitutes a breach of the criminal law, the consent of either one to participate in the mêlée does not deprive him of his civil remedy against the other. Each contestant may recover from the other all damages resulting from the injuries he received in the fight.' The defendant argues that by this instruction the court gave the law concerning mutual combat, and that under the pleadings no evidence of mutual combat could be properly introduced. By the pleadings each party alleged that the other committed an assault and battery on the party pleading. Each probably introduced evidence to prove her contention. That evidence may have tended to prove that each was ready to engage in a fight with the other, and that each willingly engaged in the contest. If such a condition existed, that evidence could not be excluded, and the court properly gave the instruction."

NATURALIZATION DECREE AS SUBJECT TO COLLATERAL ATTACK.—In Oehlert *v.* Oehlert, (Mass.) 124 N. E. 249, reported and annotated in 6 A. L. R. 406, it was held that the libellee in a suit for divorce could not attack collaterally the decree by which the libellant was admitted to citizenship in the United States. The opinion of the court was as follows: "The trial judge granted a decree nisi to the libellant, and reported the case to this court. It appears that Oehlert, who was born in Germany, declared his intention of becoming a citizen of the United States on February 11, 1913, and filed his petition on March 20, 1917, but was not admitted to citizenship until November 14, 1917, or more than seven months after the declaration of Congress that a state of war existed between the Imperial German Government and the United States (April 6, 1917). See U. S. Rev. Stat. § 2171, Comp. Stat. § 4362, 6 Fed. Stat. Ann. (2d ed.) p. 947. The single question presented by the report is whether the decree is invalid by reason of the fact that the libellant was naturalized during the continuance of the war. It is not necessary for us to consider whether the words, 'the time of his application,' in said § 2171 (at which time an alien whose country is at war with the United States is excluded from citizenship), mean the time of filing the petition, or the time of the hearing in court. That question was not raised in the naturalization proceedings. See United States *v.* Meyer, 154 C. C. A. 185, 241 Fed. 305, Ann. Cas. 1918 C 704; De Duus (D. C.) 245 Fed. 813. It is not open to the libellee in the present suit. When this libel was filed in the superior court, November 22, 1917, the libellant had been admitted to citizenship. The order of the court so admitting him was a judgment of the same dignity as any other judgment of a court having jurisdiction. It is conclusive as to all matters necessarily before the court and involved in the issue, and is not open to collateral attack. Spratt *v.* Spratt, 4 Pet. 393, 7 L. ed. 897; Scott *v.* Strobach, 49 Ala. 477, 490, 2 C. J. 1124, and cases cited. It can be impeached or annulled only by a direct proceeding brought for that purpose, which now may be an independent suit under § 15, Act June 29, 1906, chap. 3592, 34 Stat. at L. 601, Comp. Stat. § 4374, 6 Fed. Stat. Ann. (2d ed.) p. 987; Johannessen *v.* United States, 225 U. S. 227, 56 L. ed. 1066, 32 Sup. Ct. Rep. 613."

VALIDITY OF AGREEMENT BY ATTORNEY TO SAVE CLIENT HARMLESS FROM EXPENSES OF LITIGATION.—A contract between attorney and client, which provides that the attorney shall save the client harmless from all expenses that may be incurred in proposed litigation, out of which the attorney is entitled to a contingent fee of the amount received, if successful, is champertous in its nature and void as against public policy. It was so held in Stark County *v.* Mischel, (N. D.) 173 N. W. 817, reported and annotated in 6 A. L. R. 174, wherein the court said: "Under the doctrine of champerty, long has been recognized the impropriety of an attorney's speculating in lawsuits, and becoming a gambler in litigation, at his own cost. The provision in such resolution and contract which required the defendant Murtha to save harmless the county of Stark against all costs, and which thereby imposed the burden of carrying on the litigation and paying the costs and expenses thereof at his own peril, was champertous in its nature for reasons of public policy long and well established; it served to vitiate and render void such contract. 11 C. J. 241; 5 R. C. L. 276. See Woods *v.* Walsh, 7 N. D. 376, 75 N. W. 767. See Rohan *v.* Johnson, 33 N. D. 179, L. R. A. 1916E 64, 156 N. W. 936, Ann. Cas. 1918A 794. See No. 10 Canon of Ethics, Am. Bar Asso." Christianson, Ch. J., however, dissenting in part, said: "I concur in the conclusion reached by the majority members in this case, but am not prepared to concur in all that is said in the majority opinion. That opinion holds, in effect, that a contract between an attorney and client whereby the former agrees, in consideration of having a part of the money or thing recovered, to pay the costs and expense of the litigation, is champertous and void. This is directly contrary to the ruling of this court in Woods *v.* Walsh, 7 N. D. 376, 75 N. W. 767. That decision was rendered in 1898. The court therein pointed out that the legislature has defined champerty, and in so doing had singled out certain agreements which were champertous at common law and declared them to be misdemeanors; but that the legislature had not declared a contingent fee contract between attorney and

client to be champertous, even though the attorney agreed to pay the costs and expenses of the litigation. No subsequent legislature has seen fit to declare such contracts to be void. The law upon the subject remains as it was. See Comp. Laws 1913, §§ 9412-9418. The declaration of the public policy of the state is primarily a matter for the lawmaking body. It is for the legislature to determine what is best for the public good and to provide for it by legislative enactments. The province of the courts is to expound the law as it is, and to enforce the public policy as therein expressed. 6 R. C. L. 109."

CUTTING STREET CORNER IN AUTOMOBILE AS NEGLIGENCE.—In Stubbs *v.* Molberget, (Wash.) 182 Pac. 936, reported and annotated in 6 A. L. R. 318, it was held that one turning a street corner with an automobile is negligent in failing to keep to the right of the center as required by a city ordinance. Said the court: "There is not much room to question the appellants' negligence. At the time of the collision their automobile was at a place in the street where it had no right to be. On entering Ewing Street the driver turned to the left of the center of the street—cut the corner, as the common phrase expresses it—while the law of the road and the city ordinances as well required him to drive to the right of the center of the street and to keep on the right-hand side of the street. Nor was there any reason shown for violating the rule. There was no fixed obstruction in the street which prevented travel in the ordinary way. There was, it is true, a congestion of automobile traffic on the streets at the time, and a considerable number of people had congregated at the street intersection for the purpose of taking the street cars running to a public park, but this, instead of furnishing a reason for violating the ordinance, rather made it an imperative duty to obey it. It is for such occasions that rules and regulations are framed. Whether the respondent was guilty of such contributory negligence as will prevent a recovery is a more serious question. There is a decided conflict in the evidence on it. According to the appellant driver, the respondent was greatly exceeding the speed limit at this point. His evidence, and that of certain of his witnesses also, is to the effect that he violated a provision of the ordinance by passing other automobiles headed in the same direction, which had slowed up and were waiting to cross the intersecting street. But the respondent testifies, and in this he is corroborated by disinterested witnesses, that he passed the automobiles mentioned prior to the time they reached the street intersection, at a place where he had a right to pass them, and when he could do so without violating the rules of the road or the city ordinances, since they were not traveling at a rate of speed less than the rate permitted by the ordinances. He further testifies that he slowed down on approaching the street to a speed much below the permitted speed limit because of the people who had congregated there, and was traveling no faster than 8 miles per hour while crossing the street. There is also in his favor the very persuasive fact before mentioned; he had entered the street and crossed its center before the collision occurred. Obviously it could not have occurred had the appellants pursued the course they were obligated by the ordinance and the rules of the road to pursue."

RELIEF IN EQUITY FROM DEED ON GROUND OF INTOXICATION.—In Harlow *v.* Kingston, (Wis.) 173 N. W. 308, reported and annotated in 6 A. L. R. 327, it was held that equity would rescind a sale of real estate for an inadequate consideration by one who by reason of a prolonged debauch had such a consuming desire for liquor that his mind was dominated thereby and did not act normally, so that he had no appreciation of what he was doing, although he was sober when he executed the deed. The court said: "Relief in actions of this nature is based on the ground that 'both minds must meet in such a transaction; and if one is so weak, unsound, and diseased that the party is incapable of understanding the nature and quality of the act to be performed, or its consequences, he is incompetent to assent to the terms and conditions of the instrument, whether that state of his mind was produced by mental or physical disease, and whether it resulted from ordinary sickness, or from accident, or from debauchery, or from habitual and protracted intemperance." Johnson *v.* Hamon, 94 U. S. 371, 24 L. ed. 271. This principle was relied upon in Burnham *v.* Burnham, 119 Wis. 509, 110 Am. St. Rep. 895, 97 N. W. 176. If the effect of the intoxication deprives the party of memory or judgment, or makes him incapable of comprehending or appreciating the nature and effect of the act, then equity, upon application of such party, grants relief. Fagan *v.* Wiley, 49 Or. 480, 90 Pac. 910; Drefahl *v.* Security Sav. Bank, 132 Iowa, 563, 107 N. W. 179; J. I. Case Threshing Mach. Co. *v.* Meyers, 78 Neb. 685, 9 L. R. A. (N. S.) 970, 111 N. W. 602, Swan *v.* Talbot, 152 Cal. 142, 17 L. R. A. (N. S.) 1066, 94 Pac. 238; Moetzel *v.* Koch, 122 Iowa, 196, 97 N. W. 1079. When an unconscionable bargain has resulted from conditions due to intoxication and debauchery, equity considers the transaction an imposition on the incompetent party and awards relief. 14 Cye. 1105. The findings of the trial court present a state of facts showing plaintiff was, at the time of this transaction, an incompetent as the result of gross intoxication and debauchery, and that the consideration defendant paid plaintiff for the property conveyed was grossly inadequate. Such a state of facts presents a case for the relief granted by the circuit court, if the evidence sustains the findings. The defendant contends that the evidence fails to show that plaintiff was intoxicated at the time he deeded his property to defendant on July 31, 1916. The trial court is explicit in its finding that at the time the transfer was executed plaintiff was not appreciably intoxicated, but that by reason of his gross intoxication for a long period immediately before this day a consuming thirst for liquor so dominated his mind as to render it abnormal, and that he was unable to appreciate what he was doing. This in nature and effect shows that plaintiff's intoxication produced such abnormal condition of mind as to render him incapable of comprehending and appreciating the effect of his act. We have examined the evidence and find that it sustains the trial court's findings on this issue."

PROVISION IN BANK PASS BOOK AS BINDING DEPOSITOR.—The mere printing in a bank pass book of a provision, among many others, releasing the bank from liability in case complaint is not made of forged indorsements within ten days after return of vouchers, does not bind the depositor unless he is required to sign it or his attention is particularly called to it. It was so held in Los Angeles Investment Co. *v.* Home Savings Bank, (Cal.) 182 Pac. 293, wherein the court, after quoting the printed statement in the front of the pass book, said: "This statement is not signed by the plaintiff, nor is there any showing that it was called to the plantiff's attention or wittingly agreed to by it. It is just the character of thing that the average man would not trouble to read, or, reading, would fail to appreciate the significance of the inclusion in it of 'indorsements,' and the fact that it very materially changed the usual obligation of a bank to its depositors. There is no reason, so far as we know, why a depositor may not make such an agreement if he deliberately chooses to do so, unreasonable as it is. But it is evident that the statement comes in the category of 'traps for the unwary,' and before such statement can be given effect

as a contract binding upon the depositor and changing in a substantial particular the relation which presumably he thought he was entering into, it must appear affirmatively that he consented and agreed to it either by being required to sign it or by having his attention particularly called to it. It is not sufficient merely that it appear in the front of the pass book. The case is not one in which the party must know that he is accepting a contract, as where he is accepting an insurance policy, and should therefore realize the necessity of acquainting himself with its terms. For this reason it does not come within the principle of such cases as Madsen *v.* Maryland Casualty Co., 168 Cal. 204, 142 Pac. 51. It is more nearly analogous to the case of special conditions or limitations printed on the back of a railroad ticket. It is also to be noted that probably the pass book never came to the attention of any responsible officer of the plaintiff authorized to make contracts. The actual handling of the pass book and the making of deposits are ordinarily, in the case of large concerns, intrusted to some subordinate. The case comes within the principles discussed on pages 260 to 263 of 9 Cyc., and is not distinguishable from Neuman *v.* National Shoe & Leather Exch. 26 Misc. 388, 56 N. Y. Supp. 193, and Ackenhausen *v.* People's Sav. Bank, 110 Mich. 175, 33 L. R. A. 408, 64 Am. St. Rep. 338, 68 N. W. 118. In order for the bank to avail itself of the statement as a contract made by the plaintiff, it was necessary for the bank to prove that the statement had been called to the attention of some responsible officer of the company. Without this it cannot be fairly said that it was accepted or consented to by the company, and nothing of this sort appears."

NEGLIGENCE OF BAILEE AS IMPUTABLE TO OWNER OF AUTOMOBILE.—In Lloyd *v.* Northern Pacific R. Co., (Wash.) 181 Pac. 29, reported and annotated in 6 A. L. R. 307, it was held that the negligence of a bailee using another's automobile for his own pleasure is not imputable to the owner, so as to prevent the latter's holding another liable for negligently injuring the car. The court said: "The first contention made in appellant's behalf is, in substance, that the evidence conclusively shows that Colley was, at the time of the injury of the automobile, acting in the course of his employment for respondent, so that his contributory negligence thereby became the contributory negligence of respondent, preventing his recovery, and that the trial court should have so decided as a matter of law. It seems to us that under the circumstances here shown, the question whether or not the driving of the automobile at the time it was injured was being done by Colley as the agent and employee of respondent, or was being done by him for his own private purpose and pleasure, was a question for the jury to decide. Aside from the fact that Colley procured from the railway company's agent the package for respondent, and had it in the automobile when it was injured, there seems to be but little room for arguing that he was at that time doing anything other than for himself. And we think the mere fact that he had procured the package just before the automobile was injured, and then had it with him in the automobile, did not so plainly render his driving the automobile at the time it was injured the performance of his duties as respondent's employee that it could be so decided as a matter of law. The jury, we think, might, under all the circumstances, have well concluded that Colley's procuring of the package was a mere matter of accommodation, as if such act had been performed by a neighbor. Our conclusion upon this branch of the case finds support in our decisions in Hammons *v.* Setzer, 72 Wash. 550, 130 Pac. 1141; George *v.* Carstens Packing Co., 91 Wash. 637, 158 Pac. 529, and Warren *v.* Norguard, 103 Wash. 284, 174 Pac. 7. It is further contended in appellant's behalf that the contributory negligence of Colley, as found by the jury, was in any event imputable to respondent, preventing his recovery, and that the trial court should have so decided as a matter of law. This contention is rested upon the theory that because of the relationship between Colley and respondent with reference to the automobile, though it only be that of bailor and bailee, respondent cannot recover for the injury to the automobile, because Colley's contributory negligence would prevent his recovery for injury to the automobile. There was a time when the decisions of the courts seemed to support this view of the law; but in recent years the weight of authority is we think decidedly to the contrary. In view of the special finding of the jury that Colley was, at the time the injury to the automobile occurred, driving it for his own pleasure, and not in the course of his employment as respondent's employee, which finding we think the evidence fully supports, it seems plain that the relation then existing between him and respondent with reference to the automobile was merely that of bailor and bailee. Van Zile, Bailments, 2d ed. §§ 3 and 4; 6 C. J. 1101; 3 R. C. L. 72. Whether the automobile was in legal effect hired to Colley or gratuitously loaned to him we think is of no moment here, since Colley would be no more the agent of respondent in one case than in the other."

RIGHT OF FISHING IN PRIVATE LAKE.—It seems that each of several riparian owners on an inland lake whose titles include the land covered by water may, together with their lessees and licensees, use the entire surface of the lake for boating and fishing so far as they do not interfere with the reasonable use of the water by other riparian owners, and they are not limited to the portion within their respective side lines. It was so held in Beach *v.* Hayner, 207 Mich. 93, wherein the court said: "We do not understand that it is the claim of counsel for the plaintiff [a riparian owner] that they have any property rights in the fish in the lake, which are ferae naturae, and so far as any right of property in them can exist, it is in the public or common to all until they are taken and reduced to actual possession, but it is his contention that licensees of riparian owners have no right to enter upon the waters covering the lands of the plaintiff for the purpose of fishing or boating. . . . In this state, in the case of Sterling *v.* Jackson, 69 Mich. 488, 13 Am. St. Rep. 405, 37 N. W. 845, it was held that a man had the exclusive right of fowling upon his own land, whether it is upland or land covered by water, but a distinction seems to be made in the majority opinion of the court between fowling and fishing. In the dissenting opinion of Mr. Justice Campbell the following was said: 'It is the law of this state that the riparian owner on any kind of water has presumptively the right to such uses in the shores and bed of the stream as are compatible with the public rights, if any exist, or with private rights, connected with the same waters. In rivers the theoretical line of ownership is in the middle thread or line of the stream, unless changed by islands or some other cause of deflection. If the stream is crooked, the curves must be adjusted so as to save all the rights of the different owners. But lakes have no thread, and, while there is usually no difficulty in fixing equitable bounds near the shore, it cannot be done, by any mathematical process, over any considerable extent of the lake; and if—which does not often happen—there is any occasion for making partition of the surface, it can only be reached by some measure of proportion requiring judicial or similar ascertainment, and not by running lines from the shore. Small and entirely private lakes are sometimes divided up for such purposes as require separate use; but for uses like boating, and similar surface privileges, the enjoyment is almost uni-

versally held to be in common. This was held by the House of Lords in Menzies *v.* Macdonald, 36 Eng. L. & Eq. Rep. 20. It was there held that for all purposes of boating and fishing, the whole lake was open to every riparian owner; while for such fishing as required the use of the shore, each was confined to his own land for drawing seines ashore, and the like uses.' This reasoning seems to be appealing. To hold with the plaintiff and appellant in this case would cause the establishment of a rule very difficult in its application. All riparian owners and their licensees would have a clear right to enter upon certain portions of the surface of the lake, and it certainly would be very difficult to establish definite lines of demarcation along the property lines of the various owners. As the question of fowling upon the waters is not presented by the bill and is not an issue here, it will be unnecessary to determine that question, but we are of the opinion that the judge was right in holding that, where there are several riparian owners to an inland lake, such proprietors and their lessees and licensees may use the surface of the whole lake for boating and fishing, so far as they do not interfere with the reasonable use of the waters by the other riparian owners."

News of the Profession

INDIANA JUDGE DIES.—H. Clarence Austill, judge of the Madison County superior court for six years, is dead.

THE TENNESSEE BAR ASSOCIATION met at Nashville in July for its annual convention. George B. Rose of Little Rock, Arkansas, was one of the principal speakers.

THE MONTANA BAR ASSOCIATION held its annual convention at Helena, Aug. 27 and 28. President Rudolph von Tobel of Lewistown was in charge of the meetings.

PROMINENT KANSAS LAWYER DEAD.—The death of Charles S. Gleed, a prominent Topeka lawyer, is reported. He was a director of the Atchison, Topeka and Santa Fe railroad.

DEATH OF WELL-KNOWN MISSISSIPPI LAWYER.—Dan Scott, one of the most widely known corporation lawyers in Mississippi and a resident of Clarksdale, died at Battle Creek, Michigan, in July.

MONTANA ASSOCIATION OF COUNTY ATTORNEYS.—The annual convention of the association was held at Billings on Aug. 6 and 7; E. E. Collins of Yellowstone County, the president, presided at the sessions.

DEATH OF FEDERAL JUDGE OF TENNESSEE.—Judge John E. McCall, United States District Judge for western Tennessee, died Aug. 8. He had been on the bench since 1905.

ARKANSAS JUDICIAL APPOINTMENT.—H. L. Shirrell of Scott county has been appointed county and probate judge of that county succeeding Judge Payne who recently resigned.

JUDGE FOR VIRGIN ISLANDS NAMED.—Lucius J. M. Malmin of Chicago has been appointed the first judge of the new United States District Court in the Virgin Islands, formerly the Danish West Indies.

DEMISE OF COLORADO JUDGE.—Former County Judge John W. Landrum, a pioneer of Logan county, Colorado, is dead at the age of 70. He was born in Kentucky.

UNIVERSITY OF WEST VIRGINIA LAW SCHOOL.—M. T. Van Hecke of Springfield, Illinois, has been appointed assistant professor of law in the College of Law of the University of West Virginia at Morgantown.

KANSAS LAW EXAMINERS.—State Senator A. M. Keene of Fort Scott and James E. Troutman of Topeka have been reappointed to serve as members of the Kansas board of law examiners. The term is four years.

THE WISCONSIN BAR ASSOCIATION will hold its annual convention in Milwaukee September 28-30. The speakers will include ex-Senator Albert J. Beveridge of Indiana and Paul S. Reinsch, former minister to China.

THE BAR OF MASSACHUSETTS HAS SUFFERED THE LOSS BY DEATH of Judge William F. Dana of Newton, formerly of the Superior Court and at one time president of the state senate.

IOWA JURIST DEAD.—Judge Frank R. Gaynor of the Iowa Supreme Court is dead. He was a resident of Des Moines and a native of Canada. He went on the bench in 1913.

UNIVERSITY OF PITTSBURGH LAW SCHOOL.—Dr. Nathan Isaacs has been made a member of the faculty of the University of Pittsburgh Law School. He comes from Harvard and was assistant dean of the Cincinnati Law School in 1916.

VACANCY IN INDIANA SUPREME COURT FILLED.—Judge Lewis B. Ewbanks of the Marion County Circuit Court has been appointed justice of the Supreme Court to succeed the late Justice Harvey.

UNIVERSITY OF NEBRASKA LAW SCHOOL.—Warren A. Seavey, director of the school of law of the American Expeditionary forces university at Beaume, France, has been named dean of the law college of the University of Nebraska.

OHIO BAR ASSOCIATION.—Daniel W. Iddings of Dayton was elected president of the Ohio Bar Association at its annual meeting in July, held at Cedar Point. John W. Henney of Columbus was elected secretary.

TEXAS BAR ASSOCIATION.—The association met at El Paso for its annual convention. The principal address was by Thomas B. Greenwood, associate justice of the Supreme Court of Texas, on "Aid to the Supreme Court from the Lawyers."

COLORADO BAR ASSOCIATION.—At the annual meeting of the Colorado Bar Association held at Colorado Springs, August 20 and 21, the chief speakers were Governor Henry J. Allen of Kansas and Senator Charles S. Thomas of Colorado. The former's address was "The Kansas Industrial Court."

MICHIGAN ASSOCIATION OF PROBATE JUDGES.—Fred Breen of Cadillac was elected president of the Michigan Association of Probate Judges at its annual meeting held at Saginaw in July. The association is to meet at Cadillac in 1921.

INDIANA BAR ASSOCIATION.—This association at its 24th annual convention at Indianapolis was addressed by Judge Evans of the United States Circuit Court of Appeals whose subject was "The Naturalizing and Nationalizing of the Alien."

ASSOCIATION OF DISTRICT JUDGES OF IOWA.—The association of district judges of Iowa numbering about sixty has elected as its president Judge Kintzinger of Des Moines. The association is a branch of the state bar association.

RESIGNATION OF CHICAGO JUDGE.—Judge William Fenimore Cooper of the Superior Court of Cook County, Illinois, re-

signed, the resignation to take effect in December. He was elected to the Superior Court bench in 1910.

DEATH OF UNITED STATES DISTRICT JUDGE OF WEST VIRGINIA.—The death of United States District Judge Alston G. Dayton of Philippi, West Virginia, occurred at Battle Creek, Michigan, recently. He was made a judge in 1904 by President Roosevelt, being at that time a representative in Congress.

IOWA JUDICIAL CHANGES.—District Judge John W. Anderson in Onawa has resigned and Charles C. Hamilton of the Woodbury county bar has been appointed to fill the vacancy till the November election. Judge Anderson is to practice law in Sioux City. Another appointment to the district court is that of George W. Wood.

CANADIAN BAR ASSOCIATION.—The fifth annual meeting of the Canadian Bar Association was held at the Chateau Laurier, Ottawa, September 1-3. Addresses were made by Viscount Cavy, a member of the Privy Council; Sir Auckland Geddes, British Ambassador to Washington, and Hon. William H. Taft.

KENTUCKY BAR ASSOCIATION.—The nineteenth annual convention of the Kentucky Bar Association was held at Henderson, Kentucky, in July. President Lewis Apperson of Mt. Sterling delivered the president's address, and one of the important speakers was Senator Seldin P. Spencer of Missouri.

ALABAMA BAR ASSOCIATION.—J. Kelly Dixon of Talladega, president of the Alabama Bar Association, has announced the committees of the association for the ensuing year. J. T. Stakely of Birmingham was made chairman of a special committee to suggest changes in the selection of judges.

YALE LAW SCHOOL HAS NEW PROFESSOR.—Herschel W. Arant, secretary of the faculty of the Lamar School of Law, Emory University, Atlanta, Georgia, has been appointed professor of commercial law and partnership at Yale University Law School. He takes the place of Professor J. W. Edgerton, recently deceased.

NEW JUDGES IN PENNSYLVANIA.—Governor Sproule of Pennsylvania has appointed county solicitor Frank B. Wickersham of Steelton and Harrisburg a law judge of the Dauphin County court to fill a vacancy caused by the death of Judge S. J. McCarrell. Governor Sproule has also appointed Edward S. Lindsey of Warren presiding judge of the 37th judicial district comprising Warren and Forest counties.

MINNESOTA BAR ASSOCIATION.—Ambrose Tigue of St. Paul was elected president of the Minnesota State Bar Association at its recent meeting. Other officers elected were: W. D. Bailey of Duluth, vice-president; Chester L. Caldwell of St. Paul, secretary, and Roy Curry of St. Paul, treasurer.

THE WEST VIRGINIA BAR ASSOCIATION has elected as its president for the coming year John Coniff of Wheeling. The election was made at its thirty-sixth annual convention held July 28 and 29 at Wheeling. Judge Charles A. Wood of the Fourth United States Circuit Court delivered an address. Charleston will have the next convention.

WISCONSIN DEATHS.—Chief Justice John B. Winslow of the Wisconsin Supreme Court died in July after a long illness. He was on the bench thirty-seven years and for twenty-nine of those years he was a member of the Supreme Court. He was born at Nunda, N. Y. Thomas L. Kennan of Milwaukee, the oldest practicing lawyer in the state, is dead. He was born in Morristown, N. Y.

WASHINGTON STATE BAR ASSOCIATION.—At the annual convention of the Washington State Bar Association held at Aberdeen in July Otto B. Rupp of Seattle was elected president and W. J. Millard of Olympia secretary-treasurer. The direct primary was declared a failure in a speech made by J. O. Hawley. One of the principal addresses was delivered by M. A. McDonald, K.C. of Vancouver, B. C. He dealt with relations between Great Britain, Canada and the United States.

SOUTH DAKOTA BAR ASSOCIATION.—At the annual meeting of the South Dakota State Bar Association held at Sioux Falls in the early part of August, Ulanda L. Jones of Parker was elected president. The retiring president was W. F. Bruell of Redfield. The annual address was delivered by Judge Oscar Hallam of the Minnesota Supreme Court. Judge James D. Elliott of the United States district court also delivered an address.

English Notes*

LORD COZENS-HARDY, formerly Master of the Rolls, died on June 18, aged 81, at Letheringsett Hall, Holt, Norfolk. He was the second son of Mr. W. H. Cozens-Hardy, solicitor, of Norwich, and was educated at Amersham and University College, London. In 1863 he obtained a first-class in Law and took the LL.B. of London. He was called by Lincoln's Inn in 1862, and he became one of the leading juniors on the Chancery side. He took silk in 1882, and attached himself to the court of Sir Edward Fry, and afterwards, in 1883, to the court of Mr. Justice Pearson, and later to that of Mr. Justice North, until he became a "special." In February, 1899, on the death of Lord Justice Chitty and the promotion of Mr. Justice Romer to the Court of Appeal, he was made a Judge of the Chancery Division. In November, 1901, he was promoted to the Court of Appeal, and in February, 1907, was appointed Master of the Rolls. He was raised to the peerage in 1914, resigning his judicial office four years later.

THE KAISER'S LOST OPPORTUNITY.—In the Memoir of the late Sir William Reynell Anson, edited by the Bishop of Hereford, Dr. Hensley Henson, is a passage which affords material for speculation to those with an aptitude for meditating on what might have been, says the *Law Times*. After one unsuccessful attempt, Anson, we read "got to All Souls in 1867. He was hardly settled when Jowett suggested that he should go to Berlin, and, while learning German, should also instruct the children of the Crown Prince in the English language and history. At first, perhaps overborne by Jowett's insistence, he accepted the proposal, but with reluctance, which, on reflection, deepened into repugnance. When, therefore, he learned that the project was looked upon with scant favour by his parents, he was glad to make Lady Anson's disapproval an excuse for recalling his acceptance. It is a curious speculation what calamities the world might have escaped if the late German Emperor in his early boyhood had come under the teaching and influence of Sir William Anson."

THE BIRDS OF THE TEMPLE.—Attention has been called to the fact that some wood pigeons have taken up their abode within the Temple precincts. The Temple bird life is a subject which

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* With credit to English legal periodicals.

has engaged the attention of various observers. From Forster's "Life of Goldsmith" and from the latter's "Animated Nature" we learn the pleasure experienced by Goldsmith in watching from the window of his chambers in Garden-court the colony of rooks which at that time was settled in the Temple gardens, for, as Forster remarks, the Benchers had not then thinned the trees. The outlook on the comings and goings of the rooks is one of the pleasantest incidents we find recorded in connection with Goldsmith's sojourn in the Temple. According to a note in the late Mr. Ingpen's edition of "Master Worsley's Book," rooks were introduced into the Temple gardens by Sir Edward Northey (Treasurer of the Middle Temple in 1701) from Woodcote Green, Epsom, in the reign of Queen Anne. The other classical reference to bird life in the Temple is that which occurs in Lamb's essay on the Old Benchers of the Inner Temple. There we are told that during the Treasurership of Daines Barrington, his fellow Benchers unanimously disallowed in his account for the year the item of 20s. to the gardener "for stuff to poison the sparrows by my orders." Coming from Daines Barrington, the correspondent of Gilbert White of Selborne on ornithological matters, such an instruction to the gardener seems inexplicable, and one can only rejoice that his fellow Benchers refused to recoup the expenditure.

COMMON CARRIERS AND NOTICE OF BAD PACKING.—In Gould *v.* South-Eastern and Chatham Railway Company, which case was heard on appeal in the Divisional Court recently, it was sought to make the railway company as common carriers liable for damage to goods carried by them and improperly packed, on the ground that, as the company had full notice that the goods were improperly packed when accepted for carriage, they could not escape liability for damage to the goods resulting from bad packing. The County Court judge found for the plaintiff on the authority of Stuart *v.* Crawley (1818, 2 Stark. 323), where a greyhound was handed over to a carrier for carriage without any collar and with a cord round its neck so insufficiently secured that the dog escaped and was lost. Lord Ellenborough there held that as the carrier had the means of seeing that it was insufficiently secured he was responsible, and he distinguished the case of a "delivery of goods imperfectly packed, since the defect was not visible." On the other hand, in Barbour *v.* South-Eastern Railway Company (1876, 34 L. T. Rep. 67) it was held that if an owner, whose duty it was to pack the goods, chose to have them go in an unsafe condition, he could not complain if they were damaged as the result of that condition, and that it made no difference that the railway company were aware of it. In the present case Lord Justice Atkin was of opinion that Stuart *v.* Crawley was no authority for the proposition that where goods are handed to a common carrier improperly packed, he accepts full responsibility if he knows that that is the case; that Stuart *v.* Crawley could be explained on other grounds; he doubted very much whether Lord Ellenborough ever meant to lay down the proposition of law suggested, and found that in any case that case was inconsistent with Barbour *v.* South-Eastern Railway Company (sup.). Lord Justice Younger, while agreeing with Lord Justice Atkin's view that the defendants were not liable on the authorities, was also of opinion that as the inference to be drawn from what the plaintiff said to the defendant's agent was that, whether the goods were well or badly packed, they were to be taken just as they were, the railway company were in exactly the same position as if they had no notice of the improper packing. It seems clear from this decision that the mere fact that a carrier had notice of bad packing does not withdraw the protection he enjoys in the case of "inherent vice" in the goods carried.

THE HIGHWAYMAN'S CASE.—Despite the doubts expressed by Mr. Justice Darling, in an action tried by him recently, as to the authenticity of what has come to be known as the Highwayman's case, the fact that there was in truth such a case was put beyond question by the publication some years ago in the *Law Quarterly Review* (see vol. 9, pp. 197 et seq.) of the actual orders made by the court. Like Mr. Justice Darling, the learned editor of the *Law Quarterly* had been inclined to treat the whole thing as a hoax originating in some facetious equity draftman's chambers, but an examination of the records disclosed the orders, and the extraordinary story was shown to be quite authentic. As Mr. Justice Darling remarked that the case was always referred to simply as the Highwayman's case, without the names of the parties being given, it may be stated that the litigants were Everet and Williams. A copy of the bill filed by Everet was published in the European Magazine for May, 1787, in which it is recited that an oral partnership existed between the defendant and the plantiff, who was "skilled in dealing in several sorts of commodities," and that the parties had "proceeded jointly in the said dealings with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch," and, after further recitals of similar dealings in the neighborhood of Finchley, Blackheath, Bagshot, and elsewhere to the amount of £2000 and upwards, it is alleged that the defendant would not come to a fair account with the plaintiff touching and concerning the partnership, and the bill concludes with a prayer for discovery, an account, and general relief. Surely no more impudent claim was ever put forward in a court of equity, and the surprising thing about it is the comparative mildness of the punishment inflicted on those professionally engaged in it. The counsel who signed the bill was ordered to pay the costs, and the plaintiff's solicitors were ordered to pay a fine of £50 each. No order seems to have been made upon the plaintiff himself, but justice was done, for very shortly after the dismissal of the bill both the plaintiff and the defendant, having apparently resumed dealings with gentlemen at Hounslow Heath and other places, were caught, tried, and hanged, while one of the solicitors engaged for the plaintiff in the bill was convicted of robbery and transported. Besides being fully referred to in the *Law Quarterly Review*, the case is noted at some length at page 113 of the latest edition of Lindley on Partnership.

COMPENSATION TO DECEASED WORKMAN'S PARTIAL DEPENDENT.—The decision of the learned judges of the Court of Appeal in the recent case of Phillips *v.* Kershaw, Leese and Co. Limited is of considerable importance. For it will be applicable to every case in which the partial dependent of a deceased workman, whose death has resulted from "personal injury by accident arising out of and in the course of" his employment, within the meaning of section 1 of the Workmen's Compensation Act 1906 (6 Edw. 7, c. 58), has died before the assessment of the compensation payable on account of the deceased workman's death. The question only arises in the case of partial dependency, because of the difference of the provisions contained in section 1 of the first schedule to the Act concerning total dependency and partial dependency. It is thereby provided that if a deceased workman leaves any dependents wholly dependent on his earnings, a specified sum shall be awarded to them. On the other hand, if he does not leave any such dependents, but leaves any dependents in part dependent on his earnings, the sum to be awarded is to be "such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reason-

able and proportinate to the injury to the said dependents." As was pointed out by the Master of the Rolls (Lord Sterndale), where a partial dependent is alive, the learned county court judge, in giving effect to that provision, has among other things to consider how long that dependent is likely to suffer injury through being deprived of the income that was received from the deceased workman during his life. The injury inflicted by the withdrawal of his support has to be compensated for. But where, before the compensation has been assessed, the partial dependent has died, it is no longer in the region of speculation. The period of time in which that dependent was deprived of the sum that used to be paid by the deceased workman is definitely ascertained. The observations of Lord Macnaghten, in the course of his opinion in the case of United Collieries Limited *v.* Hendry or Simpson (101 L, T. Rep. 129; (1909) A. C. 383) were quoted by Lord Sterndale as authority for the view which the learned judge expressed. But even in the absence of authority, it is tolerably apparent that the period during which the receipt of income from the deceased workman was enjoyed by the dependent is the leading factor to be regarded in assessing the compensation payable.

INSTRUCTIONS FOR DRAWING WILL AS AID TO INTERPRETATION THEREOF.—It is well settled that the court cannot look at the instructions for a will for the purpose of ascertaining the intention of the testator. But it can do so in order to find out the testator's knowledge to the state of his family, or the like. This seems to be part of proposition 5 in Wigram on Extrinsic Evidence in Aid of the Interpretation of Wills, (5th edit., p. 56) by Mr. C. P. Sanger. The recent decision of the Court of Appeal in Ireland in Robertson *v.* Flynn (1920, 1 Ir. 79) is a good example of the principle. There a testator devised and bequeathed all his property to a sister, describing her as "Annie Neary." At the date of his will he had four sisters living, namely, Mrs. Mary Walsh, Mrs. Bridget Neary, Mrs. Annie Flynn, and an unmarried sister Dora. In the written instructions for his will, given by the testator to his solicitor, the testator stated that he had three sisters, naming them as Annie Neary, Bessie and Mary Walsh. It was held by the Court of Appeal that the court could look at the written instructions for the purpose of ascertaining the testator's knowledge as to his family relations, and that, on the true construction of the will, the sister Annie Flynn was entitled to the property. There is no doubt, as observed by one of the judges in that case, a man is more likely to make a mistake in the surname of a married sister than in the Christian name by which he is in the habit of calling her. Lord Justice Ronan was strongly inclined to think that, without the help of the instructions, he would have arrived at the same conclusion. The English case of Re Ofner; Samuel *v.* Ofner (99 L. T. Rep. 813; (1909) 1 Ch. 60) proceeded on much the same principle. There a testator by his will gave legacies to his grandnephew Alfred Ofner, and to his grandnephew "Robert" Ofner. He had no grandnephew or other relation named "Robert" Ofner, but he had four grandnephews, one of whom was named "Richard" Ofner, a brother of Alfred. The testator's written instructions for the will referred to "Robert" Ofner as a brother of Alfred Ofner. It was held by the Court of Appeal that such instructions were admissible, not as evidence of intention, but to find out who was the grandnephew whom the testator had wrongfully described by the name of "Robert," and from that it was clear that "Robert" was a mistake for "Richard." The court also decided that the fact that the document happened to be instructions for the will did not make it ipso facto any less admissible, not as instructions, but as a contemporaneous and serious document, explanatory of the meaning which the testator had wrongly attributed to the name "Robert," when describing the legatee. The line between evidence of intention and evidence of surrounding circumstances is sometimes rather fine.

BELIEF IN WITCHCRAFT.—The extraordinary revelation that a farmer's wife in Wales believes herself bewitched shows that belief in witchcraft is not yet extinct in Great Britain, and will recall the enormous public service rendered by the judiciary of England by the steady discouragement of trial for witchcraft, a discouragement which largely contributed to the discountenancing of the superstition and the repeal of the sanguinary enactment by which so many innocent victims had perished. The belief in witchcraft had almost disappeared in England among the educated classes at the time of the Revolution. This important change in opinion was effected, according to Buckle, so far as the educated classes were concerned, between the Restoration and the Revolution—that is to say, in 1660 the majority of educated men still believed in witchcraft and in 1688 the majority disbelieved it. The law, however, condemning witches to death still remained on the statute-book, and it was not altogether a dead letter. Three witches had been hanged in Exeter in 1682, and even after the Revolution there had been occasional trials. Addison, whose judgment was quoted and echoed by Blackstone in his Commentaries, which were first published in 1765, speaks with a curious hesitation: "I believe in general," he writes, "that there is and has been such a thing as witchcraft, but at the same time can give no credit to any particular instance of it" (Spectator, No. 117; see also Stephen's Blackstone, iv, p. 297). The great clerical agitation which followed the Sacheverell impeachment in 1710 is said to have produced a temporary recrudescence of the superstition, and it was observed about this time that there was scarcely a village in England which did not contain a reputed witch. To the judiciary belongs the great credit of discouraging the superstition. The last trial for witchcraft in England, at least of any notoriety, was that of Jane Wenham, who was persecuted in 1712 by some Hertfordshire clergymen. The judge entirely disbelieved in witches, and accordingly charged the jury strongly in favor of the accused, and even treated with great disrespect the rector of the parish, who declared "on his faith as a clergyman" that he believed the woman to be a witch. The jury, being ignorant and obstinate, convicted the prisoner, but the judge had no difficulty in obtaining a remission of the sentence, for which he was subjected in a long war of pamphlets to severe condemnation. In the same year the death of a suspected witch who had been thrown into the water, to ascertain whether she would sink or swim, was pronounced by Chief Justice Parker to be murder. Chief Justice Holt, moreover, did good service to humanity by exposing the imposture which lay at the root of some cases he was obliged to try, and in 1736 the law making witchcraft punishable by death was repealed without difficulty or agitation. The superstition long smouldered among the poorer classes, and there were several instances of the murder of suspected witches. It is a curious fact that the Irish law for punishing witches with death, though long wholly obsolete, was repealed only in 1821 (1 & 2 Geo. 4, c. 18), and is said to have been the last law in Europe on this subject.

EFFECT OF ERASURE IN WILL.—A curious case of ambiguity in a will came before Mr. Justice Astbury in Re Battie-Wrightson; Cecil *v.* Battie-Wrightson (noted 149 L. T. Jour. 429).

The circumstances of the case might recur at any time, and the judgment is therefore of very general interest, especially as the authorities which bear upon the point are somewhat ancient history. The testatrix was in bad health, and a draft will, prepared in accordance with her instructions, was submitted to her by her solicitor for signature. In this draft, after various legacies, including a legacy of £6000 to A. M., there occurred the following clause: "I give the following legacies [to be paid out of the money standing to my credit at the National Provincial Bank of England, Bishopsgate, E. C., and not out of any other moneys, namely]." Then followed certain small legacies amounting to £125 and a direction that they should be paid free from legacy duty. The clause then continued: "I give to A. M., in addition to the legacy which I have already given to her, the undisposed balance which may be to my credit at the said bank after paying thereout the legacies lastly hereinbefore mentioned." Then followed a gift of shares to A. M. with a request that she would out of the income maintain a boy who was living with the testatrix, until he should attain twenty-one, and a declaration that the written receipt of A. M. for the said "balance and shares" should be sufficient discharge to the executors. In view of her bad health, the testatrix executed the draft without waiting for it to be engrossed; but before doing so she struck out from the draft the words in brackets, which appear above, and initialed the erasure. She retained this will in her possession until death three weeks afterwards, and it was admitted to probate with the omission of the erased passage. The effect of the erasure was now apparent; the words "the said bank" were left in mid air without any antecedent to which they could refer, and as the testatrix had six banking accounts, at each of which her account was in credit, there was an ambiguity as to the legacy to A. M. She claimed that she was entitled to refer to the original will with a view to explaining the meaning of the words in the probate. As against this it was argued on behalf of the residuary legatee (to use the words of Mr. Jarman on Wills, 1st ed., p. 22) that "the granting of probate is conclusive as to the testamentary character of the instrument in reference to personality . . . and that while everything included in the probate copy might be taken by a court of construction to be part of the will, the original will could not be appealed to for the purpose of showing that such copy is erroneous." But the answer to this was that to determine the construction the original will may be looked at by the court, and there are frequent instances of this being done in the old reports. The only doubt was whether the effect here would be to introduce new words into the probate from the original will. Naturally the cases do not go so far as this, and the practice has been confined to examining the original "with a view to see whether anything there appearing—as, for instance, the mode in which it was written, how dashed, or stopped—would guide them in the true construction to be put upon it": (per Lord Justice Bruce in Manning *v.* Purcell, 7 D. M. & G. 523 n.). Mr. Justice Astbury in Re Battie-Wrightson (ubi sup.) held that he was entitled to look at the original, from which it would plainly appear to which particular bank the testatrix was referring in the words "the said bank." He did so with confidence, but prefaced his judgment by saying that his decision was without prejudice to any action which might be taken to obtain a corrected probate. It was argued on behalf of the specific legatee that the will was admissible as extrinsic evidence of the testatrix's intention, where the description in the probate copy was insufficient for the purpose. The rule is that if the ambiguity appears on the face of the will, the ambiguity is patent, and extrinsic evidence cannot be given; if, however, the ambiguity is latent, then it is admissible. Applying that rule to the particular case, Mr. Justice Astbury pointed out that the testatrix obviously intended to give the legatee a bank balance, and the ambiguity did not really arise until after probate was granted, when it appeared that she had more than one banking account. On this ground also, the ambiguity being "latent," he thought that the will was admissible so as to show what particular bank was intended. Once the original will was admitted, it was, of course, clear that the testatrix intended the legatee to have the balance standing to her account at the National Bank, Bishopsgate, E. C., and his Lordship so found.

Obiter Dicta

EXIT COL. HOUSE!—Wilson *v.* Envoy, 1 Phila. 138.

ON THE PORCH.—Harding *v.* Replier, Fed. Cas. No. 10, 401.

THE TRUTH ABOUT SOCIALISM.—Marx *v.* Freeman, 21 Tex. Civ. App. 429.

"THE PUBLIC BE DAMNED!"—Vanderbilt *v.* All Persons, 163 Cal. 507.

VICE TRIUMPHANT.—In Vice *v.* City of Kirksville, 217 S. W. 77, the city lost out.

AS A PRECAUTION AGAINST SUICIDE?—In State *v.* Quail, 5 Boyce (Del.) 310, the defendant was imprisoned on a charge of carrying concealed weapons.

NOT SO BAD.—No, Chamberlin *v.* Cobb, 32 Iowa 161, had nothing to do with batting averages, but just the same there was a horse mixed up in the case.

CAN THE SAME THING BE DISCOVERED TWICE?—"Wisdom born after the event is the cheapest of all wisdom. Anybody could have discovered America after 1492."—Per Brewer, J., in U. S. *v.* Bell Tel. Co., 167 U. S. 261.

DR. JACOBY'S MIND.—In the *Central Law Journal* for July 16, there appears an article under the heading "Jacoby's Unsound Mind and the Law." Has not the learned Doctor a good cause of action against our contemporary for libel?

AND WITH NO CLOSE SEASON, WE PRESUME.—"The people of this state want no additional stimulants to prosecute offenders. Rogues are almost the only game our people have to pursue, and they are by no means backward in that chase."—Per Richardson, C. J., in Pettingill *v.* Rideout, 6 N. H. 454.

TOUCHING HERESY.—"We cannot subscribe to the heretical notion that a call to labor is not the common duty of all, in no way impaired or modified by the mere ephemeral incident of wealth."—See Stotler *v.* Chicago, etc., R. Co., 200 Mo. 141. Listens well, but we have often observed that notions are heretical only when the other fellow has them. And we might be willing to be called a heretic if we had plenty of the ephemeral incident.

PARTICULARLY THE WOOD SAWING?—"If the court or statute should require one of its attorneys as an officer to perform certain manual labor quite disconnected from the practice of the law (for instance, to saw a cord of hickory wood daily) or to appear in public in an outlandish or in an archaic dress—for instance, with a cocked hat, sword and knee-breeches—then it might be urged with plausibility that such order of law imposed an unnatural and undignified and illegal burden upon

him and infringed upon his personal rights as an American citizen and gentleman."—See 194 Mo. 147.

NOT WITHIN THE COURT'S JURISDICTION.—The judge was evidently getting a bit fed up with the jury, and at last he announced:

"I discharge this jury!"

A tall, lean member of the 12 then rose.

"Say, Judge, you can't discharge me!"

"Can't discharge you? Why not?" thundered the other.

"Waal," replied the juryman, pointing to counsel for the defense, "I was hired by that guy over there!"—JACK GANUCK.

THE LEGAL STATUS OF AN "ATTRACTIVE" GIRL.—If we interpret correctly the decision in Johnson *v.* Atlas Supply Co. (Tex.) 183 S. W. 31, it is to the effect that no "implied invitation" to go on the premises of another can be said to arise from the presence there of an attractive girl. Of course, the decision is wrong. In the first place, it belies itself. Could there be an "attractive" girl (to use the court's own language) who did not attract? Moreover it is wrong on general principles anyway and every chivalrous court knows better. Casting around for the excuse, however, if one there be, it occurs to us that the Texas judges may have balked at the alternative of having to call a girl an "attractive nuisance."

A QUESTION OF VOCATION.—In Riegi *v.* Phelps, 4 N. Dak. 272, an action against certain attorneys to recover money collected and wrongfully withheld, the plaintiff's counsel closed his printed argument on appeal as follows: "The strongest justification and argument found to sustain the action of defendants, is in Part 1, King Henry IV, Act 1, Scene 2.

"Prince Henry.—I see a good amendment of life in thee, from praying to purse taking.

"Fal.—Why Hal, 'tis my vocation, Hal. 'Tis no sin for a man to labor in his vocation."

For the sake of the good name of our profession, we trust the learned counsel intended to make but a limited application of the famous quip.

GOOD ENOUGH STUFF, BUT WHAT A SENTENCE!—"If we may not be allowed to adopt the quaint conceit, once indulged in, that the idea of monopoly may have originated in Joseph's corn and land dealings in Egypt (Gen. chap. 41; *Ibid.* 47, *q. v.*), or the no less playful conceit of a certain ecclesiastical scholar to the general effect that illegal trusts were hinted at in Rev. 13 : 16-17 (q. v.), yet we feel at least on solid ground on the proposition that statutes leveled against monopolies are buttressed upon the wisdom of the common law, and this court, constrained and enlightened by events of current history, is not required and does not deem itself invited to approach the interpretation of such statutes with a hostile or sour predisposition to drive a coach and six through them, but, on the other hand, while sedulously protecting the rights and liberties of the individual from insidious approaches under whatever artful guise, we should at the same time not lose sight of the rights of the community and should endeavor to advance the beneficent purpose underlying such laws (State ex inf. *v.* Armour Packing Company, 173 Mo. 356), where it can be done without doing violence to constitutional provisions; and in our opinion no constitutional provision is impinged upon by the law providing for such notice nor by the notice itself, so far as it relates to the means employed in procuring the attendance of witnesses." Per Lamm, J., in State *v.* Standard Oil Co., 194 Mo. 148.

THE BRIEF THAT FAILED.—Being moved by a conscientious desire to be of real service to the younger generation of lawyers we quote the following comment by the court on the brief of the appellant in Mitchell *v.* Beck, (Iowa) 156 N. W. 428: "Had it been the purpose to demonstrate how completely the rules of printed presentation could be departed from, its accomplishment is completely effected. There is no pretense of a distinct statement on any error relied upon for reversal. There is no attempt at a 'proposition or point' grouped under a separate claim of error; no pretense of a proposition or point stated concisely and without argument or elaboration. The whole 'Brief' is without logical coherence and without heading, and has no separation except six grand divisions having for a caption the Roman numerals from I to VI, inclusive. Not one of these divisions is in 'water-tight' compartments. Each contains matter foreign to its 'titular object,' if it have one. Each jumbles various unrelated matters and repeats these at unexpected places in the division with lordly indifference to what precedes or follows. Each grand division sees to it that it has thoroughly scattered duplicates of all that is 'pepper boxed' in each of the others. The division with VI as a heading is the banner one. It is content with 1¼ pages of print and is practically confined to one law topic." There is much more in the case in the way of specific criticism of this brief, which was evidently all that a brief should not be, but we have quoted enough. Just as a proper ending to the story, however, we may add that of course the brief failed.

Correspondence

THE PROHIBITION DECISION

To the Editor of LAW NOTES.

SIR: Your article on the Prohibition Decision in the July issue of LAW NOTES I am quite sure is fairly representative of the general opinion of the Bar of the United States on that decision. The dangers pointed out by Mr. Chidsey in his letter which you published on page 80 of the same issue are not at all fantastic or unworthy of attention. In your editorial you call attention to the fact that several states were in court claiming that their reserved sovereignty had been infringed. The failure of the court to give any reasons for its decision, for which it is criticised by the Chief Justice, as you say makes it impossible to regard the decision as one which permanently settles the question. And yet the Chief Justice himself in his concurring opinion does not present any reason for the decision of the court on this question of state's rights, and even in the dissenting opinion of Justice McKenna no attention is paid to this important objection.

That objection is equally applicable to the Fifteenth Amendment and to the proposed Suffrage Amendment which will probably soon be ratified by the required number of states. The Supreme Court has never passed upon that objection although it was distinctly raised by counsel in the case of Myers *v.* Anderson, 238 U. S. 367, as will be seen by reference to the Co-operative Edition of the Reports at pages 1351-2. No attention was paid to it by the court in its opinion however, any more than has been paid to it in the Prohibition Decision. There are persons to be found who will assert that the court makes no answer to this objection because the argument in support of it is unanswerable. If it were possible to get thirty-six states to agree to an amendment entirely abolishing the state governments, no matter what might be the objections by

the twelve other sovereign states, those other states could hope for no relief from the judiciary if this Prohibition Decision remains unchanged.

Santa Fe, N. M. FRANK W. CLANCY.

DECISIONS BY EVENLY DIVIDED COURTS

To the Editor of LAW NOTES.

SIR: In reading the article on decisions by an evenly divided court, 24 LAW NOTES 66, I recall two judicial experiences of my own which may interest you.

In Beck *v.* Church, 113 Pa. 200, as Additional Law Judge of the 45th Judicial District, Pennsylvania, I was called upon to decide a question of practice which had already been disposed of by the President of the Court in another case. Upon an examination of the question, I was not able to agree with the opinion which he had expressed, but being the junior judge of the Court, and the question being one of practice, in order to avoid confusion I deemed it best to defer to the opinion of the President Judge, contenting myself with putting on record in a dissenting opinion the views which I entertained. This case was carried to the Supreme Court of the State, and my decision was reversed, the Court adopting the views expressed in my dissenting opinion. 113 Pa. 200. The President Judge did not sit with me in the argument and disposition of this case, but the course taken was necessary in order to avoid a conflict of ruling. You will note that in this I followed the practice in several of the cases which are cited in the article referred to in your paper.

The effect of a decision by a divided court was presented in a still more interesting case when I was on the Federal Bench, in Hanifen *v.* Armitage, 117 Fed. 845. The subject of the suit in that case was a patent for knitted astrakhan cloth. The validity of the patent had been at first sustained by Judge Dallas in Hanifen *v.* Godshalk, 78 Fed. 811 but upon a rehearing he had felt himself controlled by certain expert evidence and decided against it. But on appeal he was reversed and the patent unheld, although the Court of Appeals was not unanimous. 84 Fed. 649. In the meantime, the same patent came up for consideration in the Second Circuit and was sustained by Judge Townsend in a well-considered opinion. Hanifen *v.* Price, 96 Fed. 435. But he in turn was reversed by the Court of Appeals of the Second Circuit, and the patent declared invalid. 102 Fed. 509. In view of the conflicting decisions in the two circuits, the Supreme Court of the United States allowed a certiorari in the case in the Second Circuit, and in that Court the judges were evenly divided and the decision was accordingly affirmed. 186 U. S. 481. This was the situation when the patent came up before me for disposition in the Circuit Court of the United States for the Eastern District of Pennsylvania. The patent having been sustained by the Circuit Court of Appeals for the Third Circuit, in which I was sitting (84 Fed. 649), I felt constrained by that decision, but at the same time upon an independent consideration of the question I held the patent to be valid. The decision of the Supreme Court of the United States affirming the contrary ruling in the Second Circuit having been made by divided court, I did not regard it as binding. And upon my decision being taken to the Circuit Court of Appeals of the Third Circuit, the appeal was dismissed. Armitage *v.* Hanifen, 121 Fed. 1018. This left the patent in the anomalous position of being good in the Third Circuit but bad in the Second. I understand, however, that the decision favoring the patent was finally accepted.

I am reminded in this connection of another anomalous situation which arose in the case of Commonwealth *v.* Mathues, 210 Pa. 372. The question there involved was the validity of an Act of the Pennsylvania Legislature, increasing the salary of the various judges of the State, including those of the Supreme Court. The law was contested on the ground that the State Constitution prohibited the increase in salary of those who were in office. And on this ground, a similar statute had been vetoed by Governor Beaver in 1889. When this case came up in the lower court, the Act was sustained, the Constitutional provision being held not to apply to judges of the court. An appeal being taken to the Supreme Court, the judges of that court, with one exception, were directly interested in the salary increase and therefore felt themselves disqualified to consider or pass upon the question. One of the judges, however, Judge Thompson, was there by temporary appointment, and the case was therefore turned over to him for disposition. He sustained the law and upon his opinion the judgment of the court below was affirmed. It required, of course, the vote of at least a majority of the other judges to dispose of the appeal. But the decision in fact rested upon the one judge who happened not to be disqualified.

Scranton, Pa. R. W. ARCHBALD.

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Kidnapping.

A RECENT New York crime, as yet unsolved, has led to considerable discussion of the best means of preventing the crime of kidnapping. Kidnapping for ransom, as distinguished from a technical offense growing out of a separation of parents, is an offense which arouses peculiar indignation, appealing as it does to the parental affection of which few are devoid. In addition to the grief and anxiety visited on the parents by a temporary abduction, kidnapping not infrequently results in the death of the child either by murder or from the privation incident to concealment. Moreover, the crime presents some peculiar difficulties of detection because the natural tendency of parents is to put the recovery of the child above the capture of the criminals, and police aid is often not invoked promptly. While many suggestions have been made for strengthening the law, none of them seem practical. Certainly there is no merit in the one most often proffered, the increase of penalties. Making kidnapping a capital crime would not aid in the detection of the culprit, but would certainly give an added incentive for the murder of the child. There is one collateral consideration which is of some interest. It has been much discussed whether the parents of a child kidnapped in its infancy would be able to identify it a year or two later, and the question is certainly a doubtful one. This uncertainty in a matter so vital to the interested persons furnishes another argument for the proposition that there should be established a uniform system of finger print records, the finger print of every child being registered with his birth certificate. By this means identification could be made easy and certain, not only in case of kidnapping but in the many other instances in which personal identity becomes a judicial issue.

Personal Records.

IT is about time that the people of the United States awoke to a realization of the fact that the extent of our population and the complexity of our civilization require a better and more complete system of vital and personal statistics. A few loosely kept records of births and deaths, under ever varying local control, and a census taken every ten years represent now, as they did a hundred years ago, our sole effort in that direction. Meanwhile facilities for travel increase, immigration pours in, and the privilege granted in most states to change a personal name at will without any record of the fact is being increasingly taken advantage of. Every lawyer knows how difficult and uncertain is the investigation of questions of birth and pedigree; how impossible it is in most cases to examine into the personal antecedents of any person. In a new and unsettled country this was well enough; it was perhaps best that men should be able to leave their past behind them and make a new start, but we are now rapidly outgrowing that stage of our national existence. Such a system as obtains in some European countries where a man cannot sojourn in a municipality more than a limited number of hours without giving an account of himself to the public authorities is probably unnecessary and inadvisable. But short of that is much which could profitably be done. A uniform and rigidly kept record of births, deaths, marriages and divorces should be instituted. Change of name without a public record should be prohibited. As previously suggested, finger prints should be a part of each entry, so that personal identity can be proven in connection therewith. On any change of residence, a statement should be required to be filed at the new place of residence as to where the earlier record of the individual is to be found. All this involves comparatively little trouble or expense and no invasion whatever of personal liberty, yet it would simplify many legal investigations, and aid immeasurably in clearing up doubtful cases as to right of inheritance. It is an every-day matter to find a land title depending on what issue a certain person left or whether he was married at the time of making a certain deed. The most any lawyer can now do is to collect a few affidavits of no legal value whatever and take his chances. A properly kept system of vital statistics would make this phase of title investigation as definite as the recorded chain of conveyances. Most states require as prerequisite to the issuance of a marriage license an oath as to the eligibility of the parties, an oath which many do not hesitate to make falsely, leaving the innocent person to learn in later years that the marriage is void. This form of fraud could easily be obviated by requiring proper records and the production of a certified copy thereof. Illustrations might be multiplied, and the public interest to be served seems to outweigh greatly the trouble and expense involved.

Common Sense at Last.

A PERSON who has grown into the cynical habit of expecting to find a miscarriage of justice every time he picks up a case containing a technical objection to an

indictment will be agreeably surprised on reading the recent Texas case of *Garza* v. *State,* 222 S. W. 1105. The indictment in that case charged the defendant with unlawfully carrying a "pistle." His attorney promptly urged that "pistle" was an elliptical form of "epistle" meaning written communication, citing its use in that sense by Chaucer some seven hundred years ago. But to this contention the court with unfeeling and well nigh unconstitutional common sense responded: "We do not think that the fact that an early English poet, in the exercise of his license, should have used this word in that sense, would necessarily give it any standing at this time, or would likely mislead a Brazoria county Mexican, defended by a pair of able lawyers, into the mistake, in preparing for trial upon a charge of unlawfully carrying a 'pistle,' of seriously thinking himself charged with unlawfully carrying a communication." As compared with another recent decision (*State* v. *Atkins,* 77 So. 771) holding that no offense was charged by an indictment alleging that the defendant "did unlawfully and feloniously *shoow* one Rich Armstrong with a dangerous weapon, to wit a pistol," it appears that even the legal world does move.

Dying Declarations in Workmen's Compensation Cases.

THERE has always seemed to be a want of logic in the rule which confined to homicide cases the admissibility of dying declarations. If such declarations rise to the level of legal evidence they should be admitted in all cases; if they do not, no consideration of convenience should make them admissible against a man on trial for his life. Some six years ago the Kansas court repudiated the rule and held a dying declaration admissible in a civil case (*Thurston* v. *Fritz,* 91 Kan. 468), saying: "We are confronted with a restrictive rule of evidence commendable only for its age, its respectability resting solely upon a habit of judicial recognition, formed without reason and continued without justification. The fact that the reason for a given rule perished long ago is no just excuse for refusing now to declare the rule itself abrogated, but rather the greater justification for so declaring; and if no reason ever existed, that fact furnishes additional justification." So far as has come to our notice no other jurisdiction has thus far followed this decision. The same court in the recent case of *Vassar* v. *Swift,* 189 Pac. 943, applied the doctrine announced by it in admitting in a proceeding under the Workmen's Compensation Act a statement made in extremis by the injured employee as to the manner in which he received the injury. The general theory of workmen's compensation proceedings dictates a certain relaxation of the rules of evidence, and it would seem that in those proceedings the ancient and illogical rule against dying declarations in civil cases might well be abrogated. The question does not seem to have been passed on except in the case cited. In *Reck* v. *Whittlesberger,* 181 Mich. 463, Ann. Cas. 1916C 771, it was held that a self-serving statement by an injured workman as to the cause of his injury was inadmissible, and there are two English cases cited in that opinion which hold to the same effect. A different view has been taken in Ireland. *Wright* v. *Kerrigan* [1911] 2 Ir. R. 301. These cases, however, do not touch the proposition that if the expectancy of death does in fact add any weight to an ex parte declaration its effect is as great in a civil as in a criminal case.

Bar Association Recommendation of Judicial Candidates.

REFERRING to the fact that little weight is attached by voters generally to a Bar Association recommendation of candidates for judicial office, a letter recently printed in a St. Louis paper is here quoted in part, not in approval of its sentiments but because it reflects with some accuracy a type of public opinion. The writer says:

> "The voters know that members of the Bar Association have received and continue to receive exorbitant fees, allowed them by the bench, in cases, for instance, where business concerns are put in the hands of a receiver, and the Bar Association has made no protest. The amicus curiæ has ceased to exist and the curia parasiti has taken its place. Each court, circuit and probate, has its ring of favorites—Bar Association members—who are appointed and given large compensation for their services by the court, and no protest comes from the Bar Association. In the criminal divisions of the Circuit Court it is mandatory on the judge to appoint counsel to defend those charged with crime, and those of us who serve on juries know that incompetent young lawyers are always appointed, no fee being allowed. Mr. Curia Parasiti is never appointed to defend indigent persons charged with crime, and if appointed he would refuse to serve. Drop into the Circuit Court—civil division—any morning and there in all his receptive preparedness you will find Curia Parasiti—dozens of him—awaiting the toothsome viands that fall off the judges' bench and no protest from the Bar Association."

Of course it is not true that Bar Association recommendations are controlled by judicial favors past or expected, but that many laymen believe they are and value them accordingly is undeniable. From that fact much harm results, because the members of the bar are obviously the most fit if not the only fit judges of judicial capacity. To educate the public into a belief in professional honesty and disinterestedness is a hopeless task—one dishonest lawyer will undo in an hour a year's work of his more honorable associates. As has previously been pointed out in LAW NOTES the solution would seem to lie in elevating the Bar Association to a higher and more independent position. At present no association represents more than a small minority of the profession, and it in turn is controlled by the small minority of its members who are willing to do the work. The association has no powers and no recognized status, and the motives which impel to membership appeal to but a few. But given a Bar Association membership of which follows from membership of the bar, and which is given by law power to discipline its own members and to formulate subject to judicial approval the rules of civil procedure, and its independence and prestige would soon command popular recognition and lead to a ready acceptance of its recommendations.

Legal Aid Societies.

IT is reported that the American Bar Association at its recent convention in St. Louis recommended the establishment of legal aid bureaus throughout the United States to give free legal advice and assistance to the poor. However little weight may be attached by the voters to such a recommendation, its influence in legislative and professional circles cannot but be great, and it is probable that this action of the association will give a great impetus

to the cause of legal aid to the poor. That such a measure is of peculiar timeliness was pointed out by Mr. Hughes, who said that there is no more serious menace at the present time "than the discontent which is fostered by a belief that one cannot enforce his legal rights because of poverty." The reports thus far received do not indicate whether the association favored the voluntary or the official type of legal aid association, or, in fact, whether it committed itself on that point. The voluntary bureau is hampered by the ever present difficulty of securing contributions sufficient to maintain its efficiency, while the municipal bureau must cope with the periodic official incompetence with which every municipality is afflicted. It is believed, however, that in the long run the latter evil can be overcome more fully than the former. On principle, the argument favors the official bureau, since justice is a public concern, and there is no more reason why the indigent litigant should be compelled to look to private benevolence for the services of an attorney than for making him resort to the same assistance to pay a judge to hear his case. Certainly the matter is one deserving of prompt attention. Mr. Reginald Heber Smith says ("Justice and the Poor," p. 33) that "there are in the United States over 35,000,000 men, women and children whose financial condition renders them unable to pay any appreciable sum for attorneys' services" and who are thereby in effect debarred from any opportunity of resort to the courts. The most liberal discount of these figures leaves a condition which makes it impossible to say with any truth that our government in fact secures equal protection of the law to all.

"Babe" Ruth and the Right of Privacy.

"Babe" Ruth, the well-known New York baseball player, is reported to have brought a suit against a moving picture concern, which having taken a number of pictures of the homerun king in action during the progress of actual games has pieced them together and is exhibiting them under the title "Babe Ruth in 'Over the Fence.'" A New York statute (Civil Rights Law, § 51, McKinney's Consol. Laws, Book 8, p. 44) provides that any person whose "name, portrait or picture" is used "for advertising purposes or for the purpose of trade" without his consent is entitled to damages and an injunction. The applicability of this statute is settled by the decision in *Binns* v. *Vitagraph Co.,* 210 N. Y. 51, Ann. Cas. 1915B 1024, sustaining an injunction against the use of a motion picture film depicting the rescue of the steamer *Republic* and using the name and alleged portrait of Jack Binns, the wireless operator on that ship. It is however contended by the defendant that the statute is designed to protect the right of privacy and that Mr. Ruth as a public character is not entitled to its benefits, particularly with respect to pictures taken of his actual professional work. In some of the cases sustaining a common law right of privacy an exception as to public characters or institutions has been made. See *Vassar College* v. *Loose-Wiles,* 197 Fed. 982. No such exception is, however, contained in the New York statute and no decision thus far appears to have read it in by way of interpretation. While the statute is doubtless aimed primarily at invasions of privacy there is nothing in its terms to forbid giving a construction broad enough to protect public characters in whatever profit they may derive from their celebrity. It is a well-known fact that noted athletes can command large sums for appearing in the "movies." The commercial value of such a representation should in all equity belong to him whose prowess created it and not to some outsider.

Insurance against Libel Suits.

It seems to be well settled by authority that insurance indemnifying against liability for tort is not contrary to public policy though the correctness of the holding is open to much doubt. Under these rulings insurance against employer's liability and automobile owner's liability have become common and there is or was an association insuring physicians against liability for malpractice. There is, however, one closely analogous type of insurance which seems not to be issued, i.e., insurance of newspaper proprietors against liability for defamation. In one aspect such insurance is as legitimate as those which have been referred to. There are thousands of small papers any one of which might, by the error of a correspondent, be subjected to a ruinous liability. Many of the libels for which recovery is had are the result of error and not of express malice. On the other hand there is a considerable amount of reckless or malicious defamation and there would be much more but for the restraining fear of legal liability. There are men whom misfortune or ill-treatment have so embittered that they are filled with the belief that every one around is inspired by the lowest motives and guilty of the most dishonest practices. Let such a person be free to publish what he will without fear of consequences on payment of an insurance premium and no reputation would be safe. Political or business interests would conduct organized campaigns of defamation against rivals, looking to their insurance policies for protection. The utmost limit consistent with public safety would seem to be to permit insurance against liability for defamation by mistake or by the default of a minor employee. The only other course is to enact extremely rigid laws as to criminal responsibility, and this has its dangers because of the possibility that such laws may be perverted by powerful interests to the suppression of free speech. Criminal prosecutions for libel have none too reputable a past and are regarded with considerable suspicion by our people, as witness the number of state constitutions making juries judges of the law in such cases.

Conveyance in Fraud of Wife.

In the August issue of Law Notes some reference was made to the case of *Leonard* v. *Leonard,* 181 Mass. 458, holding that a conveyance by a husband subject to a life estate with the intent to defeat his wife's statutory share in his estate is valid. In this connection one of the justices of the supreme court of Colorado calls our attention to two cases decided in that jurisdiction, *Smith* v. *Smith,* 22 Colo. 480, 24 Colo. 527, and *Phillips* v. *Phillips,* 30 Colo. 516. These cases establish a rule not at variance with that of the Massachusetts court, but somewhat more carefully guarded, the court saying in the Phillips case: "The authorities generally hold that colorable conveyances made for the purpose of defeating the

wife's right are not valid; that conveyances made in immediate expectation of death to accomplish the purposes of a will are testamentary in character and do not defeat the right of the wife; that conveyances made in contemplation of marriage, without the knowledge of the intended wife, for the purpose of defeating the right of dower, are regarded as fraudulent. In the Smith case, as we read it, it is decided that a husband may dispose of his property for the purpose of defeating the right of the wife, and unless the transaction is colorable merely, or is attended with circumstances indicating fraud, it will be good as against the wife; and the fact that the husband intended to defeat her right is not in itself sufficient to invalidate the conveyance—there must be participation in fraudulent conduct by the grantee." Under the decision in the Colorado cases it is not altogether clear whether the conveyance involved in the Massachusetts case would have been sustained. That conveyance reserved a life estate, and was made in consideration of support of the grantor. From these facts it might be held by some courts that the conveyance was colorable. In respect to conveyance for a consideration it is difficult to see how any greater protection can be given to the wife than that afforded by the Colorado decisions. Where the statute permits a conveyance without the concurrence of the wife, every conveyance in pursuance of that authority is made with knowledge that it will decrease the amount of estate descending to the wife and therefore with implied intent that it shall do so. To make the intent a criterion would, therefore, defeat the statute permitting the conveyance. The utmost protection that a wife can rightfully claim from the courts is against mere colorable conveyances. It is however important that this exception to the right to convey should be clearly defined and well enforced. It is to be noted that in a more recent Massachusetts case (*Eaton* v. *Eaton,* 233 Mass. 351, 5 A. L. R. 1426) gifts by a husband which defeated the rights of his wife under an antenuptial agreement were held to be void, the court saying: "The true rule, fairly to be deduced from the weight of authority and resting on sound reason, is that a man who has entered into an antenuptial agreement with a woman who becomes his wife, to give her by will a proportional part of his estate, may, without breaking his agreement, make gifts during his life in good faith and reasonable in amount, having regard to all the circumstances; but he cannot make gifts either absolutely, conditionally, indirectly, or otherwise for the main purpose of defeating his agreement and preventing it from operating for the benefit of his wife." It would seem that the same rule should apply to gifts in the absence of an agreement, the duty of good faith being the same in each instance.

The Future of the Profession.

It is quite obvious that the present trend if continued must seriously affect the future of the profession. On the one hand workmen's compensation acts, arbitration agreements and the like are very sensibly cutting down the volume of litigation. At the same time the law schools are graduating an ever-increasing number of aspirants for professional honors. It is further to be noted that the business in large cities is tending more and more to center in a few offices where most of the work is done by a large staff of clerks. Of course there is "always room at the top," but very few ever get to the top. For the others, there will not be business enough to go around. Some will engage in "side lines," some will resort to more or less unethical efforts to get business. In any event the tone and standing of the profession will suffer. Fortunately the situation is one which is self-corrective. With the recognition that the practice of law is unprofitable will come a decrease in the candidates for its rewards, and demand and supply will again equalize. The high wages paid in various employments will also lead many into manual vocations who would otherwise have aspired to a profession. If there could be made at the present time a marked increase in the educational requirements for admission to the bar, it would, in connection with the tendencies which have been referred to, lead to a distinct elevation of the profession. But if this is not done, if the matter is left to be determined by the "survival of the fittest" the survivors will in the main be not those fittest to uphold the ideals and dignity of the profession, but those best fitted for the sordid task of making a living out of the practice of law without directly infringing any provision of the penal code. Many law schools have increased greatly the severity of their entrance requirements, but these instances are ineffective to protect the profession as long as admission to the bar is open through other and less exacting avenues.

UNEQUAL REPRESENTATION IN CONGRESS.

The Federal Constitution (art. I, sec. 2) provides that representatives in Congress "shall be apportioned among the several states which may be included within this Union according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years and excluding Indians not taxed, three-fifths of all other persons." The abolition of slavery of course destroyed the effect of the last clause, so that representation in Congress is now determined strictly on the basis of population. The vote of each state in the electoral college being equal to the total number of representatives and senators elected in the state (Const. art. II, sec. 1) is likewise fixed on the basis of population. The provision for including in the population three-fifths of the slaves was of course a concession to the less populous states—one of the many compromises which were essential to the unanimous adoption of the Constitution, and is not to be considered as establishing any principle of representation.

With voting qualifications on a basis of substantial uniformity, representation by population is as equitable as any other system. But since the adoption of the Constitution a great diversity in those qualifications has grown up. Many of the former slave states have by such provisions as the "grandfather clause" practically disfranchised the negro. Other states, like Massachusetts, have adopted more or less stringent educational qualifications. The Nineteenth Amendment to the contrary notwithstanding, the question of what persons shall be admitted to vote in a state is a local one. A state may

extend the right of suffrage to every resident or may limit it strictly and no other state has a right to complain.

But when it comes to the question of the number of votes which a state shall have as compared with other states in national affairs, a different question is presented. It is submitted that the true and logical basis for the representation of a state in federal affairs is the votes cast in that state and not its population. In no true or legal sense does a member of Congress represent the non-voters of his state. Of course his acts affect them, but no more than they affect the residents of other states. He is the representative of those from whom his mandate was received; those who had the power to designate a representative and to determine at the close of his term whether he has satisfactorily represented them. In practice as well as in theory this holds true. Everyone knows that the public opinion by which the official acts of a congressman are influenced is the opinion of the voters of his district. Perhaps the strongest of the arguments which led to the general adoption of woman suffrage was that women as property owners were subjected to "taxation without representation."

Putting the matter in another form a certain question of national policy is to be passed on, and in the absence of a system of direct legislation the voters must elect representatives to vote thereon according to their will. Is it not, as thus regarded, an obvious injustice that one group of 50,000 voters should be entitled to have the votes of two representatives cast according to their direction, while another group of equal number has but a single representative? So the voters of the United States elect their President according to the somewhat cumbrous system which the Constitution provides. What equity is there in the proposition that every 9826 voters in Alabama shall have one vote for President in the electoral college, while in California one vote is allowed to 51,809 voters? The situation is clearly presented by the following table, wherein the statement of population is based on the census of 1910, while the Presidential vote given is that of 1912, the election next following the date of the census. In the statement of the number of voters per representative fractions are disregarded.

The inequalities disclosed by this tabulation are so glaring as scarcely to require comment. Suppose a measure is before Congress, say a child labor law; each group of approximately 12,000 voters in Alabama, Louisiana, Mississippi and North and South Carolina is entitled to cast one vote in Congress for or against it, while the voters of California, Colorado, Idaho, Indiana and New York are entitled to one vote for each group of approximately 55,000. In the choice of a President the same ratio holds true, the number of voters represented by one vote in the electoral college varying from about 8000 in Louisiana to 44,000 in Colorado—a voting power multiplied by 5½ by the mere accident of residence in one state rather than another.

The last decade has seen a rapid expansion of the zone of the federal government and the tendency in that direction is unabated. The United States is steadily becoming more a nation and less an aggregation of separate commonwealths. The relation of the citizen to the national government is increasing in importance and complexity. National regulations now touch the private and business life of the individual on every side. The idea entertained by many of the founders of the republic that the federal government is principally concerned with the relation of the states as such has gone into the discard. Under these conditions inequality in the voting power of different sections of the country is in principle destructive of representative government and in practice certain to produce dissatisfaction and sectional animosity. The right of any state to limit suffrage at its discretion is not to be denied. But under the present system a state by taking the vote from a certain class of citizens gives their votes to other citizens. A state disfranchises within its borders those whom it deems unfit, and at the same time votes them in Washington. A white man in New York casts his own vote only, while a white man in Virginia casts, in national affairs, his own vote and that of two negroes as well.

	Population, 1910	Presidential Vote, 1912	Representation in Congress	Electoral Votes	No. of Voters per Congressman
Alabama	2,138,093	117,879	10	12	11,787
Arizona	204,354	23,722	1	3	23,722
Arkansas	1,574,449	124,029	7	9	16,289
California	2,377,549	673,527	11	13	61,228
Colorado	799,024	266,880	4	6	66,720
Connecticut	1,114,756	190,398	5	7	38,079
Delaware	202,322	48,693	1	3	48,693
Florida	921,648	51,891	4	6	12,975
Georgia	2,609,121	121,420	12	14	10,118
Idaho	325,594	105,755	2	4	52,877
Illinois	5,638,591	1,146,173	27	29	42,450
Indiana	2,700,876	654,474	13	15	50,344
Iowa	2,224,771	492,356	11	13	44,579
Kansas	1,672,545	365,497	8	11	40,687
Kentucky	2,289,905	453,698	11	13	41,245
Louisiana	1,656,388	79,377	8	10	9,922
Maine	742,371	129,640	4	6	32,410
Maryland	1,265,346	231,981	6	8	38,663
Massachusetts	3,366,416	488,056	16	18	30,500
Michigan	2,810,173	550,976	13	15	42,382
Minnesota	2,075,708	334,219	10	12	33,421
Mississippi	1,797,114	64,258	8	10	8,032
Missouri	3,293,335	698,562	16	18	43,660
Montana	376,053	79,826	2	4	39,913
Nebraska	1,192,214	249,208	6	8	31,524
Nevada	81,875	20,115	1	3	20,115
New Hampshire	430,572	87,960	2	4	43,980
New Jersey	2,537,167	424,622	12	14	35,585
New Mexico	327,301	51,245	1	3	51,245
New York	9,113,614	1,887,983	43	45	43,906
North Carolina	2,206,287	244,455	10	12	24,445
North Dakota	577,056	86,580	3	5	28,860
Ohio	4,767,121	1,037,094	22	24	47,140
Oklahoma	1,657,155	253,801	8	10	31,725
Oregon	672,765	137,640	3	5	45,880
Pennsylvania	7,665,111	1,217,502	36	38	33,819
Rhode Island	542,610	77,804	3	5	28,902
South Carolina	1,515,400	50,350	7	9	7,192
South Dakota	583,888	116,325	3	5	38,775
Tennessee	2,184,789	247,821	10	12	24,782
Texas	3,896,542	301,788	18	20	16,766
Utah	373,351	112,385	2	4	56,192
Vermont	355,956	62,841	2	4	31,420
Virginia	2,061,612	136,976	10	12	13,697
Washington	1,141,990	322,799	5	7	64,559
West Virginia	1,221,119	268,566	6	8	44,761
Wisconsin	2,333,860	299,972	11	13	27,270
Wyoming	145,965	42,296	1	3	42,296

The solution of course lies in a constitutional amendment requiring congressional representation to be apportioned according to the vote cast at the last presidential

election. Whether the fairness and equity of such an apportionment will ever appeal to enough of the states now enjoying an unfair advantage to permit the ratification of such an amendment remains to be seen, but the question is one deserving of more attention than has been given to it thus far.

W. A. S.

THE AMBULANCE CHASER VS. THE CLAIM AGENT.

THE soliciting of business by a certain type of attorney has long been a thorn in the side of the legal profession. Much has been written concerning the evils attending the business methods of the so-called "ambulance chaser," and he has been damned in no uncertain terms by the courts, bar associations and members of the profession. Nothing that has been written or spoken concerning him has been or can be too severe. As was said in *Maires's Appeal,* 189 Pa. St. 99, 41 Atl. 988: "No lawyer with a proper sense of the dignity of the profession, as well as his own self-respect as a man, will stoop to such practices as have been laid bare in the present proceeding. Not even death can keep these ghouls of society at bay; their emissaries invade the house of mourning; they enter the hospital; no place is sacred from their intrusion. If any more such exist, it is hoped that the censors of the Law Association will continue their laudable efforts, until the offenders shall have been discovered and driven out of the profession."

These views meet with the approval of the very large majority of the profession who share the hope there expressed for the elimination of this pest. But there exists a kindred evil which those interested in the suppression of the "shyster" would seem to have lost sight of and which might well receive some of the attention bestowed on him. While the claim departments of the large corporations, particularly railroad and street car companies, are a necessary and proper adjunct to their business, there is a certain class of claim agent who might be termed the twin brother to the ambulance chaser, and whose activities are as fruitful of evil as his counterpart among the lawyers, if not more so. While we are purging the profession of its shysters, would it not be well to make a clean sweep and eliminate the fraudulent claim agent as well?

A brief résumé of the measures which have been taken to rid the profession and the public of the soliciting lawyer is of interest when contrasted with the almost total lack of attention given the fraudulent claim agent. It was recognized at an early date that the practice of soliciting business by attorneys was unprofessional and destructive of the honor of the profession and the confidence of the community in the integrity of its members. The practice has been commented upon and criticised at meetings of lawyers and in judicial decisions as well as by the general public. It is an evil from which the English law has long sought to protect the community through proceedings in barratry and champerty, which were defined as offenses in the early stages of that law. A similar purpose may also be found in the Roman law which by its provisions for preventing groundless and vexatious suits required that the plaintiff should take an oath that the suit was not commenced from malice and that he believed his course to be legal and just. The defendant was required to swear that in his belief the plaintiff had no just claim. The advocates on both sides were required to take similar oaths. If the plaintiff failed in his suit he was fined a sum which was sometimes a tenth part of the demand, and in cases of great malice and vexation, the plaintiff was further punished by a decree of ignominy. See *Thallhimer* v. *Brinckerhoff,* 3 Cow. (N. Y.) 623, 15 Am. Dec. 308.

The common law of champerty and barratry, though in somewhat less rigid form, has been adopted by many of our states, while in others statutes have been enacted penalizing the practice. In applying the law of barratry to a case of solicitation through the aid of paid "runners" the court in *Maires's Appeal,* 189 Pa. St. 99, 41 Atl. 988, said: "The manner of obtaining the right to bring these suits involves another common-law offense, that of common barratry. Persons who did not care to bring suit, and perhaps thought their injuries were as much the result of their own carelessness as that of any one else, or were unwilling to invest their money in the moderate costs of a lawsuit, were hunted up by the assistants or students, office boys, or 'runners' of Maires, as these pests are called, and thus litigation was made and dishonesty ensued in the division of the spoils. 'Common barratry,' says Mr. Justice Blackstone, 'is the offense of frequently exciting and stirring up suits and quarrels between his Majesty's subjects, either at law or otherwise. The punishment for this offense in a common person is by fine and imprisonment; but if the offender (as is too frequently the case) belongs to the profession of the law, a barrator, who is thus able and willing to do mischief, ought also to be disabled from practicing for the future.' Fourth Commentaries, 134."

In at least one state it was at one time by statute declared to constitute barratry for an attorney to solicit employment. Texas Pen. Code 1911, art. 421. This statute has since been amended and strengthened so as to apply to any person who "shall seek to obtain employment in any claim, to prosecute, defend, present or collect the same by means of personal solicitation of such employment." Laws Texas 1917, c. 133, § 1.

In New York it is made a misdemeanor for an attorney "by himself, or by or in the name of another person, either before or after action brought" to "promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof." § 274 Penal Code (McKinney's Consol. Laws, Book 39, p. 94). Both this section and the similar Texas statute have been held to embrace an agreement made by an attorney with a plaintiff to render his services and also to advance all the money needed to carry on the suit, such an agreement being a promise to give a "valuable consideration" to his client. *McCoy* v. *Gas Engine, etc. Co.,* 152 App. Div. 642, 137 N. Y. S. 591, affirmed in 208 N. Y. 631, 102 N. E. 1106; *Ft. Worth, etc. R. Co.* v. *Carlock,* 33 Tex. Civ. App. 202, 75 S. W. 931. The

validity of the Texas statute has been upheld by the Supreme Court of the United States. *McCloskey* v. *Tobin,* 252 U. S. 107, 40 S. Ct. 306. It was contended in that case that since the state had made causes of action in tort as well as in contract assignable, they had become articles of commerce; that the business of obtaining adjustment of claims was not inherently evil, and that therefore while regulation was permissible, prohibition of the business violated rights of liberty and property and denied the equal protection of the laws. But the court held that to prohibit solicitation was to regulate the business, not to prohibit it, saying: "Regulation which aims to bring the conduct of the business into harmony with ethical practice of the legal profession, to which it is necessarily related, is obviously reasonable."

Thus from ancient days down to the present time constant war has been waged against this class of offender and much has been done to remove him, but we look in vain for the statute or law forbidding and penalizing the pernicious activities of the claim agent, other than the relief afforded through the application of the doctrine of fraud in the procuring of contracts.

That the work of the dishonest claim agent is no fancied evil is abundantly proven by the long list of reported cases in which his activities have been exposed and overturned, to say nothing of the thousands of cases in which the poor and ignorant victim has been defrauded of his rights but of which there is no record. It is with no desire to lessen the well-deserved condemnation of the ambulance chaser, and the efforts being made to eradicate him, that attention is called to the following instances of the handiwork of his brother in sin, but with a hope that he, too, may eventually be curbed by more effectual laws than that invalidating his contracts for fraud when apprehended and brought to the attention of the courts. As bad as is the practice of soliciting law business for large contingent fees, surely the preying on the weak and helpless, the poor and ignorant, is as much if not more deserving of condemnation and punishment.

Of the many means adopted by the dishonest claim agent to defraud the victim of his employer's negligence, one of the most common is to obtain the signature of a release of all claims whatsoever by representing that the document signed is only a receipt for wages or other incidental matter. Like the ambulance chasing attorney he loses no time in his work. Evidently he is a firm believer in the old adage that "the early bird catches the worm," but in his application of the principle he often overreaches himself. Thus we find numerous cases in which releases for personal injury claims have been set aside because obtained at a time when the victim had not sufficiently recovered from the shock of injury or the effect of the drugs administered to alleviate his pain, to be mentally competent to understand what he was signing. The opportunity for fraud presented by such circumstances seems hard to resist. Discussing this phase of the subject it was said in *Gilmore* v. *Western Electric Co.,* (N. D.) 172 N. W. 111: "In settlements of this character it is the plain duty of the court to scrutinize the same carefully, as manifestly there are great opportunities to practice deception and fraud upon poor unfortunates, who, then in a condition of physical disability, and mentally depressed over their misfortunes, and anxiety for their future, perhaps then in dire need of financial assistance, may not know or appreciate the real extent of their injuries, or the proper compensation that they ought to receive therefor." Of course when discovered and brought to the attention of the courts contracts of release obtained by such means will be set aside. The law of fraud and deceit is so well settled and its application to such cases so uniform where the facts justify it, that a citation of cases is unnecessary. But the very frequency of such cases emphasizes the need of some more restraining law than that which declares that if caught and brought into court he will be deprived of the fruits of his fraudulent acts. Would not a statute with teeth in it fit this "ambulance chaser" as well as his compatriot among the lawyers? In some states statutes have been passed recognizing and adopting the law of fraud and deceit as applied to the settlement of personal injury cases, but it can readily be seen that such statutes do not go to the root of the matter and add little to the prior existing law. If there is any statute penalizing the procuring of settlements in personal injury cases by fraud other than providing for their rescission and cancellation, the writer is unaware of them.

It is a regrettable fact that in many of the cases in which releases for claims for personal injuries have been set aside by the courts on the ground of fraud, the guilty parties were members of another high and honorable profession, the fraud being perpetrated through the aid and connivance of physicians. In discussing this phase of the claim agent's activities the Supreme Court of Minnesota has said: "It is equally well established that releases of claims for personal injuries, executed in reliance on fraudulent and false representations of probability of recovery, made to the injured person by an attending physician in the employ of the person sought to be charged, are voidable. Plaintiff has referred us to many authorities of this kind. The courts, moreover, have generally viewed releases by the physician, acting as assistant claim agent, with extreme suspicion, and in many cases in which the physician has acted in the dual capacity of claim agent and doctor, or in which he has violated the proprieties of the situation and has expressed his opinion with reference to or in connection with a settlement then pending, the courts have avoided releases on the ground of mutual mistake, where subsequent experience has shown that the physician was in fact wrong." *Nelson* v. *Chicago, etc., R. Co.,* 111 Minn. 193, 126 N. W. 902, 20 Ann. Cas. 748. However, the mere expression of an erroneous opinion concerning the recovery of one injured, if honestly made, will not authorize the setting aside of a settlement for the injury, but if coupled with statements of fact concerning the nature and character of the injury which are not true, but which have a direct bearing on the extent of the liability and which are likely to induce a belief in the speedy recovery, it will constitute ground for setting aside the settlement and release. *Haigh* v. *White Way Laundry Co.,* 164 Ia. 143, 145 N. W. 473, 550 L. R. A. (N. S.) 1091. An instance of the application of this rule is found in *Jacobson* v. *Chicago, etc., R. Co.,* 132 Minn. 181, 156 N. W. 251, L. R. A. 1916D 144, Ann. Cas. 1918A 355, wherein it appeared that soon after the injury the railroad's physician made a physical examination of the injured person and to induce or cause

him to act thereon, represented that he had suffered no serious injury, had no broken bones, and would recover in the course of two or three weeks. It was held that these representations were material and that the injured person had the right to rely thereon in effecting a settlement with the railroad, and since the representations were untrue in fact, though the falsity was unknown to the physician at the time, and were not made with the intention to deceive, such facts constituted fraud in law, and the release could be rescinded.

In this class of cases no moral turpitude is shown, but they serve to emphasize the degree of care a physician acting as a claim agent or in conjunction with one should exercise because of the weight given his opinion as a member of the medical profession. If the cases were limited to those of this nature there would be little call for criticism, but unfortunately we too often find that the physician has apparently forgotten the high standards of his profession in his zeal as a claim agent and the examples of actual fraud perpetrated in the latter capacity are such as to make the ordinary ambulance chasing lawyer blush with shame at his shortcomings. For instance, in a very recent case arising in Missouri it appeared that one of the employees of a mining company suffered an injury which destroyed the sight of one eye and impaired the other; that this fact was unknown to the employee, but was discovered and known to the company's agent and the doctor who assisted him in obtaining a release, and that the injured man was assured by such agents, who fraudulently concealed the truth, that there was no permanent injury, and that he would speedily and fully recover. In setting aside this release on the ground of fraud the court said: "That this was the grossest kind of fraud, though only going to the inducement for making the release, is too plain for argument. When, as here, the agent of the defendant seeks a settlement with the injured man, takes him to a skilled physician for the purpose of ascertaining the nature and extent of his injury as a basis of the settlement, discovers that the sight of one eye is totally destroyed, and that the other is somewhat impaired, and not only fraudulently conceals such fact from the injured party, but assures him that he will speedily recover and return to his work a sound man, and then settles with him and takes a release on that basis for a small sum based on the probable loss of wages, it would be a reproach to the law to hold that the obtaining of such a release is not so induced by fraud as to warrant setting it aside either in equity under the old practice or under the present statute." *Loveless* v. *Cunard Min. Co.,* (Mo.) 201 S. W. 375. In that case the consideration for the release was eighty-four dollars and the verdict of the jury after the release had been set aside was for six thousand dollars. From the standpoint of the injured person the ambulance chaser's contingent fee would be as nothing compared with the toll attempted to be exacted by the claim agent.

In a somewhat similar case, *Chicago, etc., R. Co.* v. *Johnson,* (Okla.) 175 Pac. 494, it appeared that the claim agent and the railroad's physician happened to be on the train when a woman passenger was injured. In a short time they induced her to sign a release, representing to her that her injuries were slight and temporary, when in fact they were serious and dangerous, which fact the physician knew, or should have known, had he exercised proper care. The consideration for the release in this case was four hundred dollars, which the jury increased to twenty-one hundred when the release was set aside for fraud. In *Missouri Pac. R. Co.* v. *Goodholm,* 61 Kan. 758, 60 Pac. 1066, the consideration for a release obtained by the company's claim agent and the physician was fifteen dollars. A subsequent trial before a jury resulted in a verdict for the sum of five thousand five hundred dollars.

These are not isolated cases, more is the pity; dozens of others practically on all fours might be cited to show the evils of "ambulance chasing" on the part of agents of persons whose negligence has caused an injury. It is true that in these cases the wrong done was subsequently righted, but common experience will tell us that the reported cases represent only a small minority of such cases, the great majority never reaching the courts because of the ignorance of the parties of their rights or of their poverty. The "ambulance chasing" attorney is a recognized evil, and an odoriferous one at that, but for downright small meanness we submit that his twin brother the "ambulance chasing" claim agent or physician-agent takes the palm. If our legislators can find time in their multitudinous law making they might well wedge in a statute here and there making it a crime to obtain a release of a personal injury claim by wilful false statements and misrepresentations.

Minor Bronaugh.

THE PRESUMPTION OF PATERNITY

The maxim of the common law is that marriage is the proof of paternity, and this is really only a translation of the passage in the Digest (2 4.5), *Pater vero is est quem nuptiæ demonstrant.* The civil law, however, differed from the common law in permitting the presumption of paternity which was afforded by the existence of the marriage to be more easily rebutted. When the question of legitimacy comes up for decision at the present day in jurisdictions where English law is administered—as in peerage cases, affiliation cases, etc.—the most difficult points to determine are usually the limits within which the presumption of paternity afforded by marriage is allowed to be rebutted, and the strength of the evidence necessary to successfully rebut the presumption.

The two cases in the English courts in which the subject has been most recently under discussion seem to be *Gordon* v. *Gordon* (90 L. T. Rep. 597; (1903) P. 141) and the *Poulett Peerage* (1903) A. C. 395), the former having been decided on the 12th March, the latter on the 24th July, of the year 1903. In each case the legitimacy of a child born in wedlock was disputed, and, although the two cases were entirely dissimilar in their circumstances, it is worth noting that the judicial enunciation of the principles on which the legitimacy of a child born in wedlock may be controverted was not uniform, though practically contemporaneous.

In the *Poulett Peerage* the statement by a husband that he had not had connection with his wife before marriage was held admissible to show that a full-grown child born six months after marriage was not his child. Lord Halsbury on that occasion said: "There was at one time authority for saying that if the husband and wife were within the four seas you must presume that there

was intercourse, and that you could not possibly contradict it. I think that idea is completely exploded. The question is to be treated as a question of fact, and, like every other question of fact when you are answering a presumption, it may be answered by any evidence that is appropriate to the issue." In *Gordon* v. *Gordon* Sir Francis Jeune, in giving the custody of a child to the father, respondent in the suit, declined to act on or pay any attention to the statement of the mother that the child's father was the co-respondent in the suit. The President quoted from Nicolas on Adulterine Bastardy, as representing "accurately the law on the subject," a passage of which part runs as follows (the italics being in the original): "Sexual intercourse between man and wife must be presumed, and *nothing, except evidence* that the husband *did not have such intercourse* at the period of conception, can illegitimize a child born in wedlock." Nicolas says further on (though not quoted in *Gordon* v. *Gordon*): "Unless it was *impossible* for the husband to be the father of the infant . . . the law protects the interest of the child by securing to it the right of legitimacy." In view of Sir Francis Jeune's observation that Nicolas represents "accurately the law on the subject," it is important to point out that this observation and Nicolas' statements are opposed to the current of authority and considerably exaggerate the difficulty of rebutting the presumption of the paternity of a child that arises from the fact of the marriage of its mother.

The quotation from the *Poulett Peerage* made above, though not under the circumstances a binding pronouncement or decision, does in fact represent broadly the result of cases in the House of Lords such as the *Banbury Peerage* case (1811, 1 Sim. & St. 153) and *Morris* v. *Davies* (1837, 5 Cl. & F. 163), though the law as to admissibility of evidence in legitimacy cases is in some respects on a footing of its own. The *Banbury Peerage* case is fully reported in Sir H. Nicolas' book, pp. 291-551, the report above cited giving only the opinion of the judges in answer to questions put to them in the House of Lords. These opinions were, however, the basis of the House of Lords' decision in the case and were subsequently examined and approved in *Morris* v. *Davies* (*sup.*). The result of these two cases is that the presumption of legitimacy arising from the birth of a child during wedlock may be rebutted by circumstances which, to the satisfaction of the judicial tribunal, lead to a contrary presumption. That is, it need not be shown that it was "impossible for the husband to be the father" as laid down by Nicolas. The rule as laid down in *Morris* v. *Davies* was again approved of in the *Aylesford Peerage* (1885, 11 A. C. 1).

The reliance placed by Sir Francis Jeune in *Gordon* v. *Gordon* upon Nicolas on Adulterine Bastardy was probably due to its being overlooked that Sir Harris Nicolas wrote his book in a measure to demonstrate that the *Banbury Peerage* case was wrongly decided, and before the case of *Morris* v. *Davies* had gone to the House of Lords, where the decision of Lord Lyndhurst in Chancery was affirmed.

The whole subject of the strength and admissibility of evidence to rebut the presumption of the legitimacy of a child born in wedlock has recently been discussed in an Australian case: (*In the Estate of L.*, 1919, V. L. R. 17). The judgment delivered by Mr. Justice Cussen in the Supreme Court of Victoria is a valuable contribution to the literature of the subject. All the relevant English cases and authorities seem to have been cited. The applicant in *In the Estate of L.* claimed to be entitled to a share in certain funds as the child of a lady who was admitted to be her mother. The applicant was born in wedlock, but during a period of complete separation between her mother and the latter's husband. The legitimacy of the applicant was disputed, and it was necessary for her, in order to establish her claim to the share in the funds in question, to show that her father was the husband of her mother. This the applicant failed to do, and it was eventually decided that she was not legitimate, and had not established her claim to the share in the funds. The evidence on which it was held that the initial presumption of the applicant's legitimacy had been effectually rebutted consisted largely of circumstances connected with the mother's life and the conduct and statements of the husband and the wife and her paramour. The husband was never, apparently, away from Victoria, so that there was no actual impossibility of his having had access to his wife at the time of the applicant's conception. The point of view taken by the court is shown by two extracts from the judgment: "The admission of evidence relating to the conduct of husband or wife or alleged adulterer is a special exception to the ordinary rules of evidence. . . . It is a case in which legal relevancy is made to conform to logical relevancy by reference to almost universal experience based upon the affection of a parent for his or her offspring, and the contrary feeling induced in a husband in the case of spurious issue of a wife." "Now, in this case, I am satisfied that the general presumption of legitimacy and sexual intercourse at the critical time between husband and wife has been repelled."

In the *Poulett Peerage* (*sup.*) the husband refused to recognize as his a child born after marriage which must have been begotten before marriage. The evidence was sufficient to rebut the presumption of legitimacy. In general, however, the case of antenuptial conception stands upon a ground of its own. In *Rex* v. *Luffe* (1807, 8 East, 193) Lord Ellenborough said: "The marriage of the parties is the criterion adopted by the law, in cases of antenuptial generation, for ascertaining the actual parentage of the child. For this purpose it will not examine when the gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage." This quotation has been taken as part of the headnote to the report of *Turnock* v. *Turnock* (1867, 16 L. T. Rep. 611). In that case it was held by Sir J. P. Wilde that a child born within six months of the marriage was the legitimate daughter of her parents, and administration of the goods of her deceased father was granted to her.

This general rule as to ante-nuptial generation was at one time thought to have been broken in *Foxcroft's* (*Foxcote's*) case, an old case of 10 Edw. I (1 Rolle Abr. 359), which, according to Sir Harris Nicolas, is "the earliest case of legitimacy which is reported." According to this case (as usually translated from the Norman-French) a woman was married to the man by whom she was pregnant twelve weeks before the birth of her child; the child was declared a bastard and incapable of inheriting the land of his deceased father. This case is the subject of a reporter's note in *Rex* v. *Luffe* (*sup.*), and in Nicolas' Adulterine Bastardy it was pointed out that the case had been *"entirely misunderstood,* and that the question which arose . . . depended solely upon the validity of the marriage itself": (p. 562; italics in the original). The difficulty was cleared up, as far as it can be cleared up, in 1893 by an account of the original roll given in the preface to vol. 9 of the Revised Reports.

All the cases above referred to have been cases where the presumption of legitimacy was rebutted by evidence that the husband did not have access to the wife at such a time as to make it possible for him to have been the father of the person whose legitimacy was in question. Where there are other reasons for doubting the fact of paternity—as impotence, etc.—than mere want of access, different considerations come into play.

But, as regards the mere question of access or no access, the broad rule is that the presumption of paternity may be rebutted by any evidence that is satisfactory to the tribunal deciding the case, and it is not necessary that the impossibility of access should be absolutely demonstrated.—*Law Times.*

Cases of Interest

PRESUMPTION OF LEGITIMACY IN CASE OF EXCEPTIONAL PERIOD OF GESTATION.—It seems that the conclusive presumption of legitimacy does not prevail where a child is born an exceptional time after the separation of husband and wife, although the period is a possible one. It was so held in Estate of McNamara (Cal.) 183 Pac. 552, wherein the court said: "It is apparent at the outset that the conclusive presumption of legitimacy must either be extended to apply to every case where the period of gestation necessary in order that the husband be the father is a possible one, no matter how exceptional or extraordinary such period may be, or else it must be limited in its application to those cases where the period necessary to make the husband the father is within normal or usual limits. There is no middle ground. It is apparent also, from what has already been said, that the facts with which the law has to deal in this regard are that while the average period of gestation is 280 days there are exceptional and rare instances where it exceeds 320 days, and it is probable that there are instances where it exceeds 330 days. The situation therefore is either that a child born 320 days after separation of husband and wife, and probably a child born 330 days or more after, must be conclusively presumed to be legitimate, regardless of what the evidence may show as to the mother having intercourse with another man than her husband during the normal period of conception and the entire absence of any symptoms of prolonged pregnancy, or else the conclusive presumption must be limited to cases where the husband has had intercourse with the wife during the normal period of conception. The mere statement of this proposition involves its answer. The conclusive presumption cannot be applied to such extreme and exceptional cases. To do so would be wholly unreasonable, and would be contrary to the legal presumption which exists in this state, that 'things have happened according to the ordinary course of nature.' Code Civ. Proc. § 1963, subd. 28. Nor is there any reason of public policy which requires such extending of the conclusive presumption."

VALIDITY OF PROVISION IN LIFE INSURANCE POLICY EXCEPTING DEATH WHILE IN MILITARY SERVICE.—In Miller *v.* Illinois Bankers' Life Assoc. (Ark.) 212 S. W. 310, reported and annotated in 7 A. L. R. 378, it was held that a provision in an insurance policy excepting liability for death while in the military service of the United States was not against public policy. The court said: "It is suggested by learned counsel for appellant that the above-mentioned provisions, exempting the company from liability under the circumstances named, ought to be held void for the reason that it is against public policy to permit such contracts of insurance to be made, in that the tendency is to prevent voluntary enlistments in the Army or Navy of the government, or to induce the holder of such a policy to evade or resist involuntary enlistment under the Draft Laws. We do not think the argument is well founded. An insurance company has the right to select the particular risks it is willing to assume, and there is no public policy against a contract of this sort exempting the insurance company, in advance, from liability for death of the insured while in the military or naval service of the government. The stipulation does not provide for a forfeiture of the policy, but merely for an exemption from liability under certain circumstances and conditions. It holds out no inducements to the assured to refrain from enlistment in his country's service, and does not constitute, in any sense, an agreement not to enlist or to evade the Draft Law. No authorities are cited by counsel in support of the contention, and we are unable to find any cases in which the question has been raised. The subject of exemptions from liability on insurance policies in case of service in the Army or Navy is discussed by Mr. Joyce in his work on the Law of Insurance, vol. 4, § 2237, but there is no suggestion there by the author of any question of doubt about the validity of such a provision. There is likewise a discussion on the subject in Cooley's Briefs on the Law of Insurance, vol. 3, pp. 227 et seq., but nothing is said by that author about the posibility of those provisions being held to be void. We find two cases on the subject, in one of which the insurance company was held not to be liable under such an exemption (La Rue *v.* Kansas Mut. L. Ins. Co. 68 Kan. 539, 75 Pac. 494), and in the other (Welts *v.* Connecticut Mut. L. Ins. Co. 48 N. Y. 34, 8 Am. Rep. 518) the company was held liable for the reason that the death of the insured did not fall within the terms of the exemption, as interpreted by the court rendering the decision. In each of the cases, the assured was in the service of the government during the pendency of war; but in one of the cases it was decided the assured was not in the military service, and that the case was, for that reason, not within the exemption."

RIGHT OF MORTGAGOR OF BOOKS TO MAKE PHOTOGRAPHIC COPIES THEREOF.—In Wintler Abstract etc. Co. *v.* Sears, (Wash.) 184 Pac. 309, reported and annotated in 7 A. L. R. 152, it was held that a mortgagor of a set of abstract books and records had no right to make photographic copies thereof for the purpose of using the same after the mortgage was foreclosed, in the business of making abstracts of title to property, or selling the same to be used for a like purpose. The court said: "In the instant case the chief value of the security was not in the abstract books themselves, but in the information contained in them. Any act which would make either the books and records, or the information contained in them, less valuable, would to that extent lessen the value of the security. The mortgage not only covered the books themselves, but the information contained in them; and the making public of that secret information must be considered an unlawful destruction of the security. If one set of photographs may be lawfully taken and sold for use, so may a dozen sets of photographs be taken and sold; and thus what was ample security has become almost valueless. It would be small comfort to the mortgagee to tell him that he must be satisfied if the books themselves have not been injured and if they still contain the original information. This doctrine would take the kernel and leave the shell. If one mortgage a house, used only as a dwelling, he would not subsequently be permitted to convert that mortgaged property into a stable; or if one mortgaged a high-priced pleasure automobile he would not thereafter be permitted to use it as a common truck, although he might not make any physical changes in the conveyance. We have no doubt that if this mortgagee had undertaken to enjoin the taking and selling of these photographs, or had sought to have a receiver appointed to take charge of the property because of such taking and sale, or had commenced suit to foreclose her mortgage because of the depreciation of the security resulting from such taking and sale, she must have prevailed. Any other rule of law would deprive abstract books of nearly

all their commercial value; for who would hereafter lend money upon abstract books as security, knowing that one or more sets of photographic copies may afterwards be lawfully taken and sold, to be used in opposition to the mortgaged property? The same rule of law which would permit a mortgagee to enjoin any act which would wholly or partially destroy the mortgaged property should also permit him to enjoin any act which would wholly or partially destroy the value of that property. We therefore hold that in this case the mortgagor did not have the right, over the objections of the mortgagee, to take and sell these photographic copies. But it does not necessarily follow that the appellant can maintain this suit."

LIABILITY FOR DEATH CAUSED BY RESISTING ARREST.—In Weissengoff *v.* Davis, 260 Fed. 16, reported and annotated in 7 A. L. R. 307, it was held that the driver of an automobile, who, after being lawfully placed under arrest by the sheriff who stepped on the running board of the car, attempted to escape by increasing the speed of the car and struggling with the sheriff for its control, and killed the sheriff by driving the car against an obstacle, was liable in damages for his death. Said the court: "The conduct of defendant was much more than a mere attempt to escape. It was aggressive resistance. After the sheriff stepped on the car and made the arrest, the struggle for control of the machine between him and the defendant was an unlawful struggle, initiated not by the officer, but by the defendant, to wrest the machine from lawful control, asserted and taken by the officer. By initiating and persisting in the effort to wrest the control of the car from the sheriff, the defendant took the risk of his unlawful and aggressive action. It was the duty of the sheriff to overcome this active resistance by force proportionate to it. . . . An officer has the right to stop a train or stagecoach to effect an arrest. St. Johnsbury & L. C. R. Co. *v.* Hunt, 60 Vt. 588, 1 L. R. A. 189, 6 Am. St. Rep. 138, 15 Atl. 186; Brunswick & W. R. Co. *v.* Ponder, 117 Ga. 63, 60 L. R. A. 713, 97 Am. St. Rep. 152, 43 S. E. 430, 13 Am. Neg. Rep. 254. Inevitably it follows that if, in the exercise of the duty to stop the train and make the arrest, the officer steps on the engine, and the engineer initiates a struggle with the officer to wrest the temporary control of the engine from him, he is liable for the consequences of the struggle. It would hardly be disputed that if defendant, after arrest, had pointed a gun at the sheriff as a means of effecting his escape, and in the struggle for the possesion of the gun it had been accidentally discharged and killed the sheriff, the defendant would be civilly liable. It is true that if in such a struggle initiated by the defendant the officer does a wanton or malicious act resulting in injury to the defendant, he, and not the defendant, would be responsible. 2 R. C. L. 470; 5 C. J. 424. But in this case, even if the sheriff, in the excitement of the struggle initiated by the defendant, did so move the wheel that the car struck the bridge, it would be beyond all reason to say that the jury could find he maliciously or wantonly ran a car going 20 to 25 miles an hour against the bridge, when he knew that the impact would almost certainly result in his own death or serious injury. The overwhelming presumption is against such an inference. Viewing the testimony most favorably to the defendant, the only reasonable inference is that the defendant, after his arrest and after the sheriff had assumed legal control of the car, undertook to wrest it from the sheriff's legal custody, and in consequence of the struggle thus began by the defendant the car was unintentionally driven against the bridge.

DUTY OF CARRIER TO FURNISH TANK CARS.—In St. Louis etc. R. Co. *v.* State (Okla.) 184 Pac. 442, reported and annotated in 7 A. L. R. 140, it was held that a railroad company is not required to furnish tank cars to carry the oils of a refinery. The court said: "The general rule is well settled that it is the duty of every common carrier to receive for carriage and to carry the goods of any person tendered to it for transportation, provided the goods are such that it holds itself out as willing to carry. 10 C. J. 65; Covington Stock Yards Co. *v.* Keith, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 461; Elliott, Railroads, § 1465. Subject to such exceptions, it is also the duty of the common carrier to furnish cars suitable in every respect for the safe transportation of the various kinds of property which are usually carried by it. Special cars must be furnished in some instances for transportation of perishable products, refrigerator cars for vegetables and meats, and other cars particularly adapted for the goods transported, as stock cars for cattle, and any failure to observe its duty in this regard will render the carrier liable for loss or injury caused by such failure. 10 C. J. 85; Hutchinson, Carr. § 505; Atlantic Coast Line R. Co. *v.* Geraty, 20 L. R. A. (N. S.) 310, 91 C. C. A. 602, 166 Fed. 10. This general rule, however, is not without exception and qualification. Elliott, Railroads, § 1474; United States *v.* Pennsylvania R. Co. 242 U. S. 209, 61 L. ed. 252, 37 Sup. Ct. Rep. 95; Chicago, R. I. & P. R. Co. *v.* Lawton Ref. Co. 165 C. C. A. 299, 253 Fed. 705. In the case of United States *v.* Pennsylvania R. Co. supra, tank cars are held to be an exception to the general rule. It was also held the Interstate Commerce Commission was without authority or power to require the common carrier to furnish such cars, and that case was followed by the circuit court of appeals in the case of Chicago, R. I. & P. R. Co. *v.* Lawton Ref. Co. supra, where it was said: 'Where articles of an extraordinary character are offered, a carrier is not bound to accept them, or to provide facilities of a different kind from those usually furnished for transportation; hence a railroad company was not required to furnish tank cars to carry the oils of the refinery.' In Re Private Cars, 50 Inters. Com. Rep. 652, the Interstate Commerce Commission found there are fifty-nine varieties of liquids regularly transported in tank cars, and that cars used for transportation of one kind of liquid ordinarily cannot be used for transportation of another of the varieties, many of these liquids requiring especially constructed cars, with special fittings. In that case, among other things, it was said: 'It is more economical and more efficient for the refiner to furnish a tank car, either owning it or leasing it from some concern, than for the railroad company to own it. A refiner producing two kinds of oil, gasolene and residuum, requires two kinds of cars. Another refiner, producing all grades of oil, from the lighter oils down to coke, will require several kinds of cars.'"

PERSONAL LIABILITY OF MEMBERS OF VOLUNTARY ASSOCIATION NOT ORGANIZED FOR PROFIT ON CONTRACTS WITH THIRD PERSONS.—In Robbins Co. *v.* Cook (S. Dak.) 173 N. W. 445, reported and annotated in 7 A. L. R. 218, it was held that members of a voluntary association acting by request of the governor of the state for the purpose of promoting an exhibit to advertise the state at an exposition were personally liable on their contracts for supplies ordered by them in furtherance of the enterprise. Said the court: "It is the contention of defendants that they were acting 'for the state in aid of a patriotic purpose,' and that it was well known by all parties that they had no legal authority to bind the state. They have cited numerous authorities holding that one is not personally liable who purports to act as agent for and to bind a principal by contract where the party with whom he contracts knows that he is not such agent and has no authority to bind his alleged principal.

And there can be no question but what if defendants had contracted in the name of the state of South Dakota, purporting to act as agents of such state, the plaintiff, if aware of their lack of authority, could not hold them personally liable; but this rule of law and the authorities cited have not the remotest bearing upon the situation presented by the facts of this case. It is the law fixing the liability of members of a voluntary association that governs under the facts of this case, and not the laws relating to liability of unauthorized agents. While it is true that the defendants were induced to organize as such association because of a request or so-called 'appointment' of the then governor of this state, no claim is made that any party hereto understood that such appointment was authorized by any law of this state. The defendants are exactly in the same position as though they had acted entirely on their own initiative. The defendants, prompted by the best of motives, undertook to devise some means by which this state would be properly represented at such exposition; and to such end they contracted, not in the name of the state, but in the name that they had assumed for such voluntary association. It is certainly true that they fully expected, as undoubtedly did the plaintiff, that they, as had like bodies in other states, would be able to make a success of the plan adopted, and would be able to pay for the goods purchased out of the proceeds of the sale thereof; but there is no evidence whatsoever to support any claim that it was agreed that plaintiff should look to the proceeds of the sale of these buttons for its pay—a defense pleaded by defendants, but now clearly abandoned because not supported by a scintilla of evidence. It is perfectly clear that defendants never contemplated a liability on the part of the state. It might well be asked: Who did they suppose were buying these goods? The answer is obvious: Themselves. While it is a matter for regret that these defendants must stand the loss resulting from their failure to successfully carry out their plans, there is absolutely no rule of fair dealing among men, and hence no rule of law, that can excuse defendants from paying plaintiff for the goods purchased by them."

Profits Derived from Business Conducted on Property Taken by Eminent Domain as Evidence of Market Value.—It seems that in a proceeding to condemn private property for public use, evidence of past annual profits derived from a business conducted on the property, in the form of net income arising from such business, offered as an index to the market value of the property, is ordinarily admissible, because the extent to which such income arises out of the property used is uncertain; it being dependent on the capital invested, business conditions obtaining, and the trading skill and business capacity of the owner, as well as adaptability of the property to the business. It was so held in Gauley etc. R. Co. *v.* Conley (W. Va.) 100 S. E. 290, wherein the court said: "In the beginning of the trial, the court refused to permit the owners of the property to prove the net income and profits of the horse and mule business conducted in the barn on one of the lots, for the year immediately preceding the month of August, 1917, the date of the institution of this proceeding; but, later, such evidence was admitted over an objection interposed by the applicant. In the argument submitted here in support of the court's final ruling upon the question, it is frankly admitted that such profits cannot be included in the verdict as an element or item of compensation or damages; but it is earnestly insisted that profits actually derived from business conducted on the property may be proved as one of the circumstances tending to show its market value. The distinction between the two offices of proof is obvious, but it does not overcome the objection to the evidence in question. There is a clear distinction, but it is not coextensive with the difference. The rental value is always admissible, because it is almost as fixed and certain as the market value of the property. The profits derived from a business conducted upon the property are uncertain and speculative in character, because the question of profit and loss, or the amount of profit, in the event of any, depends more upon the capital invested, general business conditions, and the trading skill and business capacity of the person conducting it, than it does upon the location of the place of business. Profits already derived from a business may not be speculative, in the true sense of the term; but they would, nevertheless, constitute an uncertain measure of the value of the property upon which the business was carried on. The argument submitted in support of the admissibility of this evidence is plausible; but it is not in harmony with our decisions, nor with the weight of authority throughout the country. Buckhannon & N. R. Co. *v.* Great Scott Coal & Coke Co. 75 W. Va. 423, 83 S. E. 1031; Shenandoah Valley R. Co. *v.* Shepherd, 26 W. Va. 672; Richmond, P. & C. R. Co. *v.* Chamblin, 100 Va. 401, 41 S. E. 750; Braun *v.* Metropolitan West Side Elev. R. Co. 166 Ill. 434, 46 N. E. 974; Dupuis *v.* Chicago & N. W. R. Co. 115 Ill. 97, 3 N. E. 720; Sauer *v.* New York, 44 App. Div. 305, 60 N. Y. Supp. 648; Re Gilroy, 26 App. Div. 314, 49 N. Y. Supp. 798; Newton *v.* Armstrong, 63 Hun, 628, 45 N. Y. S. R. 18, 19 N. Y. Supp. 573; Edmands *v.* Boston, 108 Mass. 535; Cobb *v.* Boston, 109 Mass. 438; Becker *v.* Philadelphia & R. Terminal R. Co. 177 Pa. 252, 35 L. R. A. 583, 35 Atl. 617; Kossler *v.* Pittsburg, C. C. & St. L. R. Co. 208 Pa. 50, 57 Atl. 66. Several of these cases specifically deny the admissibility of evidence of past profits derived from the land taken. Others rule out proof of future profits. No authority explicitly holding that, under ordinary circumstances, such evidence can be received to prove market value, has been cited or found."

News of the Profession

Juvenile Judge Resigns.—I. Daniel Stewart has resigned as juvenile judge of Duchesne County, Utah.

Death of Maryland Judge.—John T. Dutton, former judge of the Orphans' Court of Charles County, Md., is dead at the age of 80 years.

Resignation of Assistant Attorney General.—W. B. Gemmill has resigned as Assistant Attorney General of Indiana and resumed the practice of law.

Former Ohio Judge Dead.—Alexander Kiskadden, 58 years old, former Probate Judge of Seneca County, Ohio, died at Tiffin, O., on August 28.

Michigan State Judges Convene.—The twenty-eighth annual meeting of the Association of Michigan Judges was held at Lansing on Sept. 1 and 2.

New Texas Judge.—Augustus McCloskey has been appointed County Judge of Bexar County, Texas, to succeed Judge James R. Davis, resigned.

Dean of Ohio Bar Dead.—Judge Dennis Dwyer, dean of the Ohio bar, traction magnate and business man, died at Dayton, Ohio, on August 28, at the age of 90.

NEW HAMPSHIRE JUDGE DEAD.—Robert A. Ray, judge of probate for Cheshire County, N. H., for the past 14 years, died at Keene, N. H., on August 25, at the age of 70.

DEATH OF MAINE JUDGE.—Lucillus A. Emory, of Ellsworth, Me., former chief justice of the Maine Supreme Judicial Court, died on August 26 after an illness of several months.

THE MONTANA BAR ASSOCIATION, at its recent annual convention, elected A. N. Whitlock of Missoula as president for the ensuing year. Alva Baird of Missoula was elected secretary and treasurer.

OKLAHOMA LAW PROFESSOR RESIGNS.—Prof. H. H. Foster has resigned from the law school faculty of the University of Oklahoma after ten years of service. He goes to the University of Nebraska.

NEW FEDERAL ATTORNEY IN PENNSYLVANIA.—Dennis J. Driscoll of St. Marys, Elk County, has been named United States Attorney for the Western District of Pennsylvania. He succeeds Major E. Lowry Humes, resigned.

THE COLORADO JUDGES ASSOCIATION, including all district, federal and county judges of the state, met in connection with the annual convention of the Colorado Bar Association at Colorado Springs on August 20.

NEW CHARLOTTESVILLE JUDGE.—John S. Battle, of the law firm of Battle & Smith, has been appointed police justice of Charlottesville, Va., to succeed W. O. Fife, who resigned to assume the position of city attorney.

EX-ENVOY TO SANTO DOMINGO DEAD.—James Mark Sullivan, New York city lawyer, and formerly United States Minister to Santo Domingo, is dead in Ireland where he had been living since he left the diplomatic service in 1915.

FORMER ATTORNEY GENERAL OF VIRGINIA DEAD.—Samuel W. Williams of Roanoke, former attorney general of Virginia, is dead at the age of 73 years. He was at one time State Senator and for a number of years Circuit Judge of his district.

DEATH OF NEW JERSEY JUDGE.—Judge James H. Fithian of the Cumberland County, N. J., Common Pleas Court, died at Bridgeton, N. J., on August 30. He was elected to the State Senate in 1916 and was appointed Judge by Governor Edge in 1919.

PROMINENT LAWYER AND EDITOR DEAD.—Frederic Sturges Allen, general editor of Webster's New International Dictionary and prominent as a lawyer and in literary circles, died last month at Springfield, Mass, at the age of 58 years.

RESIGNATION OF UTAH JUDGE.—Judge Wilson McCarthy has tendered to Governor Bamberger of Utah his resignation from the bench of the Third Judicial District. He was appointed to the bench in June, 1919, and retires to enter private practice.

FORMER JUDGE DIES IN PENNSYLVANIA.—Maxwell Stevenson, former judge of the Philadelphia Common Pleas Court, died at Philadelphia on September 2. Death was due to paralysis resulting from an attack made on him by highwaymen thirteen years ago.

DEATH OF NEW YORK JUSTICE.—Wauhope Lynn, for twenty-three years a Justice of the New York City Municipal Court, died recently at the age of 64 years. He retired from the bench at the end of 1919 and has since served in the capacity of Official Referee.

PENNSYLVANIA JUDGE DEAD.—Judge Francis J. O'Connor of the Cambria County, Pa., Common Pleas Court, is dead at the age of 60. He served a term of ten years as President Judge of Cambria County, from 1901 to 1911, and was re-elected to the bench in 1918.

DEATH OF NOTED LAWYER AND JOURNALIST.—George Herbert Peet, widely known as a lawyer and journalist, died at Washington, D. C., on August 29. Mr. Peet acted as advisor to the French government at the Paris peace conference and held decorations from the Swedish, Greek and French governments.

THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL elected the following officers at its recent annual meeting held in connection with the convention of the American Bar Association: President—J. I. Smith, Alabama; Vice-President—Byron S. Paine, South Dakota; Secretary—Richard J. Hopkins, Kansas.

SOLDIER APPOINTED POLICE JUSTICE.—Capt. Louis N. Duffey has been appointed police justice of Alexandria, Va., to fill the vacancy caused by the death of Judge Luther H. Thompson. Capt. Duffey is a practising attorney and served overseas during the world war for fifteen months.

THE COLORADO BAR ASSOCIATION, at its twenty-third annual meeting held recently, elected the following officers: President—United States Senator Charles S. Thomas; first vice-president—Victor W. Hungerford of Colorado Springs; second vice-president—J. W. Preston of Pueblo; secretary and treasurer—W. W. Grant, Jr., of Denver.

THE OREGON BAR ASSOCIATION met in annual convention at Eugene, Ore., on September 3 and 4. Judge Wallace McCamant delivered the president's address. Professor Hale, recently appointed dean of the law school of the University of Oregon, and for nine years professor of law in the University of Illinois, also delivered an address.

NORTH DAKOTA BAR ASSOCIATION.—At the recent annual meeting of the North Dakota Bar Association, held at Jamestown, N. D., the principal speaker was Judge Peter W. Meldrim of Savannah, Ga. Other speakers included A. G. Divet of Fargo, Justice A. M. Christianson of Bismarck, Charles A. Pollock of Fargo, J. E. Greene of Minot, and S. D. Adams of Lisbon.

BAR ASSOCIATION MAILS REPORT.—More than 2,000 copies of the report and proceedings of the thirty-seventh annual meeting of the Missouri Bar Association, which was held in Kansas City on last October 3 and 4, have been sent to the members of the association by Dell D. Dutton, secretary and treasurer. The report contains 300 pages.

NEW SECTIONS ADDED TO AMERICAN BAR ASSOCIATION.—Two new sections of the American Bar Association were formed at group conferences held in connection with the recent annual convention of the association. The additions are the section of criminal law and the conference of bar association delegates. Stiles W. Burr of St. Paul, Minn., was elected president of the latter section.

NORTHWESTERN LAWYERS' ASSOCIATION.—At the recent sixth annual convention of this association, the membership of which consists of commercial attorneys from the states of North and South Dakota, Montana and Minnesota, the following officers were elected: President—Edgar E. Sharp of Moorhead, Minn.; vice-president—George W. Farr, Miles City, Mont.; secretary—

Herbert M. Bierce, Winona, Minn; treasurer—L. C. Van Ornum, Conde, S. D.

Death of Noted International Lawyer.—Alpheus Henry Snow of Washington, D. C., an authority on international law, died at New York city on August 19 in his sixtieth year. Mr. Snow was a member of the board of trustees of George Washington University, the executive council of the American Society of International Law, the American Bar Association, the American Society for the Judicial Settlement of International Disputes and the American Historical Association. In 1910 he went to The Hague as a United States delegate to the international conference on social insurance.

The American Bar Association held its forty-third annual convention at St. Louis, Mo., on August 25, 26 and 27. The president's address, by Hampton L. Carson of Philadelphia, dealt with the evolution of the Federal Constitution. Others on the list of speakers were the following: Sir Auckland Geddes, British Ambassador to the United States; former Senator Albert J. Beveridge of Indiana; Judge Ben B. Lindsey of Denver; Viscount George Cave, a Lord of Appeal and member of the Judicial Committee of the Privy Council, representing the British Bar Association; Richard Bedford Bennett, of Calgary, Alberta, representing the Canadian Bar Association; Charles Evans Hughes of New York; and former Senator James Hamilton Lewis of Illinois. Lack of space prohibits mention of the meetings of the various sections connected with the Bar Association. William A. Blount, of Pensacola, Fla., was elected president of the association for the ensuing year.

English Notes*

Dog Taxes in France.—In Belgium for many years the dog has ceased to enjoy the status of hereditary loafer, and he has to work for his living in a manner which to the English observer frequently seems little short of cruelty. From the new regulations which come into force on the 1st Jan. next it seems that Tobit's companion during his travels is not treated with much sentimentality in France, for they enact that chiens d'agrément—that is, dogs kept for pleasure—will in districts of less than 50,000 inhabitants pay a yearly tax of 20 francs, or 16s.; in districts of from 50,000 to 250,000 inhabitants, 30 francs, or 24s.; and 40 francs, or 32s., in larger districts. Sporting dogs are treated with greater tenderness, the tax being 10, 15, and 20 francs, according to their use. Watchdogs of all kinds will be taxed 5, 10, and 15 francs. Dogs for leading the blind will be exempted, and those belonging to men injured during the war up to 80 per cent. of invalidité. Dogs which may be classed in two categories will be taxed at the highest rate imposable for such dogs.

Political Effect of Woman Suffrage.—The State of Tennessee appears to have settled the question whether women will be able to vote in the next Presidential election in the United States, says the *Law Times*, though the opponents may endeavor to take action in the courts with a view to nullifying the vote or at least delaying its effect. In a recent article in the Journal of Comparative Legislation Professor Orman Ray summed up the position before the war as being that "about a score of States, provinces, or other political subdivisions had granted women the right to vote in certain elections by male proxies; twenty-two States, provinces, or countries had given women complete suffrage; while in more than fifty other political units, of varying size and importance, and in all parts of the world, women had a limited direct vote in municipal and other strictly local elections." In surveying the prospects of the effect of the women's vote in the United States, the *Times* observed that woman suffrage has not anywhere given politics a new orientation. In the Dominions, where there has been time to watch its effect, it has not developed a new tendency, though it would be interesting to have an impartial account of the effect of the alliance between the total prohibition and the women suffrage parties. There is material for such a study in the operation of woman suffrage legislation in some of the northern countries of Europe as well as in the Dominions.

American Middle Templars.—In his book on the Middle Temple published some years ago, Mr. C. E. A. Bedwell, the librarian of the Inn, called attention to the fact that prior to the secession of the American colonies a very considerable number of transatlantic students joined the Middle Temple, and that of these no fewer than five were signatories to the Declaration of Independence. In an article contributed to the latest number of the *American Historical Review*, Mr. Bedwell deals afresh with the subject, provides a list of those American students, and adds some interesting notes regarding the most distinguished among them. He points out that not only to the Declaration of Independence, but also to the Articles of Confederation and the Constitution, did several of the Middle Templars append their signatures, one of them, John Rutledge, after a career brilliant alike in law and in statesmanship, being nominated by Washington to be second Chief Justice of the United States Supreme Court. Not the least interesting feature about the list of names furnished by Mr. Bedwell is the fact that the link between the United States and the Middle Temple was not completely snapped when the United States set up house for itself, and it is pleasant to know that to this day the connection is maintained. Mr. Bedwell foreshadows the possibility of a little volume that will tell in detail of the notable American Middle Templars, and we can only express the hope that this undertaking, which should prove of decided interest to many both in the old country and in the new, may ere long be realized.

Damages for Breach of Contract to Convey Real Estate.—The case of Coffin *v.* Houlder, recently decided by Eve, J., draws attention to the fact that the rule in Bain *v.* Fothergill (31 L. T. Rep. 387; L. Rep. 7 E. & I. App. 158) is of limited application and has been eaten into by exceptions. There it was laid down that where a vendor cannot complete because his title is defective only nominal damages are recoverable by the purchaser. It was with reference to that rule that Sargant, J., in Re Daniel; Daniel *v.* Vassall (117 L. T. Rep. 472; (1917) 2 Ch. 405) is reported to have said: "It seems to me that the cases establish that contracts for the sale of real estate, like other contracts for sale, cast on vendors a general liability for damages for non-fulfilment of contract, subject only to an exception in a very special and limited class of cases, and that unless a case is brought within that special class the general rule applies." Thus it seems to have come about that the ambit of the exceptions exceeds in extent that of the rule. In Goffin *v.* Houlder the defendant had given a month's option, which, in accordance with the general rule, was construed as being a lunar month of twenty-eight days, to the plaintiff to purchase at a named price (inter alia) a freehold house. On the day before

* With credit to English legal periodicals.

the expiration of that option both the plaintiff and defendant sold independently the house, the former at a larger sum than that for which she was liable on exercising her option to pay the defendant. She wrote exercising her right to purchase, and called on the defendant to convey the property. This the defendant had, through no infirmity inherent in her title, but by her own act in contracting to sell to another, put it out of her power to do. In awarding as damages for breach of contract the increase in price over the price contained in the option, which the plaintiff would have got, a convenient measure of the damages which the plaintiff would have sustained through the defendant's failure to carry out her contract was found, and the court held the plaintiff was entitled to payment by the defendant of that sum with costs.

Cumulative Preference Shares.—Preference shares are generally cumulative, even though they are not expressed to be so (Gore-Brown's Handbook, 34th edit., pp. 27 and 28), and everyone knows that all profits of the company are hypothecated to their payment. The question then naturally arises whether the dividend when paid in some subsequent year belongs to that year or to the earlier years in which there was a deficiency which the dividend has made good. This was the problem which the Court of Appeal had to decide in the recent case of Re Wakley (123 L. T. Rep. 150; (1920) 2 Ch. 205), where the result of the large profits made in 1907 was that in that year there was paid a dividend sufficient to cover not only the dividend of that year, but also the dividends which had not been paid in the two previous years. In that case the testator died in November, 1905, so the court had to decide whether any part of the dividend declared in 1907 belonged to 1905 and so would have to be capitalized. Lord Justice Warrington pointed out that the shareholders have no right to a dividend until there are profits available for the purpose and it has been properly determined to distribute them. "It follows," said his Lordship, "when profits are available and the company determines to distribute them, it is the shareholder who is then entitled to the shares who takes the dividend and not the person entitled to them in past years, though the dividend may in the case of cumulative dividends be large enough to cover the amount which would have been paid in past years if there had been profits available, but which were not paid because there were no such profits." Consequently the shareholder at the time when the dividend was declared came in for a windfall which had not to be capitalized. An interesting question arises in this connection: Would the court interfere with the discretion of directors who refused to declare a dividend, though there were profits, with a view of benefiting a person who was then entitled to reversion to the shares? This might happen in a private company where a tenant for life was dying and it was desired to benefit his successor.

Damages and the Rate of Exchange.—Owing to the great variety of exchange rates, and their rapid fluctuations between countries of the world, the question of how damages for a breach of contract in a foreign country are to be assessed in the United Kingdom has become of considerable importance. In Barry *v.* Van den Hurk (149 L. T. Jour. 387; (1920) 2 K. B. 709) Mr. Justice Bailhache held that where, upon the breach of a contract, the person in default becomes liable to pay money on a foreign currency, the damages, for the purpose of an English judgment, must be assessed as to the date of the default, and the sum payable must be converted into English currency according to the rate of exchange prevailing at that date. The judgments of Mr. Justice McCardie in Lebeaupin *v.* Crispin ((1920) 2 K. B. 714) and of Mr. Justice Roche in Di Fernandino *v.* Simon are to a like effect, and these decisions have been approved by the Court of Appeal in the latter case. There are two rules applicable to the matter: the damages must be assessed in an English court in English money; and they must be assessed at the rate of exchange prevailing at the date of the breach. The question seems to be covered by the statements of Lord Lindley and Lord Justice Vaughan Williams in Manners *v.* Pearson (78 L. T. Rep. 432; (1898) 1 Ch. 581). The Master of the Rolls said: "The necessity of considering what amount the defendants ought to pay in English money arises simply from the fact that the plaintiff, having the right to sue the defendants in this country for a breach of their contract, has chosen to sue them here instead of in Mexico; and . . . the courts of this country have no jurisdiction to order payment of money except in the currency of this country. Whatever sum is ordered to be paid . . . must be expressed in English money, or such order cannot be enforced by the ordinary writs of execution." And the Lord Justice said: "It seems plain that this mode of computing the value of foreign currency or English sterling and thus converting the one currency into the other is based upon damages for the breach of contract to deliver the commodity bargained for at the appointed time and place, and . . . it follows that the date as to which that value must be ascertained is the date of this breach, and not the date of the judgment."

Injured Workman's "Average Weekly Earnings."—The computation of the "average weekly earnings" of an injured workman after the occurrence of the accident which caused his injury, for the purpose of ascertaining the weekly payment payable to him by way of compensation for the same, is not always an easy task. In the recent case of Webster *v.* Harrison, Townsend & Co., Lord Sterndale, M. R., went so far as to say that it is very difficult to state over what period the average is to be taken. The provisions contained in section 1 of the first schedule to the Workmen's Compensation Act 1906 (6 Edw. VII, c. 58) certainly do not enlighten the matter in any considerable degree. But to anyone who is in the least acquainted with the mysteries of that most perplexing of statutes that assertion will cause no surprise whatever. This much at all events is made clear, that the average weekly earnings must be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. As to the statutory requirement that in the case of partial incapacity, the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper, it is noticeable that there is no direction as to the period over which the average is to be taken. On the other hand, with regard to pre-disablement earnings, there is a direction that the period over which the computation must range shall, if possible, be twelve months previous to the accident. If that is not possible, the period must be one during which the workman has been in the employment of the same employer. In the present case, if the average were taken over the whole of the period of the workman's partial incapacity, the amount which he was earning after the accident that had happened to him was greater than the amount which he was earning before. He was receiving higher wages than he did before the accident. The learned county court judge calculated the average over the period which had elapsed at the time when the application came before him. And the contention

that that method was wrong in principle did not meet with the approval of the learned judges of the Court of Appeal. All the same, it was conceded that there might in some cases be reasons and facts to show that such a course was not right.

Running of Limitations Against Criminal Prosecutions.—A paragrahph in the *Times*, entitled "After Eight Years," states that at the Thames Police Court a middle-aged Jewess was charged on remand with stealing a diamond bracelet valued at £45. It was stated that it was eight years since the offense was said to have been committed. After hearing the evidence the magistrate said there was no ground for the charge. The case may direct attention to the fact that, with regard to limitations as to time, it is one of the peculiarities of English law that no general law of prescription exists among us. "The maxim of our law," writes Sir Fitzjames Stephen, "has always been *Nullum tempus occurrit Regi*, and, as a criminal trial is regarded as an action by the King, it follows that it may be brought at any time. This principle has been carried to great lengths in many well-known cases. In the middle of the last [eighteenth] century Aram was convicted and executed for the murder of Clarke fourteen years after his crime. Horne was executed for the murder of his bastard child thirty-five years after his crime. In 1802 Governor Wall was executed for a murder committed in 1782. Not long ago [Sir Fitzjames Stephen wrote in 1881] a man named Shepeard was executed at Norwich for the murder of his wife more than twenty years before, and I may add as a curiosity that at the Derby Winter Assizes in 1863 I held a brief for the Crown in a case in which a man was charged with having stolen a leaf from a parish register in the year 1803. In this instance the grand jury threw out the Bill." The statutory exceptions to the general rule are very few, are for the most part very evidently framed for the protection of the subject as against the power of the Crown. Thus prosecutions for high treason, other than treason by assassinating the Sovereign and for misprision of treason, must be prosecuted within three years: (7 & 8 Will. 3. c. 3, ss. 5, 6). So, too, offenses against the Riot Act and charges for illegal drilling must be prosecuted within twelve months and six months respectively. A salutary enactment provides that offenses punishable on summary conviction must be prosecuted within six months: (11 & 12 Vict. c. 43, s. 11). Under the regulations recently made by an Order in Council under the Restoration of Order in Ireland Act it is provided that offenders charged with crimes punishable on summary conviction, and of such a character as that they may be adequately dealt with by a court of summary jurisdiction, may, if not subject to the Naval Discipline Act or the Air Force Act, or to military law, be tried by a court of summary jurisdiction and not otherwise, and may be so tried notwithstanding that the crime was committed more than six months before the institution of the proceedings before the court.

Actions Against the Crown.—To the line of authorities which in recent years have elucidated the procedure open to a subject who asserts rights as against the Crown has now to be added the interesting judgment of Mr. Justice Rowlatt in the recent case of Bombay and Persia Steam Navigation Company *v.* Maclay. No difficulty, as a rule, occurs where the claim made arises out of a contract with the Crown; there, the remedy is by petition of right. But where the claim arises otherwise than under contract, the answer to the question, what is the proper procedure? has not been quite so easy. If the claim is based on a trespass alleged to have been committed by a government official, the remedy is not against that person in his official capacity, but is against him as an individual: (Raleigh *v.* Goschen, 77 L. T. Rep. 429; (1898) 1 Ch. 73). The rights of the subject were advanced a step further in Dyson *v.* Attorney-General (103 L. T. Rep. 707; (1911) 1 K. B. 410), where it was decided that the plaintiff was entitled to maintain an action against the Attorney-General, as representing the Crown, to have it declared that he, the plaintiff, was not bound to comply with certain notices served upon him under the Finance (1909-10) Act 1910. The next stage in the development of the question arose in China Mutual Steam Navigation Company *v.* Maclay (117 L. T. Rep. 821; (1918) 1 K. B. 33), where the allegation was that the defendant, the Shipping Controller, had overstepped his powers in issuing a certain requisition under the Defence of the Realm Regulations. There it was strenuously contended for the defendant that the action was not maintainable, and that the validity of his acts as an officer of State could not be challenged in an action against him, but only in a properly constituted suit against the Attorney-General as representing the Crown. Mr. Justice Bailhache rejected that contention, basing his decision upon the statement of the law by Sir Richard Webster, then Attorney-General, in Raleigh *v.* Goschen (sup.) that "if any person, whether an officer of State or a subordinate, has to justify an act alleged to be unlawful by reference to an Act of Parliament, or State authority, the legal justification can be inquired into in this court"—a statement which, as Mr. Justice Bailhache said, "plainly contemplates that the officer of State whose conduct is in question would be the defendant to the action." With that case it is now useful to compare Mr. Justice Rowlatt's recent decision. There the action was brought against the same defendant, who, in his capacity of Shipping Controller, had given certain directions diverting the plaintiffs' vessel from her voyage, which resulted in a loss of time and consequent expense, claiming a declaration that the plaintiffs were entitled to compensation for that loss and expense, and that the amount of compensation should be referred to the Admiralty Transport Arbitration Board for assessment. The case differed vitally from that before Mr. Justice Bailhache in this respect, that admittedly the order given by the defendant for the diversion of the vessel was within his powers, and so no wrong had been done by him for which he would be held liable. Further, this was an attempt to obtain a declaration of rights as against the Treasury—the body that would have to pay compensation if any were awarded—by suing an official in his individual capacity. On these grounds Mr. Justice Rowlatt held that the action was misconceived, and accordingly he dismissed it. The decision and the cases preceding it now form a useful code on a subject which, in view of the increase of departmental powers, has become increasingly important.

Obiter Dicta

Surely!—Brewer *v.* Wilson, 17 N. J. Eq. 180.

Surely Not!—Brewer *v.* Cox, 18 Atl. Rep. 864.

No Longer Cheap.—Cole *v.* Nickel, (Nev.) 185 Pac. 565.

Not So Very, Very Many!—Foakes *v.* Beer, 9 App. Cas. (Eng.) 618.

Now Missing.—In State *v.* Link, 87 Kan. 738, the defendant's sentence of imprisonment was affirmed.

Breaking Into the White House?—Cox *v.* State, (Okla.) 186 Pac. 736, was a prosecution for burglary.

TREATING THE PEOPLE ROUGH.—In Rude *v.* People, 44 Colo. 484, the plaintiff in error not only secured a reversal of a judgment of conviction but induced the appellate court to discharge him from custody.

THE MAJORITY AND THE MINORITY.—"There are some people who know everything. There are others, who, conscious of human limitation, speak with caution."—Per Fraser, J., in State *v.* McNeal, (S. Car.) 87 S. E. 1004.

CARRYING THE "STOP, LOOK AND LISTEN" RULE TOO FAR.—"It would be going too far to hold that the keeper of a hotel must spy upon the guests and form a habit of eavesdropping, or to 'stop, look and listen' at the keyhole, to determine what might be going on in the room of a guest."—Per Ethridge, J., in Banfill *v.* Byrd, (Miss.) 84 So. 230.

ESPECIALLY IN A PRESIDENTIAL YEAR!—"Questions of politics and morals, religion and governmental policy, arise and grow acute and become daily provocative, not only of prejudice, but of breaches of the peace, when opinions touching them are expressed which are at variance with the views of those within hearing distance."—Per Paris, J., in State *v.* Bowman, 213 S. W. 64.

AN UNALIENABLE RIGHT.—Said Vice-president Marshall at Duluth, Minn., recently, in explaining why he voted against the prohibition amendment: "I have always believed it is an American citizen's God-given right to make an ass of himself if he wants to." Says the Declaration of Independence: "We hold these truths to be self-evident, that all men . . . are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness." Which of these three "unalienable rights" could the Vice-president have had in mind?

INFORMATION WANTED.—"It was quarter to four in the afternoon of a lazy day. The Janney jury had just filed out in the custody of a debilitated constable sworn to deprive them of meat and drink until they had agreed upon a verdict." Thus begins William Hamilton Osborne's story, "A Turn of the Wrist," in the *Saturday Evening Post* for September 4. The scene of the story being evidently a city in the United States and the time being of the present day, it is no idle curiosity that prompts us to ask in what particular American jurisdiction is the ancient practice of starving a jury into agreement still followed?

QUÆRE: HOW WOULD IT BE ACCEPTED TO-DAY?—"Plaintiff testified that the defendant was addicted to drink, but the only serious charge made in that regard is that on the Fourth of July defendant attended a baseball game and came home somewhat intoxicated. I have never understood that such slight indiscretions on the Natal Day of the Republic were sufficient ground for either divorce or separate maintenance. However, if it be the law, I very much doubt that the American public will accept it as a good law."—Per Gideon, J., (dissenting) in Willardson *v.* Willardson, (Utah) 172 Pac. 719, decided in 1918.

IT ACTUALLY HAPPENED.—One of the favorite outdoor sports of the "clammers" who infest the waters appurtenant to Long Island is the exciting game of poaching on private oyster preserves. Every so often the private owner wins the game by having the poacher haled into police court. A few days ago, one of these scenes occurred at Northport, L. I., several poachers being put on trial before a Court of Special Sessions with a jury. Lawyer Rowland Miles was cross-examining a "clammer" who had taken the stand in his own behalf, when the following colloquy occurred:

"Have you ever been convicted of stealing oysters?"

"No, sir."

"What! Didn't you live over at Patchogue at one time?"

"Yes, sir."

"Well, weren't you convicted there of stealing oysters?"

"Oh, no! I wasn't convicted that time. I pleaded guilty."

HAPPIER THAN HOME.—The prominence of spiritism as a matter of public interest at the present time serves to recall a story told at a session of the American Bar Association several years ago by James O. Crosby of Iowa. Apropos of the failure of a delegate to the International Law Association to attend at the place appointed for the meeting, Mr. Crosby said: "It reminded me of the man who went to see a spiritualist or circulating medium. The medium asked the man how his family was. As a matter of fact this man's family had not been one where domestic felicity dwelt during the wife's lifetime, but he told the medium that he would like to communicate with his wife. The medium said, 'Ask any question you like.' So the man asked, 'My dear, are you happy?' The answer came back, 'Yes.' Then he asked, 'Are you happier than you were when you were at home with me?' 'Oh, yes,' the spirit wife replied, 'much happier.' Then the man said, 'Won't you give me a little description of heaven?' The wife replied, 'Heaven! Oh, I ain't there.'"

LOOKING FOR TROUBLE.—Basing his remarks on Adams *v.* Gillig, 199 N. Y. 314, "B. D." tries to start an argument with us as follows: "If a sale of property is induced by a verbal promise on the part of the purchaser that he will not erect a particular sort of structure, the vendor in case the purchaser violate the promise will not be entitled to relief. But if the sale be induced by a statement of the purchaser that he *has no intention of erecting* such a structure, the vendor will be accorded a remedy. The case will be determined one way or the other in accordance with the proof as to whether the purchaser 'promised' or whether he made a statement as to his existing 'intention.' Now, then, if the evidence shows that the purchaser said, 'I will not erect such a structure,' it is plain that the vendor will have no remedy—because 'will' is expressive of a promise or agreement. But if the proof is that the purchaser said, 'I shall not build, etc.,' the vendor may bring his suit—because it is equally settled that 'shall' imports an intention with respect to future conduct. Who can question but what the Law is scientific in its operation?" We pass the argument along to our readers.

STRANGER THAN FICTION.—Florian Charles Schmidt, a resident of Chicago, Ill., made and executed his last will and testament in the year 1904 and died in December, 1908. Just a few months ago, as a consequence of litigation between his heirs, the provisions of the will were made public by being set out in full in an opinion rendered by the Illinois Supreme Court (see Schmidt *v.* Schmidt, 126 N. E. 736). This column of LAW NOTES being intended as a museum for the collection of curiosities appertaining to the law, Mr. Schmidt's will is entitled to a good sized niche therein.

The will is a long one, containing 16 clauses, the last of which is subdivided into 11 paragraphs. After reading it, we can easily visualize Mr. Schmidt. He must have been an ex-

ceedingly cautious man, even suspicious in his caution at times, with all the thoroughness and preparedness for emergency which is characteristic of his race. And yet with all his shrewdness, he was sentimental on occasion, and even of a forgiving nature.

As the first instance of his caution, we may note that he declares by way of introduction that he "was lawfully married to Henrietta B. Schmidt (maiden name Henrietta B. Vahlberg) with whom I am now living." Thus does he forestall the possible evil tongue of gossip or rumor.

As a further evidence of carefulness, verging on suspicion, he directs in clause 5 that a certain trust deed formerly executed by him be cancelled, adding: "Have the old Title Guarantee & Trust Company, or its successors, attend that the above, but stay right with it until the same is cancelled and recorded."

Again, desiring that everything should be attended to without undue haste, which often results in error or mistake, he says in clause 11: "Burial ground to be selected by my wife within two years after my death. If no suitable ground can be found at the time of death, place my body on a single lot until later, then when suitable place is found take up my body and place same in the right place or lot purchased for that purpose. (Don't be in no hurry; take your time.)"

The softer side of his nature is shown by the fact that after cutting his wife's life estate in the whole property down to a one-fourth interest should she marry again, he is nevertheless willing to forgive her for such disloyalty, for he puts in another clause reading thus: "I will and request should my wife remarry and find she has made a failure of her remarriage at any time and she obtains a legal and lawful divorce from him and will have no further dealing with him whatsoever, she then can claim her full share of the will as article No. 12 of this will calls for."

In clause 16, Mr. Schmidt reveals his sentimental self. He says that should he, his wife, and his three children all die without descendants, a certain hospital is to become his trustee, and he directs the trustee as follows: "My trustee should secure our bodies, if dead, in whatever country they may be and at whatever expense, bring them to Evansville, Indiana, and there give them a first-class burial from the Trinity Catholic Church, having a requiem high mass, with music and singing (full chorus)."

But even such a good funeral service as this is not sufficient. He wants the interment also to be carried off in good style. So he says: "A burial ground to be purchased at the Catholic cemetery at Evansville, Indiana, costing not less than one thousand dollars, and erect a monument thereon costing not less than two thousand dollars, with headstone for each of the dead. Upon this ground our bodies should be entered and funeral service as follows: The graves should be made of a large cement box with cement corner, and while the bodies are being lowered into the grave any first-class band of music of twelve to twenty pieces should play the piece Nearer My God to Thee, and the casket should be lowered and disappear in a mount of flowers into their resting place forever. If Undertaker Joseph Szenanke is still in the business I wish he would take charge of the funeral." We just wonder whether Szenanke was on the job!

Finally, can it be possible that this expatriated German scented trouble in the future? If not, then the following provision for an almost impossible contingency is all the more remarkable: "This is the most important of all. Should at any time myself, wife or children, or any one of my children, return and make their legal claims and prove the same, then the entire estate is to go back to my said descendants. This is done in case one should be claimed dead, probably in some strange country, or imprisoned from where he or she could not return or be heard from, in this case he or she could claim their estate upon proving their claims. This is also the reason I want this trust in charge to continue twenty-five years, so as to give anyone, myself, wife or children, a good fair chance to come back and make their claim."

Verily, truth is stranger than fiction. If Arthur Train had pictured, in the *Saturday Evening Post*, a consultation over such a will as this in the office of Tutt and Mr. Tutt, who of us would not have smiled indulgently at the brilliant imagination of the author?

Correspondence

LIABILITY OF TELEGRAPH COMPANY FOR NEGLIGENCE

To the Editor of LAW NOTES.

SIR: My attention has just been called by one of our local attorneys to the article in your June number (page 44) entitled "Liability of Telegraph Companies," in which you call attention to the fact that there can no longer be a recovery for mental anguish, even in a mental anguish state, on an interstate message, and add the singular non-sequitur, "The result is that telegraph companies are, except as to intrastate messages in some states, practically immune from liability for negligence."

If the only direct consequence of the telegraph company's negligence is mental anguish, unaccompanied by physical injury, the telegraph company ought to be "practically immune from liability" for it, because any other person, firm or corporation would be similarly "practically immune." There is no reason why a telegraph company should be liable for a kind of damage for which no other litigant is liable. As the supreme court of Indiana said on this point in Western Union *v.* Ferguson, 157 Ind. 37: "Denial of equal justice, wrongful discrimination between persons in similar circumstances, is at least as vicious in judge-made as in statutory law;" and as the supreme court of Minnesota said in Francis *v.* Western Union, 59 N. W. 1078: "The breach of any contract—even the failure of the debtor to pay his debt at maturity—may result in more or less mental anxiety or suffering to the party to whom the obligation is due. Why not allow damage for the mental suffering or disappointment of passengers caused by the delay of trains through the negligence of the carrier? The object of the journeys of travelers is often not pecuniary, but to visit sick relatives or attend the funeral of deceased ones, which are matters affecting the feelings as much and as exclusively as a telegram. . . . It is useless to undertake to give the instances in which the rule is not the rule; for it is not the rule against any one except telegraph companies, and not against them uniformly."

It was not my purpose to enter into a discussion of the absurdities and inconsistencies of the mental anguish doctrine, but rather to point out—I think it is a matter of some public interest—the mistake you make when you say that telegraph companies are practically immune from liability for negligence under the recent decisions.

I enclose the standard message contract of the Western Union Telegraph Company, from which you will note that any person whose message has a substantial money value—i.e., any person sending a message of such a character that a substantial money

loss is likely to result directly from delay or error in the message—can secure absolute protection against negligence on the part of the company by selecting for his message the proper classification and paying the appropriate rate. If, for instance, the message is one directing the sender's broker to buy one hundred shares of steel common, repetition will prevent error and the appropriate valuation will protect against negligent delay. The sender of such a message knows that steel common fluctuates, let us say, not more than about one or two points a day, and that within twenty-four hours at most he should receive a confirmation from his broker, or, failing such confirmation, can inquire and make sure whether or not his message was duly delivered. The value of such a message, therefore, i.e., the value of his right to have such a message promptly and correctly delivered, may be ascertained by multiplying one day's probable fluctuation in the market by the number of shares directed to be purchased. The small additional charge for the higher valuation—one-tenth of one per cent—is the same as in the analogous case of an express package, and has been approved by the Interstate Commerce Commission (Cultra *v.* Western Union, 44 I. C. C. 670), which, of course, has power to reduce it if experience indicates that it is too high. As a matter of fact there is now pending before the Interstate Commerce Commission a proceeding to revise the whole telegraph contract, and it has been suggested that the liability for an unrepeated message shall be increased to fifty dollars, and that for a repeated message not specially valued to one hundred and fifty dollars. The point is, of course, to fix the basic rates with respect to a liability broad enough to cover the immense majority of messages, leaving the sender of the ultra-valuable message to pay, if he desires complete protection, an additional rate almost infinitesimally small in itself, but sufficient in conjunction with the other payments for messages of the same class to provide a fund to take care of the losses. In handling a hundred million messages a year a certain percentage of losses is unavoidable, no matter how carefully managed the business may be; precisely as a certain percentage of industrial accidents is unavoidable in any business. Someone must bear these losses; and it seems more fair that the burden should fall on those who send the important messages than that it should be spread over the entire telegraph-using public in the form of a general tendency to uniform high rates.

New York City. FRANCIS R. STARK.

THE CHRISTIAN SCIENCE SIDE OF THE QUESTION.

To the Editor of LAW NOTES.

SIR: It will undoubtedly occur to many readers of your magazine that the article, "Religious Belief as Excuse for Failure to Furnish Medical Attendance," in your June issue really presents but one side of an important question. Its argument is based wholly upon the false supposition that materia medica practice has developed to a stage of reliability superior to that of other healing methods, sufficient in fact to warrant making its employment compulsory upon those responsible for the welfare of children and other dependent persons. This leaves untouched the successful treatment of disease through spiritual means, particularly through Christian Science, and other drugless methods which have developed during the last half century. Since many will contend that without consideration of this phase of the problem a wrong conclusion has been arrived at I shall be grateful for the privilege of setting forth another view, that of the Christian Scientist. Christian Science practice, in many states based upon constitutional provision, has been generally legalized by statute and by executive order in the United States; and there is no place where its practice is forbidden. In the State of New York the right to practice Christian Science as a healing method has been established through legislative enactment, and the legality of such practice has been affirmed and reaffirmed in the highest court of the state; consequently before the law Christian Science practice stands as favorably as any healing method.

It seems clear that compulsory medical treatment for a minor or a dependent person could be justified only upon positive proof that such a practice is the most reliable method of healing disease. Such proof it may be definitely stated cannot be had. Dr. Richard C. Cabot of Boston, a well-known medical authority, recently stated in a volume entitled "Social Work," that of the one hundred and fifty diseases known to medical science, specifics have been found for not more than eight and possibly for not more than six, and that consequently the one hundred and forty-two or one hundred and forty-four ailments for which no specific has been discovered are healed only by natural methods. This would seem poor evidence upon which to base compulsory medical treatment. Yet under the reasoning of your argument a parent should be compelled to employ for a child a method which in the great majority of cases its practitioners disclaim so far as drug healing goes. The successful result of Christian Science treatment of disease, including cases called by the medical profession incurable, has become of very general knowledge among intelligent persons and is recognized by the medical profession as well. Moreover, as in the Walker case, because he failed to supply medical treatment for a sick child, to convict of manslaughter a parent who, through long and personal experience supplemented by that of the members of his family, has come to accept literally and to prove the power and presence of God as available to heal disease in fulfillment of Scriptural teaching, is to say the least a form of unwarranted persecution; for not only does it deprive him of his parental right of selecting that method of healing which, based upon his own experience, is most efficacious, but on the other hand it presumes that medical practice is sufficiently infallible to warrant its compulsory use. And it should be remembered that the vast majority of the adherents of this religion have accepted spiritual means of healing after material methods have failed.

Two prominent medical authorities have recently stated that approximately one-third of the population of our country no longer use drugs for healing. It is also of interest to note that during the days when the conviction of Mr. Walker for manslaughter in New Jersey was being exploited the press also told of the deaths of four children in one family from measles, a disease by the way for which the medical profession on their own testimony have found no cure. A few days later there also appeared an account of the deaths under medical care of three orphans in two different institutions, two from diphtheria, the malady from which the Walker child is said to have suffered. Yet no complaints were made and no talk was heard of indicting the parents or guardians of these children.

The inadequacy of medical treatment was never more definitely shown than in the situation in our country during the so-called influenza epidemic in the winter of 1918-19. The experience is so recent that it is not necessary to recall its details, but, as is generally known, the medical profession was quite helpless before its ravages. Carefully collected statistics, of Christian Science practice in New York State during that period, showed success in treating this malady, even in its more virulent forms, that was little short of phenomenal. In fact the cases unsuccessfully

treated were less than three in a thousand, in comparison with much larger numbers as reported by the various Boards of Health.

The obligation of a parent or guardian to supply medical treatment for a child was thoroughly discussed in a very illuminating way in a recent decision of the Supreme Court of the State of Florida which reversed the conviction in the lower court of a parent who did not furnish medical treatment for his child. In handing down the decision of the court, Chief Justice Brown added the following memorandum:

"I fully concur in the decision and opinion in the case.

"The question of the father's religious belief is in no wise involved.

"The all-important question is, must a parent call a physiciant every time his child is sick, or risk being adjudged guilty of manslaughter if the child should die? If not, who is to decide when the child is sick enough to place upon the father the obligation to call a physician? Is it the father, or the neighbors, or must the father call a physician to ascertain if the child needs a physician?

"Has the practice of medicine become an exact science, so that after death, human testimony can establish beyond a reasonable doubt that if a physician had been called the child would not have died?

"Does the duty of a parent to call a physician attach where a child is afflicted with a necessarily fatal ailment, such as consumption, and continue until death occurs? Can the law fix what class of ailments a child must be suffering from before the failure to call a physician becomes culpable negligence, so that if death ensues in one class it is manslaughter and in another it is not? Shall a parent who belongs to that exemplary band of Christians who have no faith in the efficacy of medicine as a curative agency, be convicted of manslaughter, because he fails to call a physician to attend a sick child that subsequently dies? Until the practice of medicine becomes an exact science so that it can be established beyond the peradventure of a doubt that death would not have ensued if a physician had been in attendance, I think the answer to all these questions must be an unqualified 'No.'"

No one can justly deny the obligation resting upon a parent or guardian to supply whatever is necessary to the health and general welfare of a dependent. The statutes in certain states which have recognized the obligation of the parent or guardian to furnish that dependent child, with food, shelter and medical attendance do not take into account the extent to which spiritual healing of disease has developed. The citation from Lord Russell that the standard of neglect varies as time goes on is particularly pertinent in this discussion. Fifty years ago Christian Science was having its beginnings. To-day it has become a demonstrable means of healing the sick which its followers believe and prove to their satisfaction to be by far the most efficacious method known, since it invokes the omnipotence and omnipresence of God. Knowledge of spiritual healing has now become so widely disseminated that there can be no excuse on the part of legislators for lack of knowledge of its efficacy. Because of the proved healing efficacy of Christian Science statutory law which would compel the use of medical methods of healing is not protective but restrictive and proscriptive. Apart from all questions of religion and the free exercise of conscience the question resolves itself into this: Has materia medica so far demonstrated its superiority as to warrant making its use compulsory? A constantly increasing number of persons will answer this question in the negative.

New York City. ALBERT F. GILMORE.

"A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other."—Per Waite, C. J., in Munn *v.* Illinois, 94 U. S. 134.

"We concede the aphorism upon which counsel relies that the 'equal protection of the laws is a pledge of the protection of equal laws.'"—Per Mr. Justice McKenna in Perley *v.* North Carolina (1919) 249 U. S. 510, 514.

"The more revolting the crime and the more it shocks the public conscience, the more important it becomes that the court should carefully safeguard all the rights of the accused by the strict application of the rules of evidence which the collective thought and experience of jurists through the ages have evolved as tending in the greatest number of cases to insure exact justice, that the jury may not substitute public sentiment for legal proof."—Per Robinson, J., in Wertenberger *v.* State, (Ohio) 124 N. E. 245.

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Law Notes

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Time to Wake Up.

ON Sept. 16th of this year two events occurred in New York city which bear a closer relation than is apparent on the surface. A bomb was exploded in front of the offices of J. P. Morgan, killing over thirty people and injuring about two hundred more. On the same day the five socialist members of the New York Assembly who were expelled last year for disloyalty were re-elected because only a handful of the nonsocialist voters of their districts came to the polls. Nero, fiddling while Rome burned, was a model of civic virtue by comparison. The merit of our government is to be found primarily in the fact that under the Constitution no wrong can exist which a majority of the people cannot correct. The indifference which will not seek to redress a grievance in the constitutional way and the lawlessness which seeks to redress it in some other way are twin evils, each striking at the very heart of free government. For the first the only remedy is the slow process of education in civic duty. For the second the only cure is the enforcement of law. How many more object lessons does the country need to convince it that the propaganda of hatred and disloyalty which has been so long tolerated is not a social or political reform movement, but is nothing more or less than incitement to crime? Is it not about time that we abated a little of our excited legal quest for 1 per cent beer and began to take an interest in the distillation of 100 per cent poison? There is little use in seeking the hand that perpetrated a particular outrage. The actual perpetrator will be found ordinarily to be either ignorant or mentally unbalanced. The blood of his victims lies at the door of those who have been preaching class hatred and disloyalty to the government and of those who, charged with the enforcement of the law, have allowed them to do so.

Macaulay's Prophecy.

IT was in 1859 that Macaulay wrote to a friend in America a letter containing these oft quoted words: "Your Constitution is all sail and no anchor. As I said before, when a society has entered on this downward progress, either civilization or liberty must perish. Either some Cæsar or Napoleon will seize the reins of government with a strong hand, or your Republic will be as fearfully plundered and laid waste by barbarians in the twentieth century as the Roman Empire was in the fifth, with this difference, that the Huns and Vandals who ravaged the Roman Empire came from without and that your Huns and Vandals will have been engendered within your own country by your own institutions." The "Ides of March" have come—but have not gone. We are now just well entered on the twentieth century. How far do present indications show that this prophecy of a man who regarded democracy as fundamentally unsound is in a fair way to be verified? That Huns and Vandals have been developed in the United States is undeniable, though the theory of Macaulay finds refutation in the fact that most of the enemies of our civilization are the imported product of European autocracies. The revolutionist who has behind him three generations of life under a democratic government here or abroad is so rare as to be negligible. The acid test of war has proved the sterling loyalty of the great body of our citizens. The equally democratic people of France and of England and her colonies gave a like demonstration of patriotism. We may therefore accept it as an exploded fallacy that a democratic form of government contains the seeds of its own destruction. So of the statement that our Constitution is "all sail and no anchor," sixty years have passed since that statement was penned, and the Constitution has held the ship of state safely through civil war and foreign war and through industrial changes that would have staggered the imagination of any man to whom they were suggested half a century ago. To-day there is world wide unrest and disturbance, but in no part of the world is it less menacing than in the United States, for in no other part of the world is so large a proportion of the population enjoying fair return for labor and the full protection of laws of their own making. The Hun and the Vandal are, so far as danger from their efforts is concerned, the products not of democracy but of injustice. They will never destroy the American Government until justice has first been destroyed.

A Progressive Constitution.

DOES not Macaulay's own figure of speech contain the fallacy which vitiates his conclusions? Our Constitution may be "all sail and no anchor." The scope which has been given to the police power by recent decisions goes far toward warranting that statement. But as every seafaring man knows an anchor is a factor of safety only in a sheltered harbor. The ship of state must move with the winds of time and progress, and in so doing must put its trust in stout rigging and a steady hand on the helm, and not in an anchor. The

forces of progress are irresistible and no form can continue to live which is not elastic enough to give expression to progress. Our Constitution possesses elasticity, not only of amendment but of interpretation, and in that fact lies our safety. If, by the charter of our government or by the entrenched powers of a few men, reforms generally demanded could be nullified, the end of our form of government would be in sight. But as long as that government can be made responsive to the demands of a majority it is safe. There is no reason, no justification, for the revolutionary agitation now carried on by a few, for the simple reason that a majority can have whatever it wants without revolution, and a change against the will of the majority is not democracy but tyranny, whether that change is made by a king or by a revolutionary group. It is well to celebrate "Constitution Day," well to inculcate respect for the charter of our liberties. It is not so clearly well to say, as did an eminent jurist in a recent opinion, that if the Constitution is to survive we must "get back to a strict construction of constitutional limitations upon the exercise of legislative, executive and judicial powers." (Chief Justice Browne in *Blackwell* v. *State,* 86 So. 224.) It needs no extensive acquaintance with the viewpoint of the disaffected to know that their disrespect for the Constitution is due to strict rather than liberal construction thereof in the past; to the fact that they have been led to regard it as an instrument for the nullifying of good laws and the release of influential criminals. The Constitution will never be accorded the respect which is its due until it is understood that it is more than the framework of an existing form, that it is a framework so well designed as to admit of all needed improvements without demolition of the original structure.

The New York Rent Laws.

PERHAPS no clearer test of the flexibility of the Constitution could be found than is presented by the laws recently enacted in New York to curb the exaction of exorbitant rents. In effect those laws take the fixing of rentals in New York city out of the domain of private contract and provide for an enforced continuance of leases at a rental to be judicially determined irrespective of the previous agreement of the parties. The validity of these laws will undoubtedly be submitted in due time to the federal supreme court. Without regard to the wisdom of such legislation, a reasonable and progressive interpretation of the Constitution should sustain its validity. The decisions in *Munn* v. *Illinois* and the railroad rate cases were the result of a recognition that the increasing complexity of our national life necessitated some curtailment of the individual power to contract. In the days of stage coaches and small local elevators those decisions would not have been rendered. The decisions so far rendered have not exhausted the transactions which so savor of the public interest that public regulation may be superimposed on private contract. Whether any business falls within that category depends on conditions prevailing at a particular time and place. In most communities it is clear that the relation of landlord and tenant is not one which may legitimately be taken from the control of the parties. But in a great city conditions are peculiar. Housing is a necessity of life. In leases made under the conditions now prevailing in the metropolis the fiction of freedom of contract is a mockery. The state has an undoubted interest in the housing of its citizens, and in the prevention of any enforced migration from centers of population which will disturb economic conditions. Exorbitant rentals tend inevitably to the crowding of families into inadequate quarters, and present a question of the public health only one degree removed from that which upholds the tenement house laws. That there was pressing need for some such relief is shown by the fact that the legislation in question was passed promptly by a vote which was nonpartisan and practically unanimous. The question comes therefore in the last analysis to this: when the representatives of the people are fully convinced that a measure is necessary to prevent distress affecting perhaps a million people in one community, does the Constitution stand as an inflexible barrier to that relief? If it does, it will take more than pamphlets and oratory to secure reverence for the Constitution or to stay the growth of dissatisfaction with a form of government wherein the people are thus prevented from protecting themselves in a recognized emergency.

Government by Board or Commission.

THE grant of extensive regulatory powers to Boards of Health, Railroad Commissions and the like has long been familiar to the American public, and very few, it is believed, are disturbed by the tendency in that direction. Our Canadian cousins, however, seem to regard the matter in a more pessimistic light. Prof. J. Murray Clark of Toronto, in a recent address at Harvard University (abstracted in *Canada Law Journal,* Sept. 1920) said: "Many thoughtful persons view with alarm the growing custom of vesting in irresponsible bodies legislative as well as administrative powers and making their arbitrary decisions above the law—not subject to appeal, as the phrase is. After a long fight it was established that even the King was not above the law, and our forefathers abolished one Star Chamber. This generation of English-speaking peoples is multiplying Star Chambers. When they become too oppressive and tyrannical, as most certainly they will, they can in turn be abolished. While the mischief done will be annoying, and to many distressing, I do not believe that in any case it will be fatal. The living principles of liberty and justice embodied in the Common Law have enabled our race to survive many dangers in the past, and I, at any rate, have no doubt they still have sufficient vitality to insure that we shall overcome the grave perils that menace our future." It is hard to see where the alarm is justified, so far as conditions in the United States are concerned. Commissions of the kind referred to proceed by public hearing and their powers exist always at the will of the representatives of the people in the legislature. It is a far cry from such commissions, with their excellent record for regulating powerful public utilities in the interest of the consumer and their entire dependence on the popular will for the appropriations necessary to their continuance, to the ill reputed Star Chamber. If commissions were in fact irresponsible they might well degenerate into corruption and tyranny, but as at present existing they seem to be a most excellent device for the regulation of special fields of government. Certainly the legislative branch is too cumbersome and the executive too much engrossed with

a multitude of duties to acquire the specialized information and make the special regulations necessary to the proper control of public health, transportation and many similar matters.

The Good Samaritan.

COUNTRY people visiting a large city frequently express surprise at the callous disregard by urban dwellers of apparent cases of illness or prostration seen on the streets. An incident from the law reports, which has been duplicated in some form or other many times in the fifty years since it occurred, goes far to explain this apparent heartlessness. In *Carl* v. *Ayres,* 53 N. Y. 14, it appeared that the plaintiff and the defendant were both passengers on a Coney Island excursion boat. One of the defendant's children had the whooping cough and the attention of the plaintiff was attracted by its severe coughing. Knowing of a valuable remedy for that disease, he went to the defendant and spoke to him on the subject. The defendant answered him roughly and at once had him arrested for an attempt to steal his diamond pin. The court said that the evidence disclosed no ground for even a suspicion of intent to steal the pin. The plaintiff was held to be entitled to recover for malicious prosecution, but it is highly probable that the next time he saw a sick child he refrained from making any kindly suggestions. The conduct of the defendant was also probably due to the fact that he had heard of thefts by persons professing to do a kindness. Individual transactions of this kind suggest a query that runs through our governmental dealings with our fellows. Penal laws are made and penal institutions administered largely on the theory of expecting the worst from everyone. Would or would not a little more trust make things better? There is a slow drift toward the belief that confidence judiciously bestowed on criminals is usually repaid. While there are a few who still point to every broken parole as condemning the entire parole system, the great majority are satisfied with the average which that system shows. The power to release on probation after a conviction is being exercised with increasing frequency. There will always be those who will violate a probation or parole. Always a cunning rascal will be able to make a better showing for clemency for himself than a repentant but inarticulate convict. But after all there is no great difference between the convicted and the unconvicted. There will always be "confidence men"; trust will always be betrayed by a few, but it is a foolish man to whom this suggests the advisability of trusting no one.

Motion Pictures as Evidence.

REFERRING to a California trial recently commented on in LAW NOTES wherein it was sought to introduce a dramatic presentation by motion pictures of the defendant's theory of the crime, Dr. Wigmore has formulated (*Illinois Law Review,* June, 1920) an additional section of his work on Evidence dealing with the subject, in which, after referring to the necessity, as a foundation for the use of any photograph, of establishing the identity of the object depicted with that in issue, he says: "The foregoing element of weakness may reach its maximum in a *moving-picture.* In so far as such a picture has any value beyond a still picture, this value depends on the correctness of the artificial reconstruction of a complex series of movements and erections, usually involving several actors, each of them the paid agent of the party and acting under his direction. Hence its reliability, as identical with the original scene, is decreased and may be minimized to the point of worthlessness. Where this possibility is serious, what should be done? Theoretically, of course, the moving-picture can never be assumed to represent the actual occurrence; what is seen in it is merely what certain witnesses say was the thing that happened. And, moreover, the party's hired agents may so construct it as to go considerably further in his favor than the witnesses' testimony has gone. And yet, any moving-picture is apt to cause forgetfulness of this and to impress the jury with the convincing impartiality of Nature herself. In view of these inherent risks of misleading, the trial judge may well deem a picture unsafe and inadmissible when the introductory evidence has not convinced him that the risk is negligible. No general rule can be laid down as to the kinds of occurrences, artificially reconstructed, in which the moving-picture would have a special risk of misleading. But where the moving-picture is taken *without artificial reconstruction,* i. e., at the time and place of the original event (a possibility not infrequent), it lacks the above element of weakness and is entitled to be admitted on the same principles as still photographs. The only circumstance then to be considered is that in a few matters, such as speed and direction of human movement, or relative size in the focus, the multiple nature of the films requires special allowances of error to be made; but these allowances are no different in kind from the elements of error inherent under certain conditions in still photographs." It is to be observed that he does not go to the length of saying that the motion pictures of artificially reconstructed scenes should in every case be rejected, but leaves the question to stand on the proof of identity in each instance. While theoretically this is probably the sound rule, it would seem that in actual practice the test of identity could never be satisfactorily met. The motion picture is preferable to the "still" picture only when action is to be depicted, and in such case it is hard to see how reliance can be placed on the ability to duplicate precisely past action. The matter is not one in which possibilities of error should be left open, for the impression produced by a graphic reproduction of a scene must inevitably be far greater than that of any narration. With all deference to the high authority of Wigmore, it would seem the better rule to exclude all motion pictures of artificially reconstructed scenes.

Best Evidence of Motion Picture.

THE recent case of *Feeney* v. *Young,* 181 N. Y. S. 481, discusses the interesting question what is the best evidence of a motion picture. The suit was under the "right of privacy" statute for the exhibition for profit of a motion picture of a Cæsarean operation performed on the plaintiff, she having consented to the taking of the picture for scientific purposes only. On the trial it was objected that the best evidence was the film itself. The film representing a single exposure was only about an inch and a half square, and nothing could be ascertained by an inspection thereof. Holding that the testimony of eyewitnesses to the picture as thrown on the screen was

admissible the court said: "The picture, as presented on the screen, constitutes the offense under the statute. If that were a permanent photograph, the photograph itself might probably be the better evidence; but it is not. It is a flash picture, presented only for a moment. There is, therefore, no permanent print of that presentation upon that screen which can be deemed the best evidence, and, in the absence of such permanent print, the evidence of eyewitnesses, who have seen the representation, must be competent evidence of the presentation itself. The film itself, on account of its size, could not represent the picture there shown, and the film cannot be used to reproduce the picture, either in the trial court or in the appellate court. It would seem, therefore, that the evidence of eyewitnesses, who had seen this representation presented only for a moment, would be competent evidence of the fact of publication." A similar result was reached in the English case of *Glyn* v. *Western Feature Films Co.,* 114 Law Times Rep. 354, an action by Elinor Glyn to restrain a motion picture alleged to violate the copyright of her well-known book "Three Weeks." A witness was offered to prove the nature of the defendant's exhibition and the synopsis shown with it. The court said: "I think the proposed evidence is not secondary evidence and is admissible, and being available is the only kind of evidence that in strictness can be given. I do not see how the infringement of a dramatic performance can be proved except by witnesses who have seen it." While the matter has apparently never been passed on by a court of last resort, the rule established by the cases cited is both reasonable and convenient, and will doubtless meet with general acceptance.

Her First Political Triumph.

IT was recently decided by the Supreme Court of Maine that a woman seeking to register is required to disclose her age, and is not entitled to register on stating that she is "over twenty-one." Such would seem to be the necessary construction of the Maine statute requiring the register to show, among other things, the "age" of the voter. However, in Connecticut an act has recently been passed making the statement of exact age unnecessary. Thus is seen the first of the long heralded changes in political method which the enfranchisement of women will cause. From one viewpoint it seems a little silly that a woman—an enfranchised woman—should have any more objection than a man to stating her age. Still it must be remembered that there are many women who, while feeling it a duty to exercise the franchise, yet retain the characteristics which made them oppose its grant. Moreover, the requirement to which objection was made is without purpose, except perhaps as it serves as some slight means of identification where there are several persons of the same name. The only information which the election officers need is whether the would-be voter is of voting age. How much he or she is past that age is of no moment. There is no reason other than a lawyer-like desire for specific information rather than a conclusion why the exact age should ever have been demanded. The ladies are to be congratulated on their victory in Connecticut and urged to retrieve their defeat in Maine. But just what other inroads will feminine peculiarities make on established proceedings? We have it on the authority of the master dramatist "How hard it is for women to keep counsel." If the fair sex is conscious of this alleged frailty—it probably is not—how long will feminine jurors consent to take the oath to keep their own counsel and that of their fellows? Will they not also insist on the time-honored prerogative of changing their minds and secure a law giving the right to come in the next day to amend a verdict? Such suggestions sound silly enough, but many a practice has had no better foundation than a masculine foible and we cannot complain if a few of the other gender are incorporated. Let us hope, however, that there will be no insistence that the style of judicial robes shall change annually. Imagine the solemn entry of the august tribunal at Washington in gowns having elbow sleeves and narrow skirts.

Public Opinion and Accomplice Testimony.

WHEN in the course of a judicial investigation a man confesses his own guilt and implicates another therein, public opinion as reflected in the press seems ordinarily to take the guilt of the implicated person as a matter of course. The latest reminder of this tendency is found in a recent case in Connecticut where a man confessing his guilt of forgery and of perjury to sustain the forged instrument asserted that his attorney participated in the crime. Notwithstanding the fact that the accused attorney has been for many years a leader of the bar and has held high public office, the press accounts are quite devoid of any suggestion that the guilt of a reputable man should not be assumed on testimony from a source so tainted. The rules by which the courts weigh testimony may not be scientific, but they are the product of centuries of experience by able and conscientious men devoting themselves to the problem of sifting the truth from masses of perjury and mistake. One of the best settled of these rules is that the statement of an accomplice, and particularly of one who admits that he has previously sworn to a different account of the transaction, should always be received with caution and suspicion, and should ordinarily be disbelieved unless it is corroborated. While the books abound in judicial statements of the rule, it has perhaps never been better formulated than by Mr. Justice Betts in a charge to the jury. (*U. S.* v. *Osgood,* 27 Fed. Cas. No. 1597 (*a*).) He said: "The jury are, however, to bear in mind that the witness has once before given an entirely opposite account, on oath, of the transactions to which he now testifies, and that in the one instance or the other he has committed manifest perjury. It may happen that the most depraved of human beings may so bear himself on his examination as to command the confidence of a court and jury; when he unbosoms himself without reserve, and carries to every judgment a deep conviction that he is honestly attempting the only atonement and expiation for his past offenses allowed man in this life—a confession of his sins, and making all the reparation in his power for the wrongs done by him. Even then the steadier experience of the law admonishes us against yielding to emotion and sympathy, and cautions us that it is safer to abide by well-tried rules of judging, than to proceed upon vague impulses, even though the mind may at the moment be entirely satisfied of the truth of the witness, and clear wrong be done in the individual case by not crediting him. The cardinal rule, which has

served in all ages, and been applied in all conditions of men, is that a witness wilfully falsifying the truth in one particular when upon oath, ought never to be believed upon the strength of his own testimony, whatever he may assert." Public opinion would be a great deal more worthy of respect, scandal and false report would be a great deal less prevalent, if men in their private acts paid a little more heed to the rules which, not from theory but from experience, they have adopted in their judicial acts.

Silence of Accused before Trial.

A recent Canadian case (*Rex* v. *Mah Hong Hing,* W.W.R. [1920] vol. 3, p. 314) discusses a point which is novel and interesting, though not likely to arise in the United States except in those jurisdictions wherein the trial judge is permitted to comment on the evidence. In that case the prisoner sought to prove an alibi, and the trial judge in his charge called attention to the fact that he had not disclosed the facts relating thereto to the police or in the police court but had kept silent as to his whereabouts until the trial, thus precluding an investigation of his story. This, the court charged, was a circumstance tending to detract from the credit given to his testimony. The court held this charge to be error, but the decision is rested on the narrow ground that the reference to failure to testify in the police court violated a statute forbidding reference to the failure of the accused to testify. There is, however, dictum in the case disapproving generally of such an instruction except under peculiar circumstances such as were presented in *Rex* v. *Higgins,* 36 New Brunsw. R. 18. This decision is doubtless good law, but it is none the less very artificial law. As a matter of common sense a person accused of crime should be open to official interrogation as to his whereabouts at the time. If he is innocent, official investigation may spare him the expense of a trial. If he is guilty, he should not be permitted to concoct a false story at his leisure and then present it to the jury when there is little or no time to investigate it. The danger is, of course, that such an investigation will degenerate into a "third degree" subject to abuse by over zealous detectives and prosecutors. Perhaps the best precaution against that result would be to have the preliminary interrogation carried on by a judge and all statements made out of court excluded. "A criminal trial is not a game of wits between opposing counsel to be played according to certain technical rules, with the judges acting as umpires. It is a solemn judicial proceeding to ascertain the guilt or innocence of a person accused of crime. Rules of criminal procedure were not formulated to enable criminals to escape punishment. They were formulated to aid the courts in properly dispensing justice in criminal causes. They are intended, on the one hand, to safeguard the rights of the accused to the end that no innocent person may be convicted of crime, and they are intended, on the other hand, to enable the state to bring those guilty of crime to the bar of justice." *State* v. *Webb,* 162 N. W. 358.

"The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day."—Per Cardozo, J., in Wood *v.* Duff-Gordon, 222 N. Y. 91.

DISBARMENT FOR DISLOYALTY OR SEDITION

APPARENTLY the World War in which we are still technically engaged has been the first to produce an officially reported American case of the disbarment of an attorney for disloyalty. During the Civil War, of course, practically every lawyer residing in the seceding states adhered to the Confederacy, and doubtless some in the north (e. g., Clement Vallandigham) were among the members of the Knights of the Golden Circle and similar disloyal organizations. On January 24, 1865, Congress provided that no person should be admitted to practice law or permitted to appear in court by virtue of a previous admission until he took a "test oath." This act having been declared to be invalid in *Ex p. Garland,* 4 Wall. 333, 18 U. S. (L. ed.) 366, the matter was apparently dropped. During the Revolutionary War the Tory element was so considerable that it was doubtless deemed inadvisable to initiate discriminatory measures at its close, and the same condition perhaps prevailed after the War of 1812. The Mexican and Spanish Wars naturally produced no appreciable number of sympathizers with the enemy, and the resources of the country were not sufficiently strained to evoke a pacifist element. The World War, however, disclosed the existence of at least three disloyal classes—the pro-German, the industrially disaffected, and the plain "slacker." Among each of these a few members of the legal profession were found, and the bar, which stands pre-eminent among the professions in the matter of ridding itself of unworthy members, has, to some extent at least, purged itself of these blots on its patriotism. That the courts have co-operated heartily in this effort is shown by the fact that in but a single reported case was disbarment refused where a substantial showing of disloyalty in time of war was made.

Of the power to disbar for such a cause there can be no doubt. The power of disbarment is inherent, and a statutory enumeration of grounds is not exclusive. *State* v. *Mosher,* 128 Ia. 82, 103 N. W. 105, 5 Ann. Cas. 990; *In re Robinson,* 48 Wash. 153, 15 Ann. Cas. 415, and notes. "Where a statute makes good moral character, as does ours, a condition precedent to admission to the bar, it follows that when an attorney has forfeited his claim to such character by misconduct of such a nature as to render him unworthy and unfit to further be continued in office the court may remove him." *In re Hilton,* 48 Utah 172, 158 Pac. 691, Ann. Cas. 1918A 271. "Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve." *Ex p. Wall,* 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552.

In two Idaho cases disbarment has been granted because of a conviction of violation of federal laws made in aid of the prosecution of the war. *In re Hofstede,* 31 Idaho 448, 173 Pac. 1087; *In re Kerl,* 32 Idaho 737, 188 Pac. 40. In the Hofstede case the conviction

was for aiding another to evade the draft, while in the Kerl case it was for violation of the Espionage Act. In each case the somewhat impudent contention was made that the crime of which the attorney had been convicted did not involve "moral turpitude." In the Hofstede case the court said: "It is said in *Pullman Palace-Car Co.* v. *Central Transportation Co.,* 65 Fed. 158: 'What constitutes "moral turpitude" or what will be held such, is not entirely clear. A contract to promote crime certainly involves it. A contract to promote public wrong, short of crime, may or may not involve it. If parties intend such wrong, as where they conspire against the public interests, by agreeing to violate the law or some rule of public policy, the act doubtless involves moral turpitude. . . .' Applying the rule to be drawn from the foregoing discussion, we find that counseling and advising young men, subject to registration, to not register for military service as required by the act of Congress approved May 18, 1917, thereby seeking to interfere with the government of the United States in its efforts to raise an army in time of war, is an act of disloyalty, and that the crime of which Edward Hofstede was convicted involves moral turpitude." To the same effect the same judge said in the Kerl case: "A certificate of admission to the bar is a pilot's license which authorizes its possessor to assume full control of the important affairs of others and to guide and safeguard them when, without such assistance, they would be helpless. Moreover, in Idaho, it is a representation made by this court that he is worthy of the unlimited confidence which clients repose in their attorneys; trustworthy to an extent that only lawyers are trusted, and fit and qualified to discharge the duties which devolve upon members of his profession. . . . If a citizen of the United States of America, at a time when our country is at war, knowingly and willfully makes false statements with intent to interfere with the success of its military and naval forces and with intent to promote the success of its enemies, or willfully attempts to cause disloyalty, insubordination, mutiny, and refusal of duty in its military and naval forces, or willfully obstructs, or attempts to obstruct, its recruiting and enlistment service, his conduct involves moral turpitude."

In two other cases the Washington court has ordered disbarment for disloyal acts without a criminal conviction. In the case of *In re Wiltse,* 186 Pac. 848, it appeared that the accused attorney had made excessive charges for the preparation of questionnaires, had solicited employment by persons desiring to claim exemption from military service, and had suggested, encouraged and assisted in the preparation of false affidavits looking to the improper exemption of his clients. The court in ordering disbarment said: "We do not feel like depriving a practitioner of his right to continue his profession on a question as debatable as the propriety of the amount of a fee. Such a question is so much a matter of individual opinion that it should not be the basis for disbarment, except in the most aggravated and extreme case. So far as the record discloses, the fees were voluntarily paid, and, were it the only charge here that such fees were excessive, the extreme penalty would not be merited. The charges of solicitation of business, however, and the filing of false claims of exemption, are so well proved and so flagrantly unethical, as well as disloyal, as sufficiently to evidence that degree of moral turpitude unfitting the practitioner to continue the practice of law in this state." In this connection may be noted the case of *In re O'Reilly,* 188 App. Div. 970, 176 N. Y. S. 781, wherein an attorney was suspended for four months for making a charge for his services in endeavoring to secure reclassification of drafted persons while serving as a member of the legal advisory board in the administration of the Selective Service Law. The mild penalty, the court said, was imposed because of the long career of the attorney theretofore unmarred by any departure from the integrity required by his profession and a belief in the genuineness of his contrition.

In the case of *In re Arctander,* 188 Pac. 380, disbarment was ordered of an attorney who charged for his services in preparing the answers to questionnaires and assisted some two hundred registrants in the preparation of affidavits withdrawing their declaration of intention to become citizens, it appearing that he received over $4000 for his activities in these matters. The court adopted the report of the board of law examiners, which scouted the somewhat mild evidence of loyalty given by the respondent in the following language: "He cites us to his conduct in making a speech in Tacoma in May, 1917, and in buying Liberty Bonds and in subscribing to the Red Cross. If men's conduct is to be weighed by their words rather than their actions, respondent's speech in Tacoma might be a good defense. An examination of that speech in Tacoma, however, shows that his own attitude towards the war was not the attitude which he recommended to others. He urges them to give freely of their time and their money in the nation's cause and then goes out and refuses to give either time or money, or to do anything without pay. Relative to the purchase of Liberty Bonds by him, it is worthy of notice that he bought no Liberty Bonds of the first or second issue. He bought two $100 bonds of the third issue. This issue was sold in the spring of 1918. Of the fourth issue, which was sold in the latter part of October, 1918, he bought $800 in bonds. This purchase was made after his conduct had been subject to investigation by the Intelligence Bureau of the War Department, which had taken possession of his correspondence. These purchases of Liberty Bonds, under the circumstances, are, in our opinion, no evidence of loyalty. Neither is the contribution which he claims to have made to the Red Cross of $100 during the two years of the war. His income, as he testifies, was from $8000 to $10000 a year. While he is entitled to credit for the contribution that he made, we are not impressed with the argument that it proves anything as to his conduct which is under criticism." The report so adopted concluded as follows: "From the respondent's own admissions and actions, we are regretfully forced to the conclusion that his conduct in performing services for registrants under the Selective Service Law was disloyal, mercenary, unethical, and unprofessional. Had the Bar of the United States assumed the same attitude in response to the President's call to duty that respondent did, it would have called down upon itself the reprobation of the nation. It would have been disgraced to eternity. It is the duty of the lawyer, above all others, to serve his country, and his services should always be at his country's call in times of need."

The one case out of accord with the decisions referred to is that of *Lotto* v. *State,* (Tex.) 208 S. W. 563. In

that case it appeared that during the progress of hostilities an attorney declared that he hoped that Germany would win the war. The court decided that this did not constitute "dishonorable conduct" within the meaning of a statute authorizing disbarment for that cause, holding, in conflict with the great weight of authority (see Thornton on Attorneys, § 849) that misconduct outside the scope of professional relations does not justify disbarment. Perhaps the best commentary on this decision is to be found in the following excerpt therefrom: "When the loyal citizens of this country were anxiously bearing the deprivations and sorrow, anticipating the dreadful issue with the most ruthless warriors of all history, which meant the sacrifice of countless treasure, the suffering of intense hardships, death, and permanent mangling by the noblest and best of their friends, relatives, and sons, it is not surprising that appellant's expressed hope that all would be in vain, that in spite of the agony and carnage upon the battlefields our country would be defeated and left to supplicate mercy from pitiless conquerors—it is not surprising that such a wish aroused those intrusted with the protection of their loved ones and their country, and determined them to end such hostile and dangerous expressions. It is to the everlasting credit of this community that it appealed to the orderly courts of our country instead of an improvised tribunal of a viligance committee." A decision that conduct of an attorney for which the people are to be complimented on their self restraint in not hanging him summarily is not ground for disbarment certainly leaves something to be desired.

But with the close of actual hostilities the question of disbarment for conduct of the sort mentioned has become somewhat academic, though some query naturally arises as to why almost all the cases arose on the western coast. Are all the disloyal attorneys located west of the Missouri, or is the bar in other parts of the country more lax in protecting itself against traitors? There is, however, an analogous situation which is of much present importance. In every part of the country there are ultra radical organizations of various names, reds varying in tint from crimson to pale pink. These organizations are not without members and supporters drawn from the legal profession. Some of the lawyers convicted of violation of the Selective Service Law, like the defendant in *U. S.* v. *Sugar,* 243 Fed. 423, were apparently actuated by domestic radicalism rather than by sympathy with Germany. That radicalism, as has frequently been declared in deportation cases (see for example *U. S.* v. *Swelgin,* 254 Fed. 884; *Ex p. Bearnat,* 255 Fed. 429), has passed the bounds of legitimate agitation for reform and is aimed at the destruction by violence of the government of the United States. Cannot and should not the attorneys who lend aid or countenance to such an effort be deprived of their standing as ministers of law? A recent unreported case decided by three judges of the Common Pleas Court in Pittsburgh, answers the question in the affirmative. The accused attorney, one Margolis, declared himself to be an anarchist and a syndicalist, and was shown to have been active in several ultra radical organizations. After referring to these activities, the court continued:

"These are but a few examples of the many organizations described in this voluminous record, the avowed purpose of which is the destruction of the government and the violation of law by forcible means and otherwise; and of these the respondent has been an ardent supporter in speech and in writing. Not only that, but he has done this in the most dangerous manner in time of strikes and unrest. He has spoken against the government from the same platform with well-known opponents of it and has advanced the same disloyal theories as they, before audiences which were regardless of law and order. Admittedly, he was active with the I. W. W. Defense League in efforts to force the supreme court of California to grant a new trial to Mooney, by a general strike. This was a defiant contempt of court. At a meeting of local and foreign radicals in Montefiore hall, August 22, 1915, held principally to raise money for the defense of men charged with complicity in blowing up the Times building at Los Angeles, he made a speech in which he said: 'Talk about workers being guilty of a crime! When one speaks of a worker being guilty of a crime, especially a working man, there is a tragedy. Just think of a worker being guilty of a crime.' While admitting that he is opposed to all government, he insisted that he did not believe in or advocate its destruction by violence. The evidence would support a finding to the contrary. At a meeting near Millersboro, Washington county, during a time of great excitement among miners, he advised them that the profits of industry belonged to them and said: 'Prepare and equip yourselves to take over these industries and mines.' He advised them to use force if necessary and referred to a Russian incident where a man's house with thirty rooms had been violently taken from him. Conceding, however, that his purpose may have been merely to educate and to bring about such a condition of society that governments would be unnecessary, yet the language used by him, spoken in the hearing of the discontented in times of stress, would incite to violence, create contempt for the government and discredit constituted authority. In short, it must be said that the respondent, a minister of the law and held out by this court as a loyal supporter of his government, has done his utmost to breed unrest among the lawless and vicious and to incite them to acts of violence and disloyalty. In all of this he has been persistent and he has shown no signs of repentance. Under the foregoing facts, which are but a small part of what appeared in the evidence, our duty is plain."

To the credit of the bar of earlier days, there have been but few cases involving conduct even remotely similar. In *Dormenon's Case,* 1 Mart. O. S. (La.) 129, an attorney was disbarred for taking an active part in a servile insurrection in San Domingo. In *Jones's Case,* 12 Pa. Co. Ct. 229, an attorney was accused of inciting strikers to violence. While acquitting him on the evidence, the court said: "The petition involves an averment that the respondent, acting in his capacity as a member of the bar and exerting the influence given him by being accredited as such, in an excited community, with intent to stir up riot and disorder, proclaimed in a public place as law that which he knew not to be the law, the result being that lawless persons were encouraged and the officers engaged in preserving the peace were embarrassed and hindered. If these facts were admitted as proven it could not well be maintained that the respondent had not been guilty of professional misconduct; and no one would deny the right of the court to take away from him its certificate of professional standing which gave weight to his words."

It is a matter of common knowledge that there are several organizations in the United States whose purpose is the destruction of constitutional government, and that some at least of these number attorneys among their supporters. It should not be necessary to warrant disbarment that an attorney be proved to have advocated actual violence. If a "philosophical anarchist" is too dangerous to be allowed to remain in the United States (*Lopez* v. *Howe,* 259 Fed. 401, 170 C. C. A. 377) he certainly is not a fit member of a profession sworn to support the Constitution and charged with the administration of the law. If obstruction of justice in a single case unfits a man for the practice of the law (see Thornton on Attorneys, § 816 et seq.) and participation in the lynching of a single prisoner is sufficient to disbar (*Ex p. Wall,* 107 U. S. 265, 2 S. Ct. 569, 27 U. S. (L. ed.) 552) certainly the slightest complicity in an organized effort to discredit and destroy our entire existing system of government should leave no question. On members of the legal profession rests not only a negative obligation to abstain from crime, but a positive obligation to be zealous in the upholding of law and government. There is a marked distinction between the acts for which a citizen should be imprisoned and the acts for which an attorney should be disbarred. A citizen may without legal guilt refrain from interfering to prevent the commission of an offense, but a peace officer who did so would merit prompt removal from his office. In like manner a citizen may maintain a negative sympathy with seditious organizations so long as he does not abet or encourage any unlawful activity, but an attorney who does so should be promptly deprived of his office. It is well that there should exist in the United States an aversion to persecution for political belief. It is well that toleration should be extended largely to eccentric views, since they are usually either harmless or contain some grain of truth which time will sift from its surrounding error and adopt. But if this toleration is to be maintained consistently with the public safety, certain distinctions must be borne clearly in mind, and one of these is that the makers and the administrators of the law must be free from any taint of hostility to our laws and institutions.

W. A. S.

PROPOSED BILL REGULATING FEDERAL APPELLATE PROCEDURE

[In *Ives* v. *South Buffalo R. Co.,* 201 N. Y. 271, 94 N. E. 431, Ann. Cas. 1912 B 156, 34 L. R. A. (N. S.) 162, decided in March, 1911, the New York Workmen's Compensation Act was held unconstitutional. Under the terms of U. S. Rev. Stat. sec. 709, then in force, that decision was not reviewable by the United States Supreme Court. At the next meeting of the American Bar Association a committee recommended an amendment of the federal statute so as to permit review of such a decision on writ of error. One member of the committee dissented on the ground that the proposed amendment would materially add to the burden of the already "overloaded" Supreme Court. Thereupon, in an editorial paragraph contributed to LAW NOTES for September, 1911, Mr. Charles C. Moore, sometime Associate Editor of Federal Statutes Annotated, suggested as a compromise measure that the Supreme Court be given power to issue a certiorari in that class of cases. Eventually Congress enacted the now well-known provision for certiorari as one mode of reviewing judgments of state courts. Observation of some unfortunate results of the new act caused Mr. Moore to suggest, a few months ago, to Everett P. Wheeler, Esq., Chairman of the "Committee on Jurisprudence and Law Reform" of the American Bar Association, that a remedial measure was desirable, and at Mr. Wheeler's request he drafted a bill for submission to Congress and prepared a paper in support of it. His communication to Mr. Wheeler is here printed. *Ed.* LAW NOTES.]

The Act of September 6, 1916, ch. 448, sec. 4, 39 Stat. L. 727 (1918 Supp. Fed. Stat. Ann. 421) provides as follows:

> That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed.

The enactment of that measure presupposes that dismissals therein mentioned were so numerous as to constitute an evil to be remedied. And indeed there had been many dismissals on that ground. In *Babbitt* v. *Clark,* 103 U. S. 606, 611, 26 U. S. (L. ed.) 507, 508, where the court conceded that the party had erred in taking an appeal instead of a writ of error to review a judgment of the federal circuit court, the error was deliberately disregarded. But I doubt if the same indulgence was knowingly accorded in any other reported case.

For a similar remedial purpose and without affecting the foregoing act in any respect, the following is submitted for enactment:

> [Be it Enacted, etc.] Whenever the United States Supreme Court is given power to review a judgment or decree of another court by writ of certiorari as one or the only appellate remedy, it shall not be necessary to dismiss a writ of error or an appeal solely because application should have been made for a writ of certiorari, or to dismiss a petition for a writ of certiorari solely because an appeal should have been taken or a writ of error sued out; but the court may, in its discretion, grant a petition for a writ of certiorari or proceed to a determination of questions duly presented on a writ of error or an appeal or a writ of certiorari regardless of the party's mistake or error in adopting the particular method of invoking appellate review. This Act shall not apply to cases where, at the date of its passage, a petition for a writ of certiorari has been denied or a writ of error or an appeal has been dismissed.

In the foregoing bill the phrase "certiorari as" an "appellate remedy" and (near the end) the words "appellate review" have been used in order more clearly to exclude from the purview of the bill a certiorari under Judicial Code, sec. 262, as a supervisory proceeding.

The bill applies to no cases other than those where the statute provides either for review on certiorari alone or for review on certiorari of specified judgments and a writ of error or an appeal for other judgments. Hence it does not in the slightest degree interfere with section 4 of the Act of 1916, first above quoted.

The bill does not impose any *duty* whatever upon the court, but submits the matter entirely to the court's discretion. The court is still at liberty to dismiss a writ of error or an appeal solely because the party has mistaken his remedy. Suppose, for instance, the record on a writ of error to a state court shows that when the presiding judge of the state court allowed a writ of error he expressed a serious doubt—as has been done in reported cases—that the judgment was reviewable on a writ of error. The federal supreme court might feel that if the party paid no heed to such admonition by filing a petition for certiorari his supineness disentitled him to any indulgence. Under this bill the court would have liberty so to decide.

If the enactment of this bill should seem to encourage carelessness on the part of litigants, and if the court should find that applications to be relieved from mistake were becoming too frequent, it could promulgate a rule imposing restrictions and conditions appropriate to abate the nuisance.

As above stated, the bill imposes no *duty* upon the court. It gives a party no *assurance* that his mistake will be overlooked. In cases coming from state courts remote from Washington a party would be tempted to sue out a writ of error invariably, if he could get one allowed, instead of applying for a writ of certiorari, were he assured that his indifference would not prejudice him.

The last sentence of the proposed bill suffices to show that it applies to pending cases where there has been no dismissal. It is supposed that hereafter if a petition for certiorari is denied, or a writ of error or an appeal is dismissed, the bill would allow a party, upon application at the same term, to be relieved, in the discretion of the court, from the effect of such dismissal and to have his case reinstated for consideration under the appropriate appellate remedy. Whether the bill as drawn would so operate, and whether it is desirable that it should save a party to that extent, is a matter submitted to the judgment of the Committee of the Bar Association. Were it not for the last sentence of the proposed bill, it is believed that in many cases where dismissals had been entered at the present term of the court applications for reinstatement would ensue and perhaps be so numerous as to make the court frown.

Although by the express terms of all the Judiciary Acts prior to the Amendment of Judicial Code, sec. 237, decisions of state courts were reviewable by the federal supreme court only on *writ of error,* the supreme court of Indiana allowed an *appeal* from such a decision, which was dismissed as an erroneous proceeding in *Verden* v. *Coleman,* (1860) 22 How. 192, 16 U. S. (L. ed.) 336, apparently on the court's own motion.

Inasmuch as the decision of a justice of the peace may sometimes be taken direct to the federal supreme court—as has been done in several Texas cases where the justice court was the highest in which a decision could be had—it is easy to imagine that a case may hereafter occur where, because of ignorance of an attorney or a judge, an appeal is taken instead of a writ of error or certiorari. The Act of 1916, above quoted (sec. 4), will prevent the error from being fatal so far as concerns the difference between an appeal and a writ of error, but not where the decision is reviewable only by writ of certiorari.

Another reason why errors in adopting the wrong method for invoking appellate review are likely to occur is that Congress has several times, since the Circuit Court of Appeals Act of 1891, taken specified descriptions of cases from the category of appeal or writ of error and made them reviewable only by certiorari, and Congress may hereafter proceed further in the same line; and knowledge of these changes made by federal legislation (as well as other changes made by acts of Congress) is not always speedily acquired by lawyers or even by the judges of federal courts. The writer hereof can cite cases where recent and controlling acts of Congress were unknown to both court and counsel and were first discovered in the appellate court.

Why, only two or three years ago an unusually careful judge of a federal District Court made a litigant a present of a ruling (the court said that counsel had not noticed the point!) that there was a removable "separable controversy" in the case, overlooking the fact that one of the parties to that controversy was an alien corporation, and probably in ignorance of the requirement in the Judiciary Act of 1875 and all subsequent removal acts that a separable controversy must be "wholly between citizens of different states."

So, too, the draftsman of sec. 25b, paragraph 1, of the Bankruptcy Act of 1898, unquestionably supposed that there were cases where an *appeal* would lie from the highest court of a state to the federal supreme court; and the Judiciary Committee responsible for the language of Judicial Code, sec. 240, as originally enacted, and the draftsman of the amendment to that section in 1915 (see 5 Fed. Stat. Ann. (2d ed.), pp. 900, 901) and the draftsman of the first amendment to Judicial Code, sec. 237 (5 Fed. Stat. Ann. 2d ed.), p. 723) likewise and unquestionably were possessed of the same idea. This disregard of technical exactness in the last mentioned act (first amendment of Judicial Code, sec. 237) is rather amazing.

In the "memoranda decisions" reported for the October term, 1918, in 248 U. S., 249 U. S., and 250 U. S., there are exactly thirty (30) cases of writs of error to state courts "dismissed for want of jurisdiction upon the authority of sec. 237 of the Judicial Code as amended by Act of Sept. 6, 1916, ch. 448." Some of these dismissals may have been because the writ of error was not sued out in time, but doubtless many of them were because the proper remedy was by petition for certiorari—and in some instances, the writer ventures to think, because of a party's ignorance of the amendatory Act of Congress. At the October term, 1919 (251 U. S., 252 U. S., and 253 U. S.), fifty-three (53) cases from state courts were "dismissed for want of jurisdiction," while the total number of cases from state courts in which jurisdiction was entertained and decision rendered on the merits was only fifty-two. Forty-nine (49) of the dismissals were on memorandum without formal opinion. In other words, the majority of cases taken to the supreme court from state courts are dismissed for want of jurisdiction.

Hence, the possibility of error in selecting the wrong method for obtaining appellate review by the supreme court is almost boundless. Despite the fact that some thousands of lawyers are subscribers to the quarterly Pamphlet Supplement of Federal Statutes Annotated, the reports constantly show an enormous number of cases dismissed for want of jurisdiction, the original or appellate proceeding in many of them having evidently been in-

stituted in ignorance of acts recently published in those Pamphlet Supplements.

But a real difficulty and one not always capable of ready solution by mere inspection of the statute is in determining whether a decision of a state court in a given case is embraced in the description of cases reviewable only by writ of error under Judicial Code, sec. 237, as amended in 1916, or whether it belongs to the class reviewable only on certiorari under that section. Prior to the amendment of that Judicial Code section, the supreme court itself was sometimes unable to determine positively whether a case belonged to one or another of the three categories of decisions reviewable on writ of error; nor was it necessary to determine the question under the statute then in force, where it was evident that the decision belonged to one if not to another of those categories. In some instances the court declared that the decision of the state court was reviewable as within two of the three classes. Such were the cases of *Home Ins. Co.* v. *Augusta,* 93 U. S. 116, 121, 23 U. S. (L. ed.) 825, 826, and *Daniels* v. *Tearney,* 102 U. S. 415, 418, 26 U. S. (L. ed.) 187, 188. In *Worcester* v. *Georgia,* 6 Pet. 515, 541, 8 U. S. (L. ed.) 483, 494, Chief Justice Marshall said the appellate jurisdiction was there sustainable on the ground that the decision below was against the validity of treaties; *"if not against their valadity,"* he continued, "against the right, privilege, or exemption specially set up or claimed," etc.

In each of the three cases above cited a claim of "title, right, privilege, or immunity," now reviewable only by certiorari, was associated with a "validity," etc., contention, now reviewable on writ of error. In many other reported cases the dual character of the federal question involved appears, but not quite so conspicuously as in the foregoing cases. But in some cases even of this class it is theoretically possible that a party's choice of a writ of certiorari instead of a writ of error may be a fatal mistake. The reasons are extremely technical and need not be stated here.

Illustrating the difficulty in determining in some instances whether a particular judgment of a state court is reviewable by a writ of error or only by certiorari, especially because the supreme court itself has made inconsistent declarations on the point, observe that in *Mutual L. Ins. Co.* v. *McGrew,* 188 U. S. 291, 311, 47 U. S. (L. ed.) 480, 486, 23 S. Ct. 375, 379, Chief Justice Fuller assigned one of the federal questions there involved to the "first class of cases named in § 709," U. S. Rev. Stat., reviewable now by writ of error, while the better opinion was expressed by Mr. Justice McKenna in *Virginia-Carolina Chemical Co.* v. *Kirven,* 215 U. S. 252, 257, 54 U. S. (L. ed.) 179, 184, 30 S. Ct. 78, 79, and in *West Side Belt R. Co.* v. *Pittsburgh Constr. Co.,* 219 U. S. 92, 99, 55 U. S. (L. ed.) 107, 110, 31 S. Ct. 196, 198, that the selfsame question belonged to the third class mentioned in the statute now reviewable only by writ of certiorari.

There seems to be no doubt that since the Amendment of Judicial Code, sec. 237, if a party applies for a writ of certiorari *alone* or sues out a writ of error *alone,* the jurisdictional basis for each must be sufficient to sustain it; neither remedy used alone can derive any benefit from the contention that jurisdiction *could* be sustained for the other remedy. The court regards itself as destitute of power to dispense with the distinction made by the statute between a writ of error and a writ of certiorari. Thus in *Hogarty* v. *Philadelphia & Reading R. Co.* (Oct. 20, 1919), memorandum decision, 250 U. S. 650, 63 U. S. (L. ed.) 1189, 40 S. Ct. 12, a writ of error to the Pennsylvania Supreme Court, the "per curiam" is as follows (italics mine):

> The writ of error in this case is dismissed for want of jurisdiction upon the authority of section 237 of the Judicial Code as amended by section 2 of the Act of September 6, 1916, ch. 448, 39 Stat. 726 [Comp. St. § 1214].
>
> The application *consented to by the parties* to convert nunc pro tunc the writ of error into a writ of certiorari, or *to treat the writ of error as having the effect* of a writ of certiorari is also denied. See Act of September 6, 1916, ch. 448, § 7, 39 Stat. 728 [1918 Supp. Fed. Stat. Ann. p. 422]; *Dana* v. *Dana,* 250 U. S. 651, 40 St. Ct. 9, 63 L. Ed. 1203, decided October 13, 1919.

For other cases illustrating the absolutely fatal consequence of mistake by a practitioner under the present state of the law see *Dana* v. *Dana,* 250 U. S. 220, 39 S. Ct. 449, 63 U. S. (L. ed.) 947, and cases there cited; *Mergenthaler Linotype Co.* v. *Davis,* 251 U. S. 256, 40 S. Ct. 133, 64 U. S. (L. ed) —; *Erie R. Co.* v. *Hamilton,* 248 U. S. 369, 63 U. S. (L. ed.) 307, 39 S. Ct. 95; *Citizens' Bank* v. *Opperman,* 249 U. S. 448, 63 U. S. (L. ed.) 701, 39 S. Ct. 330.

In *Rust Land, etc., Co.* v. *Jackson,* (1919) 250 U. S. 71, 39 S. Ct. 424, 63 U. S. (L. ed.) 850, a case of a writ of error to a state court, Mr. Justice Pitney's opinion concludes as follows (italics mine): "The present writ of error must be dismissed. On the eve of the argument a writ of certiorari was applied for; but as this was long after the expiration of the three months limited by section 6 of the Act of September 6, 1916, the application cannot be entertained, *irrespective of whether the record shows a proper case for the allowance of the writ.*"

My bill is designed to prevent such a consequence as is indicated in the foregoing italicised words; exactly as section 4 of the same Act of 1916, set forth at the head of this paper, was designed to prevent that result where a party had mistaken his remedy as between a writ of error or an appeal. If the latter section promoted the ends of justice, obviously my bill will operate likewise.

The proposed statute is also intended to meet a situation such as the following: A writ of error is sued out to review the decision of a state court, and the supreme court holds that it is a proper case for a writ of error and proceeds to determine the federal question presented. But on the same writ of error it is also assigned that the state court erred in denying a title, right, privilege, etc. This latter assignment the *supreme court will refuse to consider,* although entertaining jurisdiction of the writ of error on account of the valid assignment. This result is obviously as objectionable as a dismissal of the appellate proceeding in toto would be.

In many cases because a practitioner cannot safely determine whether a decision of the Circuit Court of Appeals is reviewable solely by a writ of certiorari, he applies for a writ of certiorari and coincidentally sues out a writ of error or takes an appeal. In one or two instances, if my memory serves me, all three remedies were resorted to at once. The Act of 1916, above quoted, will protect a practitioner who errs as between an appeal and a writ of error, but it does not include a writ of certiorari, and

probably by no liberality of construction could be extended to a certiorari. The statute proposed by the writer hereof is designed particularly to cover a certiorari. It is believed that the statute would be salutary not only in ordinary cases, but particularly in a situation such as appears in *Central Trust Co.* v. *Chicago Auditorium Assoc.*, (1916) 240 U. S. 581, 588, 36 S. Ct. 412, 60 U. S. (L. ed.) 811, 814, L. R. A. 1917B 580. In that case an appeal was properly taken by one party. The other party took a cross appeal, which was dismissed because *for him* a petition for certiorari was the only remedy. But the court said: "In view of the general importance of the question . . . we have concluded that a certiorari should be allowed in lieu of the cross appeal." The writer hereof has been informed by counsel for the Auditorium Association, that in anticipation of the dismissal of the cross appeal a petition for a writ of certiorari had already been filed. But if no petition had been filed, and the time for filing one had expired when the cross appeal was dismissed, is it not clear that he would have been remediless?

Since that case went to the supreme court Congress has made the decisions of Circuit Courts of Appeals final in cases arising under the Bankruptcy Act, except for review on certiorari, so that the exact situation in the above-cited case will not again be presented. But in view of the wide field for assignable errors and the extensive scope of review by the supreme court in cases coming from the Circuit Court of Appeals—differing in this respect from the limited review of decisions of state courts—may not other cases occur where the situation will be similar to that in the case above cited; that is to say, cases where one party's proper remedy is an appeal or a writ of error while the opposite party is confined to a writ of certiorari for his particular grievance?

CHARLES C. MOORE.

LIABILITY FOR FIRE

THE recent case of Musgrove *v.* Pandelis (120 L. T. Rep. 601; (1919) 2 K. B. 43) is an interesting illustration of the duty imposed on the owner of a dangerous thing, and of judicial method in interpreting Acts of Parliament. The plaintiff in that case was the occupier of rooms over a garage occupied by the defendant. The defendant's servant, who had only a slight knowledge of motor-cars, in starting the defendant's motor-car, caused the petrol in the carburetor to catch fire; had the petrol tap been turned off, the fire would have burnt itself harmlessly out, but owing to the servant not knowing this, the fire spread and burnt the plaintiff's rooms.

Mr. Justice Lush and subsequently the Court of Appeal held that the principle of Rylands *v.* Fletcher (19 L. T. Rep. 220; L. Rep. 3 H. L. 330) was applicable, as a motor-car containing petrol was a dangerous thing, and that the defendant was consequently liable, without any proof of negligence being required.

The case, therefore, would be perfectly plain sailing and merely an application of a well-known principle, were it not for the Fires Prevention (Metropolis) Act 1774 (14 Geo. 3, c. 78), which says, "No action, suit or process whatever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall . . . accidentally begin." This Act extended the effect of an earlier Act, 6 Anne, c. 31.

The common law on the subject is found in the case of Turberville *v.* Stamp (1 Ld. Raym. 264), which was an action by the owner of a close for damage caused by a fire spreading from an adjoining close. The declaration alleged that the defendant *"tam negligenter custodivit ignem suum,"* but the only evidence of negligence was the damage done to the plaintiff, and it is clear from the judgment that the defendant was liable independently of negligence. "A man ought to keep his fire in his field, as well from the doing of damage to his neighbor, as if it were in his house," said Chief Justice Holt.

The next case in which the question arose was Vaughan *v.* Menlove (3 Bing. N. C. 468). There the defendant had a hayrick on the edge of his land, not far from the plaintiff's cottage, and, in spite of the plaintiff's warnings, he left it there until it took fire and burnt the plaintiff's cottage. This seems a clear case of accident, in the ordinary acceptance of the term, as the hayrick was set on fire by spontaneous combustion, and the only negligence that could properly be attributed to the defendant was in not having his rick so far away from the plaintiff's premises that if it did catch fire it should not damage them. Nevertheless the defendant was held liable, Turberville *v.* Stamp being followed. Chief Justice Tindal said: "There is a rule of law which says you must so enjoy your own property as not to injure that of another, and, according to that rule, the defendant is liable for the consequence of his own neglect, and though the defendant did not himself light the fire, yet, mediately, he is as much the cause of it as if he had himself put a candle to the rick." Neither 6 Anne, c. 31, nor 14 Geo. 3, c. 78, were cited even in argument.

The Statute 14 Geo. 3, c. 78, was considered in Filliter *v.* Phippard (11 Q. B. 347), where the facts were practically the same as in Turberville *v.* Stamp, but it was held that the word "accidentally" meant without negligence on the part of the defendant or his servants, and consequently the defendant was held liable. Chief Justice Denman in his judgment said: "It is true that the word 'accidental' may be employed in contradistinction to wilful . . . but it may equally mean a fire produced by mere chance or incapable of being traced to any cause." He also held that the fire could not be accidental, as it was knowingly lit by the defendant himself.

What, then, is the effect of 14 Geo. 3, c. 78, and when can it be successfuly relied on by a defendant? It is clear that if the fire is intentionally lit in the first instance, either by the defendant or his servant, the defendant must keep it from doing damage to his neighbors at his peril. Filliter *v.* Phippard and Turberville *v.* Stamp are instances of this. The liability is the same, even if he employ an independent contractor (Black *v.* Christchurch Finance Company, 70 L. T. Rep. 77; (1894) A. C. 48).

The last three cases are all cases of a fire being started on open ground to burn rubbish or brushwood, but the principle seems to apply equally to fires lit intentionally in a fireplace in a house. "The question may some day be discussed," said Lord Justice Duke in Musgrove *v.* Pandelis, "'whether a fire, spreading from a domestic hearth, accidentally begins within the meaning of the Act, if such a fire should extend so as to involve the destruction of property or premises. I do not covet the task of the advocate who has to contend that it does."

If the defendant has been negligent, it is also clear that he is liable; but if the fire starts without any negligence on the part of himself, his servants or his independent contractors, will the statute save him? The answer given by Musgrove *v.* Pandelis is that it will not. It is true that in that case a distinction was

drawn between the starting of the fire, which was not due to negligence on the part of the defendant's servant, and the continuance of it, which might have been avoided if the servant had had the ordinary skill of a chauffeur; but the court held that the principle of Rylands *v.* Fletcher was applicable, and consequently the defendant was absolutely liable, independently of any question of negligence.

As the ground of liability is that laid down in Rylands *v.* Fletcher, it follows that the only defenses are that the fire began either by an act of God or through the act of a stranger. Therefore, a fire "accidentally" begins within the meaning of the Act only when it is occasioned by an act of God, or is due to the act of a stranger. The Act which at first sight looks so promising from the point of view of a defendant, turns out to be merely declaratory of the common law, and lays down a strictness of liability which was by no means so clearly defined before the passing of 6 Anne, c. 31, as it is at the present time.—*Law Times.*

Cases of Interest

RIGHT OF MANUFACTURER TO CONTROL RETAIL PRICE.—The conduct of a manufacturer which, as intended, has the effect of procuring adherence on the part of its wholesale and retail customers to resale prices fixed by it, does not offend against the unlawful combination provisions of the Sherman Anti-trust Act of July 2, 1890 (9 Fed. St. Ann. 2d ed., p. 664), where there is no agreement which obligates any dealer not to resell except at the fixed prices, his course in this respect being affected only by the fact that he may, by his action, incur the displeasure of the manufacturer, who can refuse to make further sales to him. It was so held in United States *v.* Colgate & Co., 250 U. S. 300, 63 L. ed. 992, 39 Sup. Ct. Rep. 465, wherein the court said: "The purpose of the Sherman Act is to prohibit monopolies, contracts, and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word, to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell. 'The trader or manufacturer, on the other hand, carries on an entirely private business, and may sell to whom he pleases.' United States v. Trans-Missouri Freight Asso., 166 U. S. 290, 320, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540. 'A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade.' Eastern States Retail Lumber Dealers' Asso. *v.* United States, 234 U. S. 600, 614, 58 L. ed. 1490, 1500 L. R. A. 1915A, 788, 34 Sup. Ct. Rep. 951. See also Standard Oil Co. *v.* United States, 221 U. S. 1, 56, 55 L. ed. 619, 643, 34 L. R. A. (N. S.) 834, 31 Sup. Ct. Rep. 502, Ann. Cas. 1912D, 734; United States *v.* American Tobacco Co. 221 U. S. 106, 180, 55 L. ed. 663, 694, 31 Sup. Ct. Rep. 632; Boston Store *v.* American Graphophone Co., 246 U. S. 8, 62 L. ed. 551, 38 Sup. Ct. Rep. 257, Ann. Cas. 1918C 447. In Dr. Miles Medical Co. *v.* John D. Park & Sons Co. supra, the unlawful combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell."

POWER OF SCHOOL BOARD TO DRILL WELL ON SCHOOL PREMISES.—In Schofield *v.* School District No. 113, 105 Kan. 343, 184 Pac. 480, reported and annotated in 7 A. L. R. 788, it was held that under a statute authorizing a school board to provide the necessary appendages for a schoolhouse, it may bind the district to pay for the drilling of a well in the school yard for the purpose of supplying drinking water, even though no suitable water is found, and the well is, on that account, entirely useless. The court said: "The power of a school district to contract is, of course, only such as is conferred by statute, expressly or by fair implication; and persons dealing with it are charged with notice of this limitation. 35 Cyc. 949, 951. The district board is authorized to 'provide the necessary appendages for the schoolhouse during the time a school is taught therein.' Gen. Stat. 1915, § 8976. This court has held that the word 'appendage,' as used in the statute, should be construed broadly, so as to include a well on the school premises; its necessity in a particular case being a question of fact. Hemme *v.* School Dist., 30 Kan. 377, 1 Pac. 104. The defendant, however, argues that a well which produces no water fit for drinking purposes, being absolutely useless, cannot fairly be considered an appendage to a schoolhouse, and certainly not as a necessary appendage. The argument has plausibility, but proceeds upon a quite literal interpretation, which we think would result in confining the discretion of the school board within too narrow limits. The evidence shows that a cistern holding rainwater had formerly supplied drinking water for the school, but was not considered sanitary. This obviously justified the officers of the district in making reasonable efforts to procure a more satisfactory supply. They could not be sure that sinking a well would answer the purpose, but they might naturally and reasonably suppose the chances were all in favor of it. The only way to find out was to make the attempt. We cannot say that as a matter of law they had no right to risk the money of the district in drilling the well, unless they were sure it would meet the purpose for which it was intended. We think the authority to provide a well implied the authority to bind the district for the amount expended in an endeavor to construct one, following reasonable and usual methods, notwithstanding it resulted in a complete failure so far as practical results were concerned. Although in a particular case it might be possible to find a contractor who would carry the risk himself, this would presumably involve a considerable increase in the price, and the question as to whether that plan should be followed would be one calling for the exercise of sound business judgment. We conclude that the board had authority to make the contract, and the district was liable upon it if the contractor duly performed his part."

VALIDITY OF ACT OF CONGRESS CREATING FEDERAL TRADE COMMISSION.—In Hurst *v.* Federal Trade Commission, decided recently by the United States District Court for the Eastern District of Virginia and not yet officially reported, the constitutionality of the Act of Congress of September 26, 1914 (4 Fed. St. Ann. 2d ed. 575) creating the Federal Trade Commission was upheld, and an injunction seeking to prevent the Commission from enforcing the provisions of the Act as against the complainants and from seizing and inspecting the complainants' books and records was denied. After reviewing the provisions of the Act, Judge Waddill said: "The above extracts from the Act of Congress make it clear just what the powers

of the Federal Trade Commission are. The method of procedure for carrying out and executing these provisions by the commission is specific, as is also the effect of its decisions, and the manner in which the same may be enforced. The purpose of the act is to make unfair methods of competition in commerce unlawful, and the commission is empowered and directed to prevent persons, partnerships, or corporations, other than banks and common carriers, subject to the act to regulate commerce, from using unfair methods of competition in commerce. The power granted is far reaching in its results, and of a most salutary character. Banks and common carriers were doubtless excepted from the provisions of the act, because each was subject to the direction and control of a separate commission largely similar to that of the Trade Commission. The contention that the Act of Congress is unconstitutional for any of the reasons specified, is without merit, as it is manifestly within the power of Congress to legislate generally in respect to the burdens that may or may not be imposed upon foreign and interstate commerce, and it is also within its power to declare what would be fair and what unfair methods and dealings in relation thereto, and how the same should be ascertained and determined. The commission is given full power and authority to investigate, make findings of fact, and render its judgment and order in relation thereto, and before the same is carried into effect the judgment of the circuit court of appeals, the second highest court under the government, is to be sought by the commission, to enforce its order, and any party required by such order to cease and desist from using such method of competition, may obtain a review of such order in the circuit court of appeals, by filing its written petition praying therefor. The action of the circuit court of appeals is final, save when its interposition is sought by the commission, certiorari lies from its decision to the Supreme Court of the United States. The jurisdiction of the circuit court of appeals to enforce, set aside, or modify orders of the commission, is exclusive. In all the proceedings, whether before the commission or the court, the amplest provision is made for notice to and full hearing of all parties interested, and for this court, for any of the reasons urged, to anticipate by injunction the action of the commission, and the judgment of the court, charged under the law with the review thereof, would be clearly an usurpation of authority."

CONCLUSIVE OF LEGISLATIVE DECLARATION OF EMERGENCY IN ENACTMENT OF STATUTE.—In Payne *v.* Graham, (Me.) 107 Atl. 709, reported and annotated in 7 A. L. R. 516, it was held that a constitutional provision that the facts on which an emergency bill can be made to take effect immediately shall be set forth in the preamble is a limitation on legislative power, and the court may prevent the immediate taking effect of a statute in which an emergency is declared, unless the facts are so set forth. The court said: "Of the states that have provided for giving emergency acts immediate effect, generally in connection with the initiative and referendum, the constitutions of nearly all provide in effect that emergency legislation shall include only such measures as are immediately necessary for the preservation of the public health, peace, or safety. But our constitution goes further and requires that the emergency, 'with the facts constituting the emergency, shall be expressed in the preamble of the act.' The only state constitutions containing similar language are those of California, art. 4, § 1; Ohio, art. 2, § 1d; North Dakota, art. 2, § 67; Mississippi, amendment of 1914 (see Laws 1914, chap. 520); Massachusetts, amendment of 1918. In neither of these is the language precisely like that of the Maine Constitution, but all require that the facts constituting, or reasons for, an emergency be expressed or set forth in the preamble or some part of the act. Our investigation does not disclose that in either of these states such constitutional provisions have been judicially interpreted. The case of Roanoke *v.* Elliott, 123 Va. 393, 96 S. E. 821, construes that clause of the Virginia Constitution reading: 'The emergency shall be expressed in the body of the bill' (Const. § 53). The Virginia Constitution does not require the facts or reasons to be expressed, and it is held that in the absence of an explicit constitutional mandate the facts need not be set forth. We think it clear that the above-quoted language of the Maine Constitution creates a limitation upon legislative power, and that without conforming to it no act can be made an emergency act, and as such be given immediate effect. The preamble of chapter 112, under consideration, is as follows: 'Whereas, owing to the necessity of preserving the public health in general, the enactment of more stringent laws prohibiting prostitution, lewdness and assignation, and providing punishments therefor is an emergency measure, immediately necessary for the preservation of the public peace, health or safety.' This preamble contains an assumption that there is 'a necessity of preserving the public health in general,' and a conclusion that 'the enactment of more stringent laws . . . is an emergency measure.' It contains no statement of facts, as required by the constitution, and no facts that are even suggestive of an emergency. In argument, indeed, facts are presented which give the act an emergent character. In argument it is said that a great World War had been raging; that, while an armistice had been declared, large bodies of troops were still assembled; that for preventing the spread among those troops of sexual disorders, destructive of military efficiency, existing laws were inadequate; and that the Federal authorities had requested the co-operation of the state in meeting these conditions. But these facts are not, as the constitution requires, expressed in the preamble. The facts constituting the emergency are expressed in the briefs of counsel instead of in the preamble of the act. Chapter 112 is therefore not an emergency act as defined by the constitution."

RIGHT OF ABUTTING OWNER TO CONSTRUCT VAULT OR SUBWAY UNDER SIDEWALK.—In Kress *v.* Miami, (Fla.) 82 So. 775, reported and annotated in 7 A. L. R. 640, it was held that a person owning land abutting on a street in which he has the fee may excavate and construct a vault or subway beneath the surface of the sidewalk, and have access thereto by properly constructed and safeguarded trapdoors or other equipment. The court said inter alia: "The authorities are not in harmony, but they may be grouped into three classes: those that hold that the owner of the fee to the street is also the owner of the subsurface and may make excavations therein if he does not unreasonably interfere with the public easement; those that hold that excavations may be made as long as they are not forbidden by ordinance or other regulation of the city; those that hold that every excavation in the street or sidewalk made without municipal consent is a nuisance per se. Those in the first group follow the older, and we think the better, rule, as laid down by so eminent an authority as Lord Mansfield, who said: '1 Rolle, Abr. 392, Letter B, pl. 1, 2, is express—"that the King has nothing but the passage for himself and his people, but the freehold and all profits belong to the owner of the soil." So do all the trees upon it, and mines under it (which may be extremely valuable). The owner may carry water in pipes under it.' Goodtitle ex dem. Chester *v.* Alker, 1 Burr. 133, 97 Eng. Reprint, 231. This doctrine has been modified by some of the later decisions of the courts of this country, but we cannot

follow those that seek to extinguish all rights of the owner of the fee to the subsoil, or give to municipalities the power to take from such owner his unsurrendered right in the subsurface. The distinction between the doctrine of those courts that hold every excavation under the street or sidewalk made without municipal authority is a nuisance per se, and those that hold they are lawful so long as not forbidden by the ordinances of the city, is more in name than in substance. A right that may be taken from a person at the will of the city is not a right, but a privilege, and, when we sustain the right of the city to grant or withhold from the owner of the fee the privilege of making excavations in the subsoil of a street adjacent to his property, his right vanishes. Neither can a municipality deprive the owner of his property or property rights, by declaring by ordinance or otherwise that to be a nuisance which, in fact, is not a nuisance. . . . Upholding, as we do, the right of the owner of the fee in a street to use the subsurface the same as his other property, so long as he does not interfere with the rights of the municipality below the surface for sewers and pipes for water, gas, and other proper purposes, it follows that the owner has the right, subject to reasonable municipal regulation, to make openings in the sidewalk to give access to the area beneath; but he is bound so to construct and cover the opening that it shall at all times be as safe for the use of the public as if it did not exist, and public travel over the same be not unreasonably interfered with. The city has the right to require the appellant to procure a permit before making an opening in the sidewalk, and it has the right to see that the proper safeguards are thrown about the work, and that in its progress the right of the public to use the sidewalk is not unreasonably interfered with. It may also regulate how the excavation shall be made, and the trapdoors or other appliances for closing the opening constructed; but it may not arbitrarily refuse to grant a permit, nor, under the guise of regulation, place an additional burden upon the abutting owner, or make such regulations as would in effect deprive him from exercising the rights recognized in this decision."

KNOWLEDGE DERIVED FROM FAMILY CORRESPONDENCE AS QUALIFYING ONE TO TESTIFY TO GENUINENESS OF HANDWRITING.—In Johnston *v.* Bee, (W. Va.) 100 S. E. 436, reported and annotated in 7 A. L. R. 252, it was held that grandchildren who had obtained their knowledge of their grandmother's handwriting only by inspection and repeated readings of letters from the grandmother to their mother, preserved by the family for a long period of time for sentimental reasons, were qualified to testify to their opinions as to the genuineness of the grandmother's signature. The court said: "A decided weight of authority affirms the right of an interested person or party to testify to the handwriting of a signature purporting to be that of a deceased person, if he is otherwise qualified, even though he would be an incompetent witness to testify to the act of signing. In Iowa, Massachusetts, New York, North Carolina, Texas, and Wisconsin the courts hold that such testimony involves no more than a matter of opinion, and does not relate to a personal transaction or communication between the witness and the decedent. 40 Cyc. 2327; Ware *v.* Burch, 148 Ala. 529, 42 So. 562, 12 Ann. Cas. 669, note 671; 25 Am. & Eng. Enc. Law, 261. On the other hand, the contrary has been held in Alabama, Georgia, Kentucky, Missouri, and Pennsylvania, as will be seen by reference to the books already cited. The intermediate court of appeals of Indiana has apparently held both ways as to such testimony. Merritt *v.* Straw, 6 Ind. App. 360, 33 N. E. 657; Shirts *v.* Rooker, 21 Ind. App. 420, 52 N. E. 629. The decisions adopting the minority rule take the view that, inasmuch as proof of the signature authenticates or validates the document constituting the basis of the action, it virtually covers the whole case, and impliedly proves the entire transaction represented by the document. If, however, the ultimate effect of evidence admitted against the estate of a deceased person were the sole test of admissibility, much evidence not related to personal transactions or communications would be inadmissible. Much authority and the terms of the statute deny that it is the true test. As to facts not amounting to or involving such transactions or communications, interested witnesses are competent. This is an unqualified and unlimited implication arising from the very words of the statute. There is no proviso saying they are competent only in the event that the fact has only limited probative force respecting the right involved or none at all. The statutory test is whether the fact in question is a personal transaction or communication or involves one. Davidson *v.* Browning, 73 W. Va. 276, L. R. A. 1915C, 976, 80 S. E. 363. The chief purpose of the statute is to prevent the living party to a transaction from testifying because the other, being dead, cannot be produced to contradict him, in case of false swearing. Denial of right to the former to testify puts them on an equality. Faulkner *v.* Thomas, 48 W. Va. 148, 35 S. E. 915. If so, its reason does not apply here. One party cannot very well contradict another's mere opinion. Whether the witnesses in question were competent depends upon the means by which they obtained the knowledge of the handwriting of the decedent, constituting the basis of their opinions. They are not disqualified by reason of the nature of the fact to which their testimony relates. The witnesses now under consideration, parties plaintiff, derived their knowledge of the handwriting of Mrs. Bee from letters written by her to their mother, in their early childhood, preserved by their mother until her death, and by them afterwards for sentimental reasons, and frequently read and perused. These letters were not communications between them and Mrs. Bee, and they make no claim to any other source of knowledge of her handwriting. Their inspection of these letters also qualified them to express opinions as to the genuineness of the signature in question. There could scarcely be a better index to the genuineness of the letters than their preservation as heirlooms, tender remembrances, or sacred relics for more than forty years. Besides, it is clearly revealed by their contents—messages of solicitude, advice, and love from mother to daughter. What is better calculated to make an impression on the minds of grandchildren than the written messages of their living grandmother to their dead mother?"

News of the Profession

OREGON JUDGE RESIGNS OFFICE.—Justice A. S. Bennett of the Oregon Supreme Court has resigned.

RESIGNATION OF COUNTY ATTORNEY IN MINNESOTA.—Chris. Rosenmeyer, county attorney of Morrison county, has resigned.

DEATH OF CIRCUIT JUDGE OF WISCONSIN.—Judge George Clementson of the Circuit Bench of Wisconsin is dead. He was born in England.

CHANGE IN COUNTY ATTORNEYSHIP IN TEXAS.—John F. Simpson has qualified as county attorney of Jack county, succeeding Judge R. S. Blair, deceased.

FORMER JUDGE OF KANSAS DEAD.—Former Judge Anisell Clark of Sterling, Kansas, is dead. He was for twenty years a judge of the district court.

CHARTER MEMBER OF ILLINOIS BAR ASSOCIATION DEAD.—Isaac N. Bassett, aged 95, of Aledo, Illinois, is dead. He was the last charter member of the Illinois Bar Association.

TEXAS DEATHS among the profession include Judge L. Autrey and Judge S. A. McMeans of Houston. The latter was ten years a judge of the Civil Court of Appeals.

CALIFORNIA DEATHS of recent date include Henry E. Mills of San Diego, and George H. Mastick, of Alameda, senior partner of the San Francisco firm of Mastick and Partridge.

NEW COUNTY ATTORNEY IN MINNEAPOLIS.—Floyd B. Olson has been appointed county attorney of Hennepin county, Minnesota. Mr. Olson was formerly second assistant county attorney.

NEW ORLEANS CRIMINAL JUDGE PASSES AWAY.—Judge Frank D. Chretien of New Orleans died recently. Since 1901 he had presided over one of the criminal branches of the district court.

NORTH CAROLINA JUVENILE COURT HAS NEW JUDGE.—C. C. Moore has resigned as judge of the county juvenile court of Mecklenburg county and Frank Fennedy had been named his successor.

MISSISSIPPI SUPPREME COURT HAS NEW MEMBER.—W. H. Cook of Hattiesburg has become a Justice of the Supreme Court succeeding Judge J. M. Stevens who resigned to resume the practice of law.

FORMER WEST VIRGINIA JURIST DEAD.—E. Boyd Faulkner of Martinsburg, former judge of the Thirteenth Judicial District, is dead. He was appointed to the bench in 1891 and served four terms.

DEATH OF VETERAN RICHMOND LAWYER.—Judge Roger Gregory, formerly professor of law in Richmond College, Richmond, Virginia, died recently. He was at one time judge of the King William County Court.

AMBASSADOR DAVIS TO ENTER NEW YORK LAW FIRM.—John W. Davis, ambassador to Great Britain, is to practice law in New York city as a member of the law firm of Stetson, Jennings and Russell.

KENTUCKY DEATHS in the profession in the last few weeks include William P. Talbot of Parsons, a native of Danville, and John M. Stuckey of Lexington, a graduate of the University of Virginia.

DES MOINES LAWYER OF PROMINENCE DEAD.—Roy E. Cubbage, attorney and former president of the Des Moines school board, is dead at the age of 37. He was born in Hand county, South Dakota, and was graduated from Drake University Law School.

DEMISE OF MINNESOTA JUDGE.—District Judge John H. Steele of Minneapolis died Oct. 2. He was born in Indiana and was a Judge of Probate in Minneapolis for a number of terms before becoming a district judge.

NEW YORK JURIST DEAD.—George R. Salisbury, Justice of the Supreme Court in the fourth judicial district, died recently at his home in Saratoga Springs. He had been district attorney and county judge of Saratoga county.

ASSISTANT UNITED STATES ATTORNEY IN WASHINGTON CITY RESIGNS.—James B. Archer, Assistant United States Attorney in Washington City, has resigned to take the position of senior counsel for the Washington Railway & Electric Co.

OHIO DEATHS.—The Ohio Bar has lost by death, Robert W. M'Coy of Columbus, Judge Charles C. Shearer of Xenia, former Circuit Judge, and Gen. Edward S. Meyer of Cleveland, one time a United States district attorney.

DECEASE OF OLD MARYLAND LAWYER.—Col. Thomas S. Hudson, prominent for more than a half-century in the public life of the Eastern Shore of Maryland, died at his home in Crisfield recently. He was 83 years old. He was a graduate of Princeton.

PROMINENT COLORADO LAWYER PASSES AWAY.—Former Judge Caldwell Yeaman, pioneer Colorado lawyer, died in Denver some weeks ago. He was senior member of the firm of Yeaman, Gove and Huffman. He was born in Elisabethtown, Ky., in 1849.

DEATH OF PIONEER LAWYER OF WISCONSIN.—Gerry W. Hazelton, 91 years of age, of Milwaukee died in September. He was a member of the convention which nominated Abraham Lincoln in 1860 and was a member of Congress for two terms as well as a United States district attorney for the western district of Wisconsin.

VACANCY ON BENCH IN IOWA FILLED.—Governor Harding of Iowa has appointed Judge Thomas Arthur of Logan to the Supreme Court to fill temporarily the vacancy caused by the death of Judge Gaynor. Judge Arthur was at the time of his appointment a judge of the district court and that vacancy has been filled by the appointment of George W. Cullison of Harlan.

CHANGE IN TEXAS JUDICIARY.—Judge Volney W. Taylor of Alice, for the past six years District Judge of the 75th Judicial District, which includes Hidalgo, Jim Wells, Duval and other counties, has resigned and removed to Brownsville. He is succeeded by Major Hood Boone of Pharr, appointed by Governor Hobby to fill out the unexpired term. Judge Boone is the Democratic nominee for the place.

CHANGES IN PERSONNEL OF DISTRICT ATTORNEY'S STAFF IN NEW YORK STATE.—District Attorney Lewis of Brooklyn has announced the appointment of Marshall Snyder, a graduate of New York Law School, as an assistant district attorney. John S. Knibloe of Buffalo, assistant district attorney for the past three years, has resigned to resume the practice of law.

VACANCIES IN NEW JERSEY COURTS FILLED.—Linwood W. Erickson of Bridgeton, New Jersey, has been appointed a judge of the Common Pleas Court of Cumberland county to succeed J. Hampton Fithian, deceased. Judge Erickson was at one time court crier. The vacancy caused by the resignation of Judge Frank Smathers from the District Court at Atlantic City was filled by the appointment of Louis Repetto.

BOSTON DEATHS.—Hugo Clark, a Boston attorney, died suddenly at his summer home in Maine in October; he was a graduate of the University of Maine and formerly practiced law in Bangor, Maine. Ferdinand A. Wyman, for fifty years a member of the Boston bar and connected prominently with the development of the electrical industry, died at his summer home at Littleton, New Hampshire, in September. Francis A. Perry, a retired Boston lawyer, died at his home in Cambridge in the same month.

OREGON BAR ASSOCIATION.—H. G. Platt of Platt & Platt, Portland, was elected president of the Oregon Bar Association at the recent annual meeting. Albert B. Ridgway of Portland was re-elected secretary, and Hall B. Lusk of Portland, treasurer. Vice-presidents chosen were: F. M. Calkins, Medford; J. W. Hamilton, Roseburg; Percy R. Kelly, Albany; James U. Campbell, Oregon City; Robert W. Phelps, Pendleton; John W. Gavin, The Dalles; Gustave Anderson, Baker; Dalton Biggs, Ontario; John W. Knowles, La Grande; David Parker, Condon; Harry H. Belt, Dallas; Delmon V. Kuykendall, Klamath Falls; Judge Batcheller, Lakeview; T. E. J. Duffey, Prineville; George R. Bagley, Hillsboro; James A. Eakin, Astoria. An executive committee consisting of Fred W. Wilson, E. O. Immel, Robert Maguire, Charles J. Schnabel and Hugh Montgomery was named. The association voted to hold a special meeting in Portland in December to act upon the final report of the codification of the probate code.

WISCONSIN BAR ASSOCIATION.—At the recent annual convention of the Wisconsin Bar Association held in Milwaukee, Sept. 28 to 30, an important address was made by ex-Senator Albert J. Beveridge of Indiana. The president's address was entitled: "The Poison in Society," and was a plea to curb radicalism. The nine suggestions put forward by the former president of the association, B. R. Goggins, at Madison in 1917, and which were referred to a committee headed by Howard L. Smith, professor of law at the university of Michigan, were discussed. These concern technical rules of evidence, less than unanimous verdicts, simplifying and cheapening appeals and abolition of the printed case, shortening of opinions and abridging the reporting and publishing of cases, principles and appellate decision, extension of appellate jurisdiction such as in the hearing of the testimony on appeals in certain cases, association activities between sessions, increase in membership of the bar association, compulsion of lawyers to join and the Minnesota plan, the harmonizing of inconsistent statutes in the subjects of eminent domain and municipal bond issues of village and city government. At the annual banquet one of the speakers was Mitchell Follansbee of Chicago.

English Notes*

PUBLICATION OF TREATIES REGISTERED WITH LEAGUE OF NATIONS.—Arrangements have already been made to publish the first volume of treaties in accordance with the provisions of the Covenant of the League of Nations, of which particulars have been given in the *Law Times* (vol. 150, p. 152). Ten agreements are to be included in the volume. They concern Norway, Sweden, Denmark, Great Britain, Japan, the Netherlands, Belgium, Switzerland, France, Greece, Italy and Bulgaria, together with a general treaty on the preservation or re-establishment of the rights of industrial property affected by the world war. The German Government have notified that they are fully prepared to inform the Secretary-General of the League of Nations of all international agreements entered into by the Government since the Peace Treaty came into force. As this is a voluntary arrangement on their part, the provision laid down in article 18 of the covenant, to the effect that the legal validity of all international agreements shall date from the day of their registration by the League of Nations, cannot, in the nature of things, apply to Germany.

PUNCH AND THE LEGAL PROFESSION.—Sir Owen Seaman's amusing lines in last week's *Punch*, bearing the title "An Apology to the Bench, Humbly Addressed to T. E. S.," in which the poet deprecates the wrath of the Lord Justice whose initials are set out, for having beaten him recently at golf, illustrate not merely that the golf course makes the whole world kin, but likewise the intimate association between the *personnel* of our famous contemporary and the profession of the law. Like his two immediate predecessors in the editorial chair of *Punch*—Sir Frank Burnand and Tom Taylor—Sir Owen Seaman is a member of the Bar, although, like the two former editors, he has more assiduously cultivated the muse and the delights of literature rather than the weightier matters of the law. But not only the editors we have named have been members of the Bar, several also of the most noted contributors to *Punch* have kept them company in this respect. The A'Becketts papers from Pump Handle-court by Briefless and Briefless Junior were long and pleasing features of *Punch;* R. C. Lehmann, whose contributions are also well known, can likewise be claimed for the Bar, for is his name not associated with a Digest of Overruled Cases?—a useful work, but not quite on the lines of his other writings; while, still further back, we do not forget that Thackeray combined association with the Bar and with *Punch*.

THE VENDETTA.—Professor Busquet, of Lyone University, has written a comprehensive work on Le Droit de la Vendetta et les paci corses (Paris: Pedone). Corsica is still the principal home of the vendetta, which is the family feud requiring the nearest kinsman of a murdered man to take up the quarrel and avenge his death. The custom still partially survives in Sardinia, Sicily, and some other places, but Professor Busquet's historical research shows that it has been active for centuries right down to our own time, though the war seemed to some extent to mitigate its operation. The learned author appreciates that underlying the custom is a sound foundation of loyal attachment to the family. Its undesirable features have developed through a number of causes, of which the principal is perhaps the weakness of the Central Government. It is suggested that an arrangement such as that which has been made for Alsace-Lorraine under an Administrator-General at Strasburg would be suitable for the island, supported by a more efficient police. It is a curious anomaly that the vendetta is frequently caused by the decisions of the courts, which are influenced by local prejudices. It is proposed that this cause should be removed by requiring the decisions to be reviewed by a central authority, and giving a right of appeal to a higher tribunal. Professor Busquet has dealt with the legal and historical aspects of the subject with a lucidity and thoroughness which will give to his work with its valuable appendices of documents and authorities the position of being a standard book on the vendetta.

JUDICIAL DICTIONARIES.—In one of his books Lord Bolingbroke mentions the case of a pious Oxford student who was overheard at his devotions thanking God for the makers of dictionaries. Lawyers no less than laymen may well acknowledge with gratitude the labors of those who, scorning delights and living laborious days, have sought to elucidate the difficulties to be encountered at times even in the simplest words and phrases. Of late years, in addition to the publication of law dictionaries in the ordinary sense, that is, which endeavor to

* With credit to English legal periodicals.

present in abbreviated form a view of the whole law, we have seen the rise of a new type—dictionaries which collect the meanings placed upon words and phrases by the judges. We have all at times been indebted to the exhaustive Judicial Dictionary of the late Mr. Stroud, who, if we are not mistaken, was the pioneer in this particular form of dictionary. His example has set others to work on similar lines in some of the colonies. A few years ago a judicial dictionary was published having special reference to the needs of the South African practitioner. That was followed more recently by another covering the same ground for Canada. And now Mr. C. E. A. Bedwell, the librarian of the Middle Temple and honorary secretary of the Society of Comparative Legislation, has prepared a similar work for Australia. This addition to the list of judicial dictionaries, which will be published very shortly, whilst primarily intended for the Australian lawyer, will have its uses, too, for English practitioners, especially in connection with the elucidation of words and phrases in the numerous enactments dealing with labor and kindred subjects.

JUDGES AND BARRISTERS AS TRANSLATORS.—In the obituary notice of the late Sir Samuel Griffith, formerly Chief Justice of Australia, it was stated that among his extra-judicial activities were included scholarly translations of the Divina Commedia and the Vita Nuova of Dante. This is further testimony not only to the wide recognition in recent years of the work of the great Florentine, but likewise the hold the poet appears to possess over lawyers, not a few of whom have occupied their leisure hours in rendering into English the laconic verse of the Inferno, the Purgatorio, and the Paradiso. The second Sir Frederick Pollock, long one of the Masters of the Queen's Bench and Queen's Remembrancer, was early attracted to the study of Dante, and in 1854 he brought out in closely literal blank verse an excellent rendering of the Divine Comedy, with numerous plates mostly after Flaxman. More recently another Master of the Supreme Court, the late Master Wilberforce, entered the same field and produced a rendering of Dante. While not many busy judges and barristers in full practice have the leisure to produce original work in literature, it is gratifying to observe how so many of them find an outlet for their literary tastes in translation. Everyone recalls how Lord Bowen found occupation and solace during several Long Vacations and other intervals of leisure in translating Virgil's Eclogues and the first six books of the Æneid; his rendering, published in 1887, finding, as may well be imagined, many warm admirers, for everything that came from Bowen's pen was clothed in exquisite language. Another judicial translator is still with us—Sir Edward Ridley—who some years ago brought out a rendering of Lucan's Pharsalia, a new edition of which appeared quite recently.

DEATH OF DISTINGUISHED BELGIAN JURIST.—By the death of Mr. Justice Ernest Nys, which occurred early in September, one of the most distinguished personages of contemporary Belgium disappears. Born at Courtrai in 1851, Ernest Nys graduated at the University of Ghent, and commenced his judicial career at Antwerp. Since the end of the war he had been president of the Court of Appeal in Brussels. Professor of international law in the Metropolitan University of Belgium, a member of the Royal Academy of Belgium, a member of the permanent Court of Arbitration at The Hague, his pre-eminence was in the domain of international law. His *magnum opus* in three volumes, entitled 'Le Droit international, les principes, les théories et les faits," made him a universal authority. The work is a vast assemblage of the notions of the law, and the evolution of the theories through the centuries. He had also written upon the rights and duties of neutrality, and the great international waterways. During the creation and development of the Congo State the late King Leopold frequently consulted Mr. Justice Nys, and again he was consulted during the difficulties with Great Britain arising from the Casement *soi-disant* revelations concerning the rubber industry. Years ago he was frequently to be seen in the reading room of the British Museum with Elisée Reclus and Prince Krapotkin. His patience in research was measureless, and it is to him that we are indebted for establishing the fact that Cruce, the French monk, 1590-1648, was the author of the New Cyneas, a work published in 1623-24, of which three copies only are known; and in which the monk sketched a League of Nations almost identical with President Wilson's scheme. Among the late judge's many academical distinctions are included the degree of LL.D. *honoris causa tantum* conferred by the Universities of Glasgow and Edinburgh.

THE HABEAS CORPUS ACTS OF ENGLAND AND IRELAND.—The Lord Chief Justice of Ireland on September 15, sitting as Vacation Judge, in admitting to bail a prisoner charged with rioting in Belfast, said the accused was charged with a misdemeanor, and the only question was sufficiency of bail. "There is," said the learned Lord Chief Justice, "one little Act which has not yet been suspended in Ireland, and that is the Habeas Corpus Act." The Irish Habeas Corpus Act 1781 (21 & 22 Geo. 3, c. 11) differs from the celebrated English statute of 1679, known as the Habeas Corpus Act. It is a statute entitled an "Act for the better securing the liberty of the subject," but its provisions do not, as in the case of the English Act, extend to the prevention of imprisonment beyond the seas. In this Act, however, is contained a power for the Chief Governor and Privy Council of Ireland to suspend the Act by proclamation under the Great Seal during such time as there should be an actual invasion or rebellion in Ireland or Great Britain. The palliation of the delay in not placing a Habeas Corpus Act on the Irish statute-book for upwards of a century after a Habeas Corpus Act had been placed on the English statute-book—that its provisions were part of the common law of the realm—is an instance of that method of "retrogressive progress," of which there are many illustrations in the history of the British Constitution and the versions of that Constitution, whereby the authority of Parliament has been extended, not under the form of a request for new powers, but under the nominal demand that an existing power should henceforth be treated as part of the known law of the land. The method of retrogressive progress, in the opinion of Professor Dicey, "while greatly favoring the growth, has also disguised from many historians and constitutionalists the true nature of the power obtained by the Parliament of England." The English Habeas Corpus Act itself may, however, be regarded as an instance of genuine "retrogressive progress." Mr. Hallam observes that it is a common mistake to suppose "that this statute enlarged to a great degree our liberties and forms a sort of epoch in their history. But though a very beneficent enactment and eminently remedial in many cases of arbitrary imprisonment, it introduced no new principle nor conferred any right upon the subject. It was not to bestow an immunity from arbitrary imprisonment, which is abundantly provided in Magna Charta (if, indeed, it were not more ancient), that the statute of Charles II was enacted, but to cut off the abuses by which the Government's lust of power and the servile subtlety of Crown Lawyers had impaired so fundamental a privilege."

LAW AND INJUSTICE.—Sir Hamar Greenwood, speaking in the House of Commons recently, as Chief Secretary, in defense of the policy of the Government in Ireland, met an interruption in debate, suggesting that Sinn Fein courts were "illegal but just," by the rejoinder that he could "not understand how anything could be just if illegal." This paradox is sufficiently intelligible and probably true, as will be evident by the consideration that many legal things are admittedly unjust. "Social necessities," writes Sir Henry Maine, "are always in progressive societies more or less in advance of law. We may come indefinitely near to the closing of the gap between them, but it has a perpetual tendency to reopen. Law is stable; the societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed." Lords Mansfield and Camden, who differed on most questions, agreed in discountenancing legal measures against Roman Catholics, and, by their conduct in seeking to protect the observance of Roman Catholic rites from the severities of the Penal Code, showed that in their opinion legality is not incompatible with injustice. One Roman Catholic priest appears to have escaped conviction mainly through the extraordinary ingenuity with which Lord Mansfield from the Bench suggested doubts and difficulties in the evidence of a very clear case, and thus gave the jury a pretext for acquitting the prisoner. The statement from the Bench of the Right Hon. John Edward Walsh, Master of the Rolls in Ireland, in the delivering of a judgment between landlord and tenant in which he stated in relation to the acquisition by the landlord of the tenant's improvements that he was compelled to administer the law which was not just, but unjust, constituted a powerful factor in the passing of Mr. Gladstone's first Irish Land Act of 1870, which was thus supported by Mr. (Baron) Dowse, then Solicitor-General for Ireland, speaking in the House of Commons on March 8, 1870, on the motion for the second reading of the Bill: "In the case of O'Fay *v.* Burke, the landlord sought to confiscate all the improvements of the tenant, which no landlord would be able to do if this bill passed, but which all landlords, if not restrained by feelings of conscience and justice, could do if not restrained by law. But what said the Master of the Rolls: 'Nothing can be more repugnant to the principles of natural justice than that a landlord should look at a great expenditure carried on by a tenant from year to year without warning the tenant of his intention to turn him out of possession. I have no jurisdiction to administer equity in the natural sense of that term or I should have no difficulty in making a decree against the defendant. I am forced to administer an artificial system established by the decision of eminent judges such as Lord Eldon and Sir William Grant, and, being so bound, I regret that I must administer injustice in this case and dismiss the petition.' Should such a state of things continue, or should this great and beneficent measure become the law of the land?"

SALES BY EXECUTORS AND TRUSTEES.—In dealings with freehold and leasehold property the conveyancer is frequently faced with the question: When do the executor's estate and powers come to an end and those of the trustee commence? The dividing line is by no means always easy to ascertain; but there is a dividing line, as the two estates cannot co-exist. As a rule, a testator appoints the same persons to be both executors and trustees of his will, and generally the will contains a devise and bequest to the trustees on trust for sale. In such cases, notwithstanding anything contained in the will, the testator's property on his death first devolves on his executors as his personal representatives, whether the property be freehold or leasehold. To enable them to administer the estate, the executors can sell and dispose of it regardless of the trusts of the will, so long as it remains vested in them in that capacity; but once the estate has become vested in them in their capacity of trustees, their executorial estate and powers cease, and they can exercise only the powers given to them by the will. It is not, of course, until the executors have assented to the devise or bequest that the trustees can deal with the property under the trust for sale; but such assent can be effected in different ways—e.g., by express assent, or by conduct. One would hardly expect to find an express consent by executors to a devise or bequest in their own favor. Consequently their assent has generally to be implied from their conduct. As to this, it may be said that if executors, in their manner of administering the property, do any act which shows that they have assented to the devise or bequest, such act may be taken as evidence of their assent; but if their acts are referable to their character of executor, they are not evidence of assent. This point was well brought out in the recent case of Re Milner and Organ's Contract (1920, 89 L. J. 315, Ch.). There the vendors in their capacity of trustees of the testator's will, agreed to sell a freehold farm; but as a matter of fact their trust for sale was not exercisable until a future date, and, owing to the subtle wording of the will, the vendors had misconceived its effect. On the position being pointed out by the purchaser, the vendors offered to convey as legal personal representatives, but to this the purchaser would not agree. As Mr. Justice Eve said in his judgment, the purchaser was naturally unwilling, with his subsisting contract, to take a conveyance on that footing, inasmuch as the fact that the vendors had contracted to sell as trustees was almost conclusive evidence that as executors they had assented to the vesting of the land in themselves as trustees, and were therefore no longer in a position to sell as legal personal representatives, and consequently that the purchaser would not have been safe in taking from the vendors a conveyance in that form. In the circumstances the court allowed the vendors to rescind the contract. The above-mentioned case shows that whenever there appears to be any doubt on the matter, the purchaser would be wise to make some inquiry as to the state of the administration of the estate, so as to ascertain the true position of affairs. If this were more often done, one would not see so many instances where the practitioner has looked on the matter as merely one of choice (and frequently made the wrong one), or where the vendor has been clumsily made to convey or assign, or, rather, purport so to do, in both capacities at once.

Obiter Dicta

"MAKE YOUR OWN!"—Mull *v.* Boyle, 102 Kan. 579.

EVEN IF THE BREWERS DON'T LIKE IT.—Brewer *v.* Mock, 14 Colo. App. 454.

TROUBLE IN THE ASYLUM.—Nutt *v.* Knut, 200 U. S. 12.

A PROTEST FROM THE NEIGHBORS.—Hollar *v.* Cornett, 138 S. W. 298.

IN A MINOR LEAGUE.—In Pitcher *v.* Patrick, Minor (Ala.) 321, Patrick made a hit in the Supreme Court.

SARCASM?—"Jurors are not mere figureheads."—Per Prendergast, J., in Melton *v.* State, 158 S. W. 557.

AND HE COULD NOT.—The report of the case of Dey *v.* Mayo, [1919] 2 K. B. 622, shows that "Cannot" appeared for the plaintiff. The defendant won.

SUCH A POLITE COURT!—"We hope appellant will not take any offense if we call the reasons advanced to sustain its theory mere sophistry."—Per Broaddus, P. J., in State *v.* Federal Union Supply Co., (Mo.) 137 S. W. 615.

COHABITATION BY REQUEST.—"When household goods are taken for storage from a house where a man and his wife are living together, at the request of the husband, and are subsequently delivered to him," etc. See Oakes *v.* Sloane, 135 App. Div. 354.

AN OVERSIGHT.—In State *v.* Brunette, 28 N. Dak. 539, wherein it was sought to have the defendant adjudged to be the father of a bastard child, no attempt seems to have been made, strangely enough, to prove the paternity by resorting to a comparison of color.

CARING FOR THE YOUNG IN LOUISIANA.—Act No. 99 of the Session Laws of Louisiana for 1912 is entitled "An Act to prohibit gambling . . . within five (5) miles of the Waterproof High School," etc. We suppose the legislature was trying to make the High School foolproof, too.

A MARRIED JUDGE.—"I think we may safely take judicial notice that camphor treatment of woolen goods for the purpose of keeping out moths is not only a familiar, but the usual, method adopted by housewives to combat this destructive insect."—Per Mullan, J., in Hamilton *v.* Ward, 181 N. Y. S. 31.

PATIENCE REWARDED.—In Job *v.* Harlan, 13 Ohio St. 485, Job was beaten in justice's court, appealed to the common pleas and was beaten there, filed a petition in error in the district court and was beaten there, and then filed a petition in error to the Supreme Court where at last, after seven years, he won out.

A HOUSE DIVIDED AGAINST ITSELF.—In Sons et al. *v.* Sons et al., (Minn.) 177 N. W. 498, wherein the plaintiffs were brother and sister, and the defendants were brothers of the plaintiffs, the trouble arose over the ownership of a farm on which all the Sons lived with Sons, the father of the Sons, including that one of the Sons whose front name was Mary.

ANOTHER BLOW AT FREEDOM OF SPEECH!—"It is the right of counsel to assign error upon the conduct and statements of the trial judge, and to properly discuss such assignments of error. But this court will not tolerate the use of such assignments of error as a vehicle for abuse of the trial judge or to vent the spite of an unsuccessful attorney."—Per Fellows, J., in Estate of Broffee, (Mich.) 172 N. W. 541.

MISSING IN ACTION.—"As far as the court is concerned, I have been in a condition of mind that would have enabled me to decide this case long since, but counsel for defendants took leave to file a brief four or five weeks ago, and up to this time I have never seen that brief. It may be a very good brief, but, not having seen it, I, of course, have been unable to read it."—Per Faris, J., in Laugenberg Hat Co. *v.* United Cloth Hat and Cap Makers, 266 Fed. 127.

NOT NOW!—"Chiefly because he got no replies to bills he chose to send her, the plaintiff has gotten a recovery against the defendant as upon an account stated, an amount for groceries, largely of the common household variety, with so much flavor of alcohol, hops and malt as to strengthen the presumption that the husband, rather than the housewife, would be looked to for payment."—Per MacLean, J., in Blendermann *v.* Mann-Wray, 111 N. Y. S. 827. That might have been true when penned, but not in these days of home brew!

AMBIGUOUS.—The following "ad." which appeared in a local paper seems to be somewhat lacking in clearness:

FOR SALE.—For reason of ill health, one large contractors' horse, also 2 young cows, giving milk and coming in.

What we would especially like to know is whether the "ill health" is supposed to refer to the horse, the cows, or the large contractors.

HE MUST BE A LAWYER.—In a recent letter to the New York *Tribune,* Cornelius Martin says:

The plank in the New York State Democratic platform proposing an amendment to the Federal Constitution requiring that all future amendments shall be ratified by a majority of the voters, and not by the legislatures of three-fourths of the states, although good in itself, should be opposed by every one that is opposed to the Eighteenth Amendment, unless a provision is inserted in the proposed amendment allowing any amendment repealing the Eighteenth Amendment to be ratified by any method that was applicable before or at the time of the passage of the Eighteenth Amendment.

After reading this over at least as many times as the word "amendment" occurs therein, we have come to the conclusion that it is so. But who was it that said the purpose of language is to conceal thought?

Correspondence

THE PARDONING POWER OF THE KING OF ENGLAND

To the Editor of LAW NOTES.

SIR: I have been for a long time a reader of LAW NOTES and greatly appreciate its broad-minded, level-headed editorials, but in this issue for September, 1920, there is an editorial on "The Pardoning Power" which may lead to a misapprehension in the minds of some of your readers not as well up on British institutions as you are.

Being a Canadian I am naturally a subject to the King of England, and there may be many of your readers who would think that the pardoning power which originally centered in the King, had remained in him in as complete a way as I would gather from your editorial it now exists with the Executive of many of your States. But I would like to call your attention to the fact that at least since 1688 the pardoning power has been exercised through the King's advisers, and is exercised practically under the ideas which you suggest should be put in force in the United States. In Canada, for example, the pardoning power, though nominally exercised by the King's representative the Governor General, is actually exercised by the Minister of Justice, who is himself a member of the Cabinet, who is invariably a lawyer of high standing, and who never

recommends a pardon until after investigation by skilled investigators, and always after consultation with the Judge who presided at the trial.

The same thing is true in every self-governing part of the British Commonwealth. In England it is done through the Home Secretary, also a member of the Cabinet and also after consultation with the Judge who imposed the sentence, though the pardon is granted in the name of the Sovereign. This is simply another example of the way in which Democratic Institutions have assumed complete control of what is nominally a Monarchy.

There may be some cases where the Sovereign has acted on his or her own will or wish, but practically in every case where this might be apparently done the Cabinet of the day has assumed the responsibility, and the principle is now as I have stated it.

Edmonton, Alberta. JOHN R. LAVELL.

STARVING THE JURY IN NEW JERSEY

To the Editor of LAW NOTES,

SIR: On page 137 of Obiter Dicta, LAW NOTES for October, 1920, under the head "Information Wanted," you called attention to the fact that in a story of mine, "A Turn of the Wrist," in *Saturday Evening Post* for September 4, I stated that a jury was in custody of a constable sworn to deprive them of meat and drink until they had agreed upon a verdict. You ask in what particular jurisdiction in America is the ancient practice of starving a jury into agreement still followed? Your query, though in the form of a query, bears all the earmarks of an assertion by you that to-day in no jurisdiction is such an oath administered. While the paragraph in the story was purely and simply by way of introduction and had nothing to do with the merits of the story, the statement nevertheless is correct. In all the courts in the county of Essex, New Jersey, where juries sit, and (I take it) in all the jury courts in the State, the oath, to-day, administered to the constable in any ordinary case, is to the effect that he will take the jury to some convenient place and there keep them, without meat or drink, water excepted. Tobacco, however, is not yet taboo. I have heard this oath administered so many times that I had forgotten its exact wording. Your query startled me. I thought I might have dreamt it. To make sure I asked the Clerk of the jury term of the Supreme Court in the Court House at Newark (Mr. George Joerschke) to repeat the oath for me, which he did, and I find that my statement in the story was correct. Inasmuch as some friends of mine, readers of LAW NOTES, read your criticism, they have assumed that you, being an editor, are right, and that I, being merely a friend of theirs, am wrong. As a matter of fact not one lawyer in a hundred ever knows anything about the routine in a court-room. He's there frequently; he has ears but he hears not.

WM. HAMILTON OSBORNE.

[NOTE.—We are pleased to set Mr. Osborne right with his friends, not only by publishing his letter but also by acknowledging that he is correct in his statements as to the antiquated custom in New Jersey. Section 159 of the District Court Act of that State prescribes the following form of oath to be administered to the officer appointed to attend a jury: "You do swear, in the presence of Almighty God, that you will to the utmost of your ability, keep every person sworn on this jury together in some private or convenient place, without meat or drink, water excepted . . . until they have agreed on their verdict." So far, so good. But we are still after information. Can Mr. Osborne, or any of his lawyer friends, tell us whether this oath is actually adhered to in practice?—ED.]

"By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people."—Per Davis, J., in Ex p. Milligan, 4 Wall. 119.

"No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."—Per Gray, J., in Union Pac. R. Co. *v.* Botsford, 141 U. S. 251.

"The true conception of what is judicially known is that of something which is not, or rather need not, unless the tribunal wishes it, be the subject of either evidence or argument—something which is already in the court's possession, or at any rate is so accessible that there is no occasion to use any means to make the court aware of it."—Per Roraback, J., in Chiulla de Luca *v.* Board of Park Com'rs, (Conn.) 107 Atl. 612.

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A Small Beginning.

IN denying the application of the Catalonian Nationalist Club of New York for approval of its certificate of incorporation (112 Misc. 207, 184 N. Y. Supp. 132) the court stated the object of the proposed corporation to be "a center of representation in North America of Catalonian culture and the legitimate national aspirations of Catalonia" and said: "It has, I think, been demonstrated in the recent past that the great need of the time is the teaching of American 'culture,' and that there has been too much teaching and adherence to foreign 'culture,' the result of which has been that naturalized citizens to the second generation have retained a dual fealty. Organizations for the purpose of perpetuating the division of the people into racial groups, and thus retarding homogeneity, should not be sanctioned. The declared purposes of the corporation are solely in the interest of the province of Catalonia and if carried out to their ultimate completion might result detrimentally to American interests. The approval of the court is therefore withheld." In view of the associations now engaged in diffusing the "culture" of Russia, not to mention Germany and Ireland, in our midst, the denial of sanction to this somewhat innocuous aggregation of Catalonians seems at first blush to strain at a gnat after swallowing a considerable menagerie. But of course the court could decide only the matter which came before it, and there can be no two opinions as to the soundness of the principle which it declared in so doing. Not only have nationalist groups maintained in the United States always been the greatest impediment to Americanization, but the trend of international affairs is certain to give them a yet more detrimental effect in the future. It is quite certain that there will be in some form a league or association of nations to which the United States will be a party and which will deal in an advisory if not in a controlling manner with many of the aspirations of its members. It will be quite intolerable if every issue which thus comes up between foreign nations results in efforts in the United States by associations of natives of each of them to control the American policy in that dispute. A presidential election, for example, should turn wholly on matters affecting the United States and not be complicated by an alignment of naturalized Italians and Jugo-Slavs based on the views of the candidates respecting Fiume. Of course the denial of incorporation to organizations looking to the preservation of foreign institutions and ideals in our midst is wholly inadequate to prevent the evil. If we are to gain the national spirit which will permit us to participate with safety in any international association means far more sweeping and drastic must be employed to clear the ground, and systematic education must raise the superstructure of American spirit.

The Ideal and the Possible in Criminal Procedure.

IT is comparatively easy to work out on paper an ideal system of criminal procedure. It is to a great extent true that the persons who commit most of the crimes are not wholly responsible; that dementia praecox or some other form of degeneracy is found in the majority of cases; that to a considerable extent the problems of crime are medical rather than legal, and that our present machinery for ascertaining the mere fact of guilt is wholly unfitted to deal with the problem. It is easy enough to show that in most cases a sentence to prison for a fixed period is, for purposes of reformation, about as rational as the commitment of an invalid to the hospital for a predetermined time. Starting from these premises it seems logical enough to conclude that alienists rather than lawyers should determine the place of confinement, the nature of the restraint and treatment required by the convict, and the time when, if ever, it is safe to release him. But right at this point the theory runs foul of a fact, that no person or class of persons is fit to be trusted with any such powers. Beautiful as the theory may be, it would in practice be so apt an instrument for malice and oppression that it would soon become intolerable. It is still true in theory that no government is so efficient as that of a wise and benevolent despot, but despotism has gone out of fashion because the despot's power may fall to one who has neither wisdom nor benevolence. Experience has verified the theory of our Constitution that the grant of fixed and inalienable rights to the citizen, while at times it may serve to impede the administration of law, is none the less essential to liberty and justice. The indeterminate sentence has justified itself in practice, but there must be no yielding to any attempt to take away the convict's safeguard against oppression, the maximum beyond which it cannot be extended. The advisory aid of the medical expert, as well exemplified in the Municipal Court of Chicago, is invaluable. But the safety of the man falsely accused of crime demands that in seeking that aid no particle of the judicial safeguards of innocence be abated. Not even reaction is so real a menace as the disposition shown in some quarters to put into effect theories which, however perfect in themselves,

ignore entirely the errors and imperfections of human nature.

Finger Prints Again.

EVERY reader of LAW NOTES is aware of its optimistic attitude with respect to the use of finger prints as a means of personal identification. But every cause needs to be guarded from the too zealous advocate even more than from the scoffer, and it would seem that such an injudicious advocacy is found in a suggestion made recently in a New York newspaper that the finger print of every registrant should be taken as a means of identifying him when he appears to vote. If anyone imagines that this is feasible, let him experiment by taking the finger prints of a few of his acquaintances and comparing them. Finger prints are unique, it is true, but their differences are so minute that only microscopic observation by a person having some considerable familiarity with the subject can discover them. There are only about six or eight primary types of finger prints (authorities differ as to classification), and identity as between prints of the same class is established only by the comparison of a great number of minute details. Enlarged photographs superimposed on a card having many numbered squares furnish the most convenient means of identification, but this of course requires time, expense and a high order of skill. In other words, a competent expert (and the United States affords but few of these) is essential to any helpful comparison of finger prints. Bringing the suggestion to its irreducible minimum, it may be that in a very few cases of apparent fraudulent voting the comparison of finger prints by an expert called into an election contest might be helpful. But the little benefit to be so derived would be obtained at great expense. Moreover, the practice would bring out a crop of pseudo experts whose conclusions would only darken counsel and would tend in a very short time to discredit finger print evidence entirely. Most lawyers can remember the day when every "Professor" who taught penmanship in a business college qualified as a handwriting expert, and expert testimony was a subject of general derision. Testimony as to comparison of handwriting has been redeemed from that discredit, thanks to the efforts of a very few men whose real scientific attainments have finally compelled recognition. It will be a great mistake if, in respect to finger prints and some other aids to investigation which have been developed in Europe and are just beginning to be recognized in America, we do not profit by this lesson.

" Side Lines " for Judges.

SOME little comment has been occasioned by the employment of Federal Judge Landis, at a salary to exceed $40,000 a year, to act as the final arbiter of the questions arising in the two major baseball leagues. At least one metropolitan journal doubts the propriety of his retention of his judicial office, saying editorially: "Judge Landis, if he is properly supported, can render great services to the industry and to the millions who love the sport, but it is hardly to be supposed that he intends to retain his position on the Federal bench. The fact that the big leagues are willing to give him about seven times as much money as the United States Government is rather grotesque, but offers no particular obstacle to his future usefulness in either capacity. But if our Federal Judges are so badly off that they have to earn easy money after hours, or if they have so little to do that they can earn seven times their salaries in leisure moments, the thing to do is to raise the salaries of Federal Judges. Certain dignitaries of the bench doubtless possess the presence and perhaps the other talents that would make them stars in the movies, but it would be regarded as somewhat eccentric for a Judge to lay off the make-up as he assumes the gown. One may suppose that Judge Landis is wiser than some of the correspondents who have been writing about his intentions, and that he will resign his office before he goes into his new work." The view quoted seems to be based on a false conception of the nature and dignity of position of Judge Landis in the sporting world. Assuming of course that his new duties will not take so much time as to interfere with the proper discharge of his judicial functions, there seems to be nothing except the novelty of the situation and the magnitude of the salary paid to cause any comment. There are many unpaid positions on committees and directorates which a public-spirited judge assumes from time to time, for which in fact his judicial prestige is one of his qualifications, and few if any of these involve more of real public usefulness than that which Judge Landis has accepted. The course which the judge will take as to the retention of his judicial office is at the present writing unknown. While the acceptance by judges of other remunerative employment would doubtless be a bad practice if generally followed, the present situation is so far unique that a hope may be expressed that the gain of the national game may not be at the cost of depriving the Federal bench of one of its most conspicuous figures. But if other judges yearn for a share in the rich rewards of professional athletics, the following incident may serve as a useful suggestion. The writer once tried a case before a judge whose austerity of personal life was equalled only by the rigid impartiality of his judicial conduct. One of the witnesses, a prize fighter of some local repute, after sitting in court for the best part of the day leaned forward and whispered in a tone of unfeigned admiration, "What a referee that fellow would make!"

Duty of Soldier to Retreat.

IN *Caldwell* v. *State,* 84 So. 272, a homicide case in which self defense was urged by the accused, it was sought to introduce a unique exception to the familiar rule as to the duty of one assailed to retreat if he can safely do so. "Appellant's counsel insists," the court said, "that the doctrine established in this state and repeated to the jury in this case did not have application in the present circumstances because the defendant was a soldier, wearing a uniform, and who was taught by the military authorities that an American soldier should never retreat." The contention was summarily overruled in the following words: "There is no merit, of course, in this effort to discriminate in such circumstances the application of the established law, in civil courts, to offenders, whether they be soldiers in uniform or not. In civil courts all offenders must be accorded the benefit of and held responsible under the same law." The ruling is, of course, sound. Any other doctrine would go far toward introducing the Teutonic doctrine of the "Kaiser's coat"

by virtue of which any insult to a soldier in uniform might be resented to the same extent as if it had been offered to the person of the "Most Highest," a theory which, according to press reports, was more than once deemed to justify a soldier in killing a civilian who jostled him in the street. But nevertheless the contention in question was aimed at a very debatable point in the law of self defense. It is settled that the standard by which the conduct of one defending himself against an assault is what a reasonably prudent and courageous man would have done under the same circumstances. However convenient this standard may be, is it altogether just? The "reasonably prudent man" is, of course, the proper criterion in cases of negligence. But is not a man unlawfully assailed entitled to be judged by what he himself believes is necessary to the protection of his life? The belief must, of course, be honestly entertained, but granting that honesty, is a timid man to be adjudged a murderer because one endowed with more of courage would not have been alarmed? Self defense presupposes an unlawful attack. Should not the assailant be held responsible for the actual result of that attack, on the same theory on which it is held that a person inflicting an injury is responsible for its actual consequences to the victim irrespective of the latter's infirmities, and is not immune from liability for damages which would not have resulted to a reasonably sound and healthy man?

Election of Judges.

THE recent election again calls attention to a fact which of itself is sufficient to make questionable the wisdom of the popular election of Judges, viz., that where each party presents several judicial candidates their relative position on the ballot is a very material factor. This was well illustrated in New York city, where each of the major parties had four candidates for the Supreme Court bench who were not endorsed by any other party. With but a single exception the vote for the members of a party group varied precisely with the position of each candidate's name, the first named of course getting the largest vote. On account of the "landslide" it made no difference in this particular instance, but in a close election the first-named candidate of the minority party frequently defeats the last-named candidate of the majority. In New York, and doubtless in many other states, where several are to be voted for the order of names is determined by lot. So it is, in a close election, decided by chance which one of several candidates of the majority party shall be defeated. Taking for example again the New York city election, a lawyer familiar with the local situation might discern some disparity of ability and experience among the several candidates. But that disparity is in no way reflected in the vote. "Vox populi" reflects nothing but the accidental order of the names on the ballot; a certain proportion of the voters regularly weary of well doing after voting for one, two or three out of four candidates. Of course, the same thing is true with respect to candidates for nonjudicial office. As to these there is no available remedy, but as to the judges there is a class of persons, the members of the bar, peculiarly familiar with the qualifications of candidates for judicial office and peculiarly interested in the selection of the best men for such office. Nonpartisan judicial nominations by the bar, with some provision for independent candidacy in case the Bar Association should develop into a political ring, would seem to be free from all the objections which have been urged against an appointive judiciary. Under the present system, whatever might be done by a proper use of the primary, the people do not in fact choose the judicial nominees. They merely vote by way of referendum on the selections made by the leaders of two parties. To substitute, therefore, a referendum on the selection of the bar would take away no substantial right of the people but would merely curtail the power of the politicians. The Governor-elect of New York, himself a former Justice of the highest court of that state, advocated during his campaign a substitution of the party convention for the party primary for judicial nominations, and many members of the bar who have seen both systems in operation will agree. If this position is sound, it is hard to find a convincing reason why a convention of lawyers, concerned only with the judiciary, will not make even better nominations than a general political convention which is notoriously prone to regard the judicial nominations as of secondary importance.

The Press and the Bar.

LAW NOTES has on many occasions adverted to the tendency of the lay press to treat as typical the occasional instances of fraud or sharp practice by members of the bar. Perhaps in so doing it fell into the very error which it condemned. At any rate, it is glad to give space to a recent instance of the contrary attitude. Commenting on the action of the lawyers for Ponzi in voluntarily turning over to the receivers of that get-rich-quick artist the $50,000 which they had received from him as attorneys' fees when they thought him solvent, the Washington (Pa.) *Observer* said editorially: "Their action speaks eloquently for a profession which is often criticised and seldom praised. It is a reminder that the bar as a whole is too often judged by sharp practice which is the exception, not the rule. If all the truth were told, it would doubtless appear that these two Boston attorneys themselves are not exceptions to wonder at. There is many a deed of unselfish service and high honor done by lawyers that never comes to the light. The bad ones get the publicity. Here is a bit of unsought publicity for the good ones." One would like to believe that the *Observer* itself is not an exception "to wonder at." But, however obscure may be the good deeds of the lawyer, the good and evil alike of the press have been displayed with all the publicity at its command, and it is believed that but few expressions of the kind above quoted can be found.

The New York Pistol Law.

LAW NOTES has pointed out on several occasions that the notorious Sullivan law has never been effective to prevent the murderous gangsters of New York city from obtaining and carrying the weapons necessary to their evil trade. But it must not be supposed that the Sullivan law is a dead letter. Far from it. In *People* v. *Byrne,* 112 Misc. 377, 184 N. Y. S. 114, it appeared that a woman while waiting for a surface car at a street corner in Brooklyn, saw a shining object in the gutter. She picked it up and found it to be a revolver. At this

juncture a police officer appeared, and arrested her, and she was convicted and sentenced to three years in the reformatory. The court granted a certificate of reasonable doubt because of the excessive sentence. The one plea offered in extenuation of this kind of legislation is that it enables the police to curb more effectually potential criminals. Waiving the obvious retort that with its aid they are not very successful, the entire theory is wrong. Plainly stated, it amounts to this—a man is suspected by the police but no crime can be proved against him, therefore let an arbitrary crime be created for which ostensibly he can be punished. This was clearly recognized by the court in *People* v. *Miles,* 158 N. Y. S. 819, where, in setting aside a conviction under the Sullivan law, the court said: "The punishment was out of all proportion to the magnitude of the alleged offense, so far as appears from the evidence in this case, and seems to have been the result of a determination to punish the defendant for some unknown offense, which he was supposed to have committed, or attempted to commit, but of which he was not convicted." If the act did in fact keep dangerous weapons out of the hands of the criminal class there would be something to be said for it, but nothing is clearer than that it has no such effect. It is absurd to think that it could have, for the really dangerous criminal is the one man who will not be deterred by the fact that in preparing for the commission of a crime he commits another and lesser one. The honest householder, seeking to protect his life or property, is the only person disarmed by the law. If any real criminal is ever convicted under it, it is only as a makeshift to conceal the inability of the police to fasten his real crime on him.

Intoxicants for Personal Use.

THE federal Supreme Court has recently decided, so far as can be determined from the press reports, that a person having intoxicating liquor lawfully in his possession may transport it from place to place so long as nothing except lawful personal use by him is intended. Except for the cynicism aroused by some past decisions on the Eighteenth Amendment few lawyers could have expected any different decision, since the holding amounts to no more than a declaration that one may make a lawful use of property lawfully owned by him. The argument to the contrary is, of course, that the transportation permitted by the decision opens the door to evasions of the law, and it must be admitted that such is the fact. The right to have liquor in possession outside the home of the owner undoubtedly makes it more difficult to fasten guilt on a person whose intent is to make an illegal sale. But there certainly must be a limit somewhere to the power to prohibit lawful acts in order to facilitate the detection of unlawful ones. If no person was allowed to carry or otherwise transport personal belongings in the streets of any city, it would aid greatly in preventing the efforts of thieves to dispose of their booty. A prohibition of the sale or purchase of second-hand chattels would be even more effective. Unless we are to go frankly to the length of saying that the crime of selling liquor unlawfully is of such unique turpitude that all other considerations must yield to its suppression, that offense must be prevented like any other, by the discovery and proof of the facts constituting it. Of course the decision, however great its scope, is of temporary moment only. The amount of liquor now lawfully owned in the United States is small and steadily diminishing. When it is exhausted the real test of prohibition will come. The Volstead act is on the statute books to-day largely because very many men who were able to stock their own cellars think that prohibition is good for the other man. When the last bottle is empty and the last faucet emits but the dregs of a once inspiring brew, we will know for the first time what the American people really think about it. In the meantime the Supreme Court has vindicated a principle of personal liberty but has done nothing of any permanent value to the thirsty.

Judicial Notice.

THE doctrine of judicial notice is, of course, an invaluable aid in the administration of the law. But in these times of rapid progress, when almost every day sees some startling invention accomplishing what had been deemed impossible, or some scientific discovery relegating to the scrap heap something long accepted as a fact, the judge who attempts to take judicial notice must be at some pains to be up to date. "A manifest hoax and humbug, like a proposition . . . to fit out a traveller for a submarine voyage to China . . . or any other scheme which belies the known and generally recognized laws of nature," etc., said Judge Adams some thirteen years ago in *U. S.* v. *Fay,* 83 Fed. 839. Of course at that time the judge was correct enough, and was merely a little rash in assuming that our philosophy had at last succeeded in dreaming of all the things that are in heaven and earth. Not quite so fortunate was the Louisiana court which declared in June, 1920 (*State* v. *Winehall,* 86 So. 181) that 22 and 25 caliber rifles are "used merely as toys or for practice" and are not "dealt with by the law as dangerous weapons." There must be some members of the bar whose hours of relaxation have led to sufficient knowledge of small arms to cause them to smile at this echo from the days of the 45-caliber "pumpkin slinger." Without indulging in any display of technical information, it may be mentioned that in 1917 a man in Idaho killed eight bears with nine shots from a 25-caliber rifle, and bruin is noted among sportsmen for his robust constitution. There is a 22 high-power rifle on the market which claims records almost as impressive. By way of a friendly suggestion to the court, if a disgruntled suitor ever breaks into the court room armed with one of these "toy" rifles, the judges had better forget this decision and get behind a wall—a thick one.

The Pardening Power.

THE observations made in a late issue of LAW NOTES (September, 1920, p. 101), as to the need for the establishing of the pardoning power in the United States on a different basis, are given point by a pardon recently granted in Vermont. It seems that a state officer was guilty of criminal defalcations. Later, while these were undiscovered, he was elected Governor, and served in a most efficient manner. After the expiration of his term as Governor the earlier irregularities were discovered and he was convicted thereof. On the day when the conviction was affirmed by the Supreme Court the then Governor granted him a full pardon, basing his action, according to press reports, on the theory that the valuable services

rendered as Governor had atoned to the state for the previous official misconduct. Viewed as a single instance it is hard to justify this pardon. Hundreds of men have gone to prison for crimes despite the fact that years of honest life intervened between the offense and the conviction. Service as Governor is merely conspicuous; it has no special merit of service or sacrifice. Certainly by serving in an honest and competent manner in an honored and well-paid office a man puts the state under no peculiar obligation. But underlying the question is a proposition of some substance, and more than a little difficulty. If the sole purpose of punishment is reformation, no man should be sent to prison for an offense if his conduct subsequent thereto shows that he is not likely to repeat it. But it is not believed that any sound criminologist regards reformation as the exclusive aim of punitive justice. Protection of the public from future crimes by others is also involved, and the more conspicuous the offense and the offender the greater the exemplary effect of the prompt and rigid enforcement of the law. Every conviction of a person who is not a professional criminal brings up the same difficulty—the question how far leniency may achieve a reformation of the culprit, balanced against the question how far that leniency may tend to encourage latent criminal tendencies in others. A Governor cannot give to every case the careful study necessary to solve the problem which it presents. Resultantly the pardoning power as now exercised gives such a review to those whose prominence forces the case on official attention and denies it to many equally deserving but more obscure. The trend of modern thought is strongly toward the view that something more than the fact of a broken law should be inquired into, but if that view is to be recognized at all the recognition should not be sporadic or occasional. It should become a part of our judicial system and should be intrusted to those fitted to meet consistently and judicially the serious responsibility which it imposes.

PROSECUTIONS UNDER THE ESPIONAGE ACT AND THE LESSON THEREFROM

SINCE the entry of the United States into the World War there have been officially reported a considerable number of prosecutions under the Espionage Law and the provisions of the Selective Service Act forbidding the obstruction of enlistment and the like. Quite aside from the legal questions involved, these prosecutions present a question of some interest and importance, viz.: what were the motives which induced a small minority thus to endeavor, at some risk to themselves, to array themselves against the government at a time when the great majority thought that no difference of opinion was possible, and forgot all minor divisions in the common cause. Many of the reports, of course, afford no basis for a conjecture as to the motives which animated the accused. But, discarding these, the offenders seem to group into three classes—the pro-Germans, the pacifists and the industrially disaffected. It is not always possible to state with certainty the category in which a particular case belongs, for it is quite possible always that language of pacifism or radicalism was used by one who was at heart an enemy sympathizer. One or two reports disclose little more than a violent hostility to the Administration. Thus the accused in *U. S.* v. *Hall,* 248 Fed. 150, was acquitted by order of the court, it appearing that he had said little more than that the President "was the crookedest ——— ever President" and was "the richest man in the United States." The recent election indicates that perhaps the agents of the department of justice were not sufficiently diligent in their efforts against this class of offenders.

Rather surprisingly few in number are the unmistakable cases of German sympathizers. Of this class were the defendants in *Seebach* v. *U. S.,* 262 Fed. 885, *Albers* v. *U. S.,* 263 Fed. 27, and *Schoborg* v. *U. S.,* 264 Fed. 1. As illustrating the extent to which pro-German talk was held to be legal during the war, attention might also be called to the cases of *Sandberg* v. *U. S.,* 257 Fed. 643, *Kammann* v. *U. S.,* 259 Fed. 192, *Wolf* v. *U. S.,* 259 Fed. 388, *Fontana* v. *U. S.,* 262 Fed. 283, and *Grubl* v. *U. S.,* 264 Fed. 44. In each of these cases it was held that there was no violation of the Espionage Act. Somewhat more numerous and somewhat less fortunate in escaping the clutches of the law are the persons whose conduct, so far as can be judged from the reports, was due to a general spirit of opposition to war. See *U. S.* v. *Boutin,* 251 Fed. 313, *U. S.* v. *Doe,* 253 Fed. 903, *U. S.* v. Binder, 253 Fed. 978, *Fraina* v. *U. S.,* 255 Fed. 28, *U. S.* v. *Strong,* 263 Fed. 789, and *Anderson* v. *U. S.,* 264 Fed. 75. That war is wrong, is under all circumstances legalized murder, was the favorite theme of this class. "President Wilson is a murderer in the first degree. He is murdering not only the Germans but his own people as well," said Anderson. "By the greatest campaign of lies the world has ever known the young men of Germany and America are made to hate and kill each other," declared Doe. Fraina sang the praises of the conscientious objectors and urged his hearers to join their number. In addition there were several prosecutions all based on the circulation of a book, apparently issued by some religious sect, entitled "The Finished Mystery." See *Shaffer* v. *U. S.,* 255 Fed. 886, *Stephens* v. *U. S.,* 261 Fed. 590, *Hamm* v. *U. S.,* 261 Fed. 907, and *Sonnenberg* v. *U. S.,* 264 Fed. 327. Various passages from this volume were counted on in the different cases, its general purport apparently being that war is always and under all circumstances murder and that the spirit of patriotism is one of the "three great untruths," the other two being "human immortality" and "the Anti-Christ."

Passing these, we are brought to what seems to have been the chief source of the violations of the Espionage Law—industrial disaffection. Among the persons convicted some were acting avowedly as Socialists, Anarchists or I. W. W. The most notable were Debs (see *Debs* v. *U. S.,* 249 U. S. 211, 39 S. Ct. 252), whose recent failure to gain the Presidency of the United States is perhaps due to the fact that prison rules denied him the use of the front porch; Emma Goldman (see *Goldman* v. *U. S.,* 245 U. S. 474, 38 S. Ct. 166), Kate Richards O'Hare (see *O'Hare* v. *U. S.,* 253 Fed. 538), Rose Pastor Stokes (see *Stokes* v. *U. S.,* 264 Fed. 18), and Scott Nearing (*U. S.* v. *American Socialist Soc.,* 260 Fed. 885). For cases of radical publications excluded from the mail, see *Masses Pub. Co.* v. *Patten,* 246 Fed. 24, and *Jeffersonian Pub. Co.* v. *West,* 245 Fed. 585. Among

the other cases in which the disloyal conduct on which the charge was based appeared more or less directly to be connected with some radical organization may be mentioned *U. S.* v. *Sugar,* 243 Fed. 423, *Herman* v. *U. S.,* 257 Fed. 601, *Kumpula* v. *U. S.,* 261 Fed. 49, *Equi* v. *U. S.,* 261 Fed. 53, *Reeder* v. *U. S.,* 262 Fed. 36, *U. S.* v. *Steene,* 263 Fed. 130. So in *Frohwerk* v. *U. S.,* 249 U. S. 204, 39 S. Ct. 249, and *Pierce* v. *U. S.,* 40 S. Ct. 205, the defendants were convicted of distributing certain literature which was being sent out pursuant to the vote of locals of the Socialist organization. Abrams (see *Abrams* v. *U. S.,* 40 S. Ct. 17) was apparently a Russian Jew and was convicted by reason of his distribution of pamphlets urging a general strike in the United States in aid of the revolution in Russia. In addition to the cases which disclose some direct connection with an ultra radical organization as the cause of the defendant's act, there are a number wherein the language constituting the offense was clearly a product of social discontent. The defendant in *Rhuberg* v. *U. S.,* 255 Fed. 865, for example, declared that the moneyed men forced the United States to enter the war. "This Conscription law is just one more attempt of Wall street to tighten its grip on the people," declared another pamphleteer (*Coldwell* v. *U. S.,* 256 Fed. 805). "The war is for the big bugs in Wall street," said Heynacher of South Dakota (*Heynacher* v. *U. S.,* 257 Fed. 61). "It (the war) was a money making proposition, and the steel men and the big men and the big office holders were the ones that were getting the benefit of it, and he bet Woodrow Wilson was getting his drag," was the sapient utterance which landed Hickson in jail (*Hickson* v. *U. S.,* 258 Fed. 867). The same kind of statements, that it was a rich man's war, that it was for the benefit of the capitalists, that it was solely to protect investors in British securities and so on, figured in a number of other cases. See for example, *U. S.* v. *Nagler,* 252 Fed. 217; *Mead* v. *U. S.* 257 Fed. 639; *Wimmer* v. *U. S.,* 264 Fed. 11; *Bold* v. *U. S.,* 265 Fed. 581.

From the foregoing résumé of the cases several significant facts become apparent. The first, well known and not of vital importance at the present time, is that in any foreign war a considerable number of our foreign born will sympathize with the land of their birth rather than with that of their adoption. While the number of convictions under the acts here considered for conduct palpably induced by sympathy with Germany is negligibly small, there are some considerations which must not be ignored. One is the number of offenders whose acts cannot be classified as due to pro-Germanism, but whose names clearly betray Teutonic origin. Another is that the organized and dangerous enemy propaganda during the war took forms more effective than pamphlets and loose speech, and found its opportunities in sabotage, destruction of property, transmission of information to the enemy and the like. Also it must be remembered that in computing the number of seditious aliens in the United States the summary internments, which greatly outnumbered the convictions, must be taken into account.

The latent disloyalty of a part of our foreign-born population is, however, a factor which is of importance only in time of war, and therefore, it is to be hoped, can be for the present ignored. The fact of present moment which a study of the cases under the Espionage Act discloses is that discontent with domestic economic conditions has led a great number of our citizens to give aid and assistance to the most brutal and ruthless alien enemy that ever assailed the peace of the world. This condition is one which will persist in times of peace. It means that thousands of our citizens have gotten into a state of mind where they do not regard this as their country, to be reformed if possible the better to conform to their desires, but to be loved and safeguarded the while. They regard the entire governmental and industrial machinery of our nation as an alien thing, imposed on them by force, by a separate and hostile class. They regard themselves as victims, who owe nothing of allegiance to the system which they profess to believe enslaves them. Absurd and unreasonable as the idea may seem, it is here. It runs through the publications and the utterances set out in the cases cited. It is held by thousands, and held so firmly that the great wave of national spirit which the war evoked did not dissolve it. It is held so sincerely that its devotees risked the penalties of a drastic law to give voice to their sentiments. Those whom the majority consider as criminals thousands enshrine as martyrs, and hold up their crimes and punishment for inspiration and emulation. This spirit is not confined to the ignorant. The pamphlet for the circulation of which Pierce was sent to prison was written by "an Episcopal clergyman and a man of sufficient prominence to have been included in the 1916-1917 edition of 'Who's Who in America.'" See the dissenting opinion of Mr. Justice Brandeis in *Pierce* v. *U. S.,* 40 Sup. Ct. 205. In a footnote to the same opinion are quoted utterances in both houses of Congress identical in tenor with those for which agitators were later sent to the penitentiary.

That spirit is with us in peace as it was in war; it will merely find other forms of expression. Is there any manner of legal regulation which will restrain that expression without infringing on the just rights of any citizen? There is room in this country for every form of opinion as to the changes which should be made in our governmental and economic system. Changes there must be, and only the fullest and fairest discussion will lead public sentiment thereto. The substitution, for example, of a socialistic for an individualistic system may be wholly unwise and pernicious, but those who think otherwise should be permitted freely to present their arguments. There is no danger that the American people will accept hastily and unthinkingly any radical changes. The conservative influence of the great number of small property owners is sufficient guaranty against any national rashness.

To what, then, may regulation be addressed? First, to all agitation which looks to the establishment of an alleged reform in any other than a legal and constitutional manner. It makes no difference what the grievance is which it is sought to redress; it makes no difference how excellent the measure which it is proposed to institute, if the agitation is aimed at the accomplishment of that purpose by revolution, by general strike, or by any other means than the enactment of laws in a constitutional manner, or the amendment of the Constitution in the prescribed method, it should be made criminal. In the second place, any propaganda based on the theory that the government of the United States is a thing alien

and hostile to any class of its citizens, any suggestion that every man in the United States does not owe a full duty of allegiance to the government and obedience to its laws should be made criminal. The very essence of a republic is the power of the majority to govern according to its will, subject to such limitations as the Constitution fixes. The necessary concomitant is the duty of the minority to submit loyally to that government, keeping up freely if it will such educational measures as may in time convert it into a majority. The attempt to segregate in the United States a minority class which deems the government to be an alien oppressor to which no allegiance is owed is sedition of the worst sort, and whether that class is or is not receiving its just share of the rewards of industry is entirely beside the question.

It should not be particularly difficult to draft a law which, without endangering any rights, will put a stop to the loose and reckless talk by which the security of the nation is being jeopardized. The criterion of illegality in respect to language alleged to be seditious is always the intent to incite to unlawful acts. (See *Abrams* v. *U. S.*, supra.) That intent is of course a question for the jury, and this of itself, except perhaps in times of great public excitement, is a sufficient safeguard against any oppressive use of a sedition law.

Most of the statutes now on the books deal only with an earlier type of seditious agitation. The New York act, for example, prohibits the advocacy of anarchy, which is defined as "the doctrine that organized government should be overthrown by force of violence or by assassination of the executive head or of any of the executive officials of government or by any unlawful means." (Penal Law, § 160, McKinney's Consol. Laws, book 39, p. 55.) Modern ultra-radical propaganda seems almost wholly to have abandoned the idea of armed revolution or wholesale assassination, and, at least as a preliminary measure, turns its energies towards the accomplishment of the same result by acquiring a domination of the industrial situation. The agitators have learned that with absolute control of industry control of government will follow automatically. If this movement is to be met by statute, the legislation must be of a type as modern as the agitation itself.

There is a class of legislation which has been adopted in several states which seems worthy of general imitation—that prohibiting the advocacy of "criminal syndicalism." Such a statute was passed in Minnesota in 1917. The statute defines the crime as follows: "Criminal syndicalism is hereby defined as the doctrine which advocates crime, sabotage [this word as used in this bill meaning malicious damage or injury to the property of an employer or by an employee], violence or other unlawful method of terrorism as a means of accomplishing industrial or political ends." The validity of the act was sustained in *State* v. *Moilen,* 167 N. W. 345 1 A. L. R. 331, the court saying: "The contention that the statute violates rights granted and secured by the Federal Constitution is without special merit. The design and purpose of the Legislature in the enactment of the statute was the suppression of what was deemed by the lawmakers a growing menace to law and order in the state, arising from the practice of sabotage and other unlawful methods of terrorism employed by certain laborers in furtherance of industrial ends and in adjustment of alleged grievances against employers. The facts surrounding the practice of sabotage, and like *in terrorem* methods of self-adjudication of alleged wrongs, are matters of common knowledge and general public notoriety of which the courts will take notice. That they are unlawful and within the restrictive power of the Legislature is clear. Sabotage as practiced by those advocating it as an appropriate and proper method of adjusting labor troubles embraces among other lesser offensive acts the wilful and intentional injury to or destruction of the property of the employer in retaliation for his failure or refusal to comply with wage or other kindred labor demands. It amounts to malicious mischief and is a crime at common law as well as by statute. The methods of terrorism referred to in the statute have close relation to sabotage, and are practiced for the purpose of intimidation, and to coerce employers into a compliance with labor demands. Methods of that sort are equally unlawful and open to legislative condemnation." A California statute in almost identical terms was sustained in *Ex parte McDermott,* 183 Pac. 437. A Washington act making criminal the editing of printed matter tending to encourage or advocate disrespect for law was upheld in *State* v. *Fox,* 71 Wash. 185, 127 Pac. 111, affirmed 236 U. S. 273, 35 S. Ct. 383. The vagueness of that statute, however, is not to be commended, despite the dictum of the federal Supreme Court in the decision just cited that it "is not likely that the statute will be construed to prevent publications merely because they tend to produce unfavorable opinions of a particular statute or of law in general.' 'There can be no sound criticism of the actual result reached in the Washington case, the publication on which the conviction was based being one inciting to a criminal violation of the law, but the broad terms of the statute permit an oppressive interpretation.

There is, of course, a deep-seated prejudice against sedition laws in time of peace, and so far as such a law may fetter criticism of officials or their policies that prejudice is well founded. But to-day the United States must deal with a specific condition—organized and dangerous sedition woven through the entire structure of its industrial life. That sedition must either be prohibited by law and rigidly suppressed or else tolerated until it gains the power to overthrow the government and make the United States into another Russia.

W. A. S.

THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

SUMMARY OF THE PROCEEDINGS OF THE THIRTIETH ANNUAL CONFERENCE.*

THE Thirtieth Annual Conference of Commissioners on Uniform State Laws was held at St. Louis, August 19-23, 1920. Thirty-four jurisdictions were represented. The Conference was called to order by President Blount. An address of welcome was given by Hon.

* By Prof. Eugene A. Gilmore, Madison, Wis., Secretary of the Conference.

Frederick W. Lehmann, on behalf of the St. Louis bar, to which there was a brief response by the President. The programme, consisting of ten sessions, was devoted to hearing reports of standing and special committees, and the discussion of tentative drafts of proposed uniform acts. President Blount presided at the first three sessions, President-elect Stockbridge at the other sessions.

The following drafts of acts were presented by the committees having these subjects in charge:

Seventh tentative draft of a Uniform Incorporation Act.
First tentative draft of a Uniform Declaratory Judgments Act.
Final draft of a Uniform Act Concerning Depositions.
Final draft of an Act Concerning Proof of Statutes of Other States.
Fourth tentative draft of a Uniform Vital Statistics Act.
Fifth tentative draft of an Occupational Diseases Act.

The acts on the first two subjects were, after discussion, referred to their respective committees for further consideration and report. The acts on the last four subjects were, after discussion and amendment, finally approved and recommended for adoption by the legislatures throughout the jurisdiction of the United States.

On the recommendation of the Committee on Prohibition, the second tentative draft of a Prohibition Act was not considered.

The Conference, on the recommendation of the Committee on Commercial Law, approved an amendment to Section 26 of the Uniform Conditional Sales Act, relating to the right of the parties to a conditional sale to provide by special stipulation for the waiver of certain provisions of the Act concerning the retaking and sale of chattels on default of the buyer.

In addition to the regular standing committees, viz., Executive, Legislative, Publicity, Attendance and Appointment of Commissioners, special committees were continued on the following subjects:

Commercial Law.
Marriage and Divorce.
Insurance.
Corporation Laws.
Registration of Title to Land.
Uniformity of Judicial Decisions.
Depositions and Proof of Statutes of other States.
Automobile Legislation.
Occupational Diseases.
Co-operation with the American Institute of Criminal Law and Criminology.
Co-operation with the American Judicature Society.
Compacts and Agreements between States.
Securing Compulsory Attendance of Non-resident Witnesses.
One Day's Rest in Seven.
Marking and Labeling.
Drug Laws.
Declaratory Judgments.
Prohibition.

The special committees on the following subjects were discontinued:

Constitution and By-Laws.
Wills, Descent and Distribution.
Conveyances.
Taxation.
Legislative Drafting.
Anti-Loan Shark Laws.
Purity of Articles of Commerce.

The following new committees were authorized:

Committee on Tribunal for Settling Industrial Disputes.
Committee on Status and Protection of Illegitimate Children.
Committee on Uniform Aviation Law.
Committee on Uniform Mortgage Law.
Committee on Uniform Primary Law for Federal Offices.

The Conference voted not to appoint committees to consider the following subjects: Uniform Law Prohibiting and Punishing Criminal Anarchy; Uniform Banking Law; Uniform Standard of Weights and Measures and Purity and Inspection; Uniform Law on Limitation of Liens of Mortgages; Uniform Law for the Standardization and Licensing of Engineers.

The following matters were referred to the Committee on Commercial Law: Uniform Blue Sky Law; Uniform Law on the Liability of Bankers with Respect to Checks drawn by Fiduciaries; the question of harmonizing the Sales Act, the Warehouse Receipts Act, the Bills of Lading Act, and the Stock Transfer Act with respect to the negotiability of documents of title.

There was referred to the Committee on Scope and Programme the matter of a model law on Health Insurance; to the Committee on Marriage and Divorce the question of an amendment to the Uniform Divorce Law as prepared by the National Divorce Congress in 1906 and approved by the Commissioners on Uniform State Laws in 1907.

At the 1919 Conference a special committee was appointed on the subject of Obsolete and Superseded Acts, with authority to consider all the Acts previously drafted and approved by the Conference, and to report such as were obsolete or superseded by later acts. The report of this committee was approved.

The committee also recommended that the act entitled "An Act to Establish a Law Uniform with the Laws of Other States for the Acknowledgment and Execution of Written Instruments," approved by the Conference at its meeting in 1892 and again in 1895, and the act entitled "An Act to Make Uniform the Law of Acknowledgments to Deeds or Other Instruments Taken Outside the United States," approved by the Conference at its meeting in 1914, be referred to the Executive Committee to consider and report any needed changes or to report a consolidated act, as said committee may deem best. This recommendation was approved.

The Conference approved the principle reported by the Committee on Scope and Programme, with respect to amendments to Uniform Acts, that no hard and fast rule should be adopted on the subject, but that each proposed amendment should stand on its own merits, and that the necessity for such an amendment must be clearly shown, and the proposed amendment first submitted to the Committee on Scope and Programme for its consideration, reference and recommendation.

With the exception of the special committees on Uni-

form Drug Law, Compacts and Agreements Between States, Uniformity of Judicial Decisions, the special committees either made no reports or merely formal reports of progress. The Committee on a Uniform Drug Law made an extended report of its investigation of the subject referred to it. This report was referred to the incoming committee. The Committee on Compacts and Agreements between States made a brief oral report calling attention to the provision of the Federal Constitution recognizing the power of the states with the consent of Congress to enter into compacts and agreements, and pointed out the possibility of utilizing such power in the interest of securing uniformity, and also in the interest of foreign commercial relations.

Announcement was made of the deaths of Commissioners Francis M. Burdick of New York, George Whitelock of Maryland, and Frederick N. Judson of Missouri. The Conference voted that the delegations from these states be appointed respectively committees to draft proper memorial resolutions, and that these resolutions be spread upon the minutes and copies sent to the families of the deceased commissioners.

The following officers were elected for 1920-21: President—Henry Stockbridge, Room 132, Court House, Baltimore, Maryland. Vice-President—George B. Young, Montpelier, Vermont. Secretary—Eugene A. Gilmore, University of Wisconsin, Madison, Wisconsin. Treasurer—W. O. Hart, 134 Carondelet Street, New Orleans, Louisiana.

The National Conference of Commissioners on Uniform State Laws is composed of Commissioners appointed by Legislative or Executive authority from the States, the District of Columbia, the territory of Alaska, and the Island Possessions of the United States. The organization meeting was held at Saratoga, New York, in August, 1892; and annual meetings have been regularly held since that time, immediately preceding the meetings of the American Bar Association.

The purpose of the organization, as its name imports, is to promote uniformity of legislation on subjects of common interest throughout the United States. The Commissioners are chosen from the legal profession, and serve without compensation or emoluments of any sort. Many of them have for years paid their own expenses, and all of them have rendered unstinting services for the public welfare. There is nothing of a personal or private nature about any of the aims or objects of the National Conference. Proposed acts are carefully drawn by special committees of trained lawyers, assisted by experts in many instances, and are printed, distributed and discussed in the National Conference at more than one annual session. When finally approved by the Conference, the Uniform Acts are recommended for general adoption throughout the jurisdiction of the United States and are submitted to the American Bar Association for its approval. Each uniform act is thus the fruit of one or more tentative drafts submitted to the criticism, correction and emendation of the Commissioners, and represents the experience and the judgment of a select body of lawyers chosen from every part of the United States.

"The common law is reason dealing by the light of experience with human affairs. One of its merits is that it has the capacity to reach the ends of justice by the shortest paths."—Per Swayne, J., in Dickerson *v.* Colgrove, 100 U. S. 584.

TENANCY BY HOLDING OVER

AT the present time a strong feeling of uncertainty prevails amongst landlords as to what may be the value of house property in the future, and it is not surprising that they often prefer to allow their lessees to hold over on the termination of the existing lease, leaving the question of a new lease and its term to be determined when conditions are more settled. The rule of law under these circumstances is fairly clear. If there is a new agreement on any point, then that supersedes any corresponding term in the lease. But where no express provision is made between them, there is at first a tenancy on sufferance, and then, as soon as rent is paid and accepted, this tenancy becomes a tenancy from year to year, the terms being such of the terms of the expired lease as are "applicable to or not inconsistent with" a yearly tenancy. That is the presumption, but, as we have said, it is liable to be rebutted by evidence of an agreement to the contrary between the parties.

Instances of this rule are common enough in the law reports. Thus an agreement in a lease that the tenant might at the end of the term retain and sow part of arable land demised and have the standing thereof until the following harvest was held to be applicable to such a tenancy (Hyatt *v.* Griffiths, 17 Ad. & Ell. 505). So have a proviso in a lease for re-entry on non-payment of rent (Thomas *v.* Parker, 1 H. & N. 669), a covenant to rebuild in case of fire (Digby *v.* Arkinson, 4 Camp. 275, and (more recently) a clause in the lease providing for the reference of disputes to arbitration (Morgan *v.* Harrison, 97 L. T. Rep. 445; (1907) 2 Ch. 137). The last-named case is also an authority to the effect that where a lessee is expressly authorized to hold as tenant at will the same presumption applies as to the terms of the tenancy.

Perhaps the clearest statement of the law on the subject is to be found in Dougal *v.* McCarthy (68 L. T. Rep. 669; (1893) 1 Q. B. 736). In that case Lord Justice Lopes said that where there is a mere holding over by the tenant after the expiration of the tenancy for a year by consent of the parties, and nothing is said in reference to the terms of the tenancy either by the landlord or the tenant, there is a tenancy from year to year on the same terms as those of the lease which has expired, so far as they are not inconsistent with such a tenancy; there is a "renovation of the old agreement" (Right *v.* Darby, 1 T. R. 159); but where, after the expiration of the term, letters have passed or conversation has taken place between the parties, it is a question for the jury to decide, whether there has been a consent by both parties to a continuance of the tenancy and, if so, on what terms.

In the recent case of Bradbury *v.* Gimble, a brewery was sublet to the plaintiff for seven years with a covenant that should he be desirous of purchasing the unexpired residue of the term, which was for 999 years, he might give notice in writing to his immediate lessors six calendar months before the determination of his underlease, and he should then be regarded as the purchaser, as from the date of the notice, at the price of £3000. The underlease expired on the 31st May, 1910, but by express agreement between the parties it was extended for twelve months. The plaintiff held over after the 31st May, 1911, and continued in occupation until 1919 as tenant from year to year at the same rent as before. His lessors then sold the residue of the term of 999 years to the defendants and gave the plaintiff notice to quit. The plaintiff then gave a written notice, in accordance with the covenant in the lease, claiming to exercise his option to purchase; and upon completion of the sale of the property to the defendants he called upon them to transfer the residue of the term to him at the

price of £3000. This they refused to do, and the plaintiff then took out a summons to determine the effect of the covenant in the lease. His case was that holding as tenant from year to year on the terms of the lease, so far as they were applicable he could in any year exercise the option to purchase contained in the lease, provided he did so six months before his year's tenancy expired.

The case was argued upon several grounds, but eventually turned on this question alone, whether an option to purchase was a term of the lease applicable to a tenancy from year to year. In Buckland *v.* Papillon (15 L. T. Rep. 378; L. Rep. 2 Ch. 67) the owner of a long term agreed to let certain lands for three years and also when called upon by the tenant to grant him a lease for three years, seven years, or the whole term. There was no limitation on the period within which the tenant could claim to exercise this right. The tenant continued in occupation beyond the three years and became bankrupt. The assignee sold the bankrupt's interest to a purchaser, and the question arose whether the tenant's option had gone at the end of three years or no. The Lord Chancellor held that the option existed so long as the original agreement existed, but not afterwards, because it was not one of the terms of the original agreement under which the tenant afterwards held as tenant from year to year. A similar view was expressed by the Court of Appeal in the recent case of Woodall *v.* Clifton (93 L. T. Rep. 257; (1905) 2 Ch. 257). There a lease for ninety-nine years contained a proviso that if the lessee, his heirs, or assigns should desire to purchase the fee simple for £500 an acre, the lessee would execute a conveyance in favor of the lessee, his heirs and assigns, on receipt of the purchase money. The assignee of the lease gave notice to the assignee of the reversion of his desire to purchase, but Mr. Justice Warrington held the option to be invalid on the ground of remoteness. The Court of Appeal, without deciding this point, held that the proviso did not run with the reversion and so did not come within 32 Hen. 8, c. 34, and was not exercisable against the defendants, who were the assignees of the reversion. Lord Justice Romer founded his judgment in the Court of Appeal on the fact that the covenant did not affect the subject-matter of the lease. "To our minds," he said, "it is concerned with something wholly outside the relation of landlord and tenant with which the statute of Henry VIII was dealing." In Bradbury *v.* Gimble (ubi sup.) Mr. Justice Peterson similarly regarded the option to purchase as "wholly outside the relation of landlord and tenant, and not as one of the terms of the original tenancy on which the lessee held the property when he became tenant from year to year." He cited the views expressed in Buckland *v.* Papillon (ubi sup.) and Woodall *v.* Clifton (ubi sup.) on this point in support of his decision, and accordingly held that the option to purchase was not exercisable by the plaintiff after the termination of the lease.

It should be added that the case of Bradbury *v.* Gimble (ubi sup.) was also argued on behalf of the defendants on the ground that the covenant in question was void for remoteness; but, having regard to the view which the judge took of the main contention, it was not necessary for him to decide the point. The decision is certainly most instructive as to the true meaning of the rule which applies in the case of a tenant holding over. Too little stress is apt to be laid by practitioners on the fact that the terms of the lease are applicable only in so far as they affect the strict relationship of landlord and tenant. Any covenants in the lease which are outside that relationship are not affected by the rule and are not applicable to a tenancy from year to year which results owing to the tenant holding over on the expiration of the lease.—*Law Times.*

Cases of Interest

INSANITY OF PRINCIPAL AS DEFENSE TO PROCEEDING FOR FORFEITURE OF BAIL BOND.—In Smith *v.* People, (Colo.) 184 Pac. 372, reported and annotated in 7 A. L. R. 392, it was held to be a good defense to a proceeding to forfeit a bail bond that the principal was insane and in the custody of the authorities in another state. The court said: "It is plain that the purpose of a recognizance is merely to insure the presence for trial of a person accused of a bailable offense. The enriching of the public treasury is no part of the object at which the proceeding is aimed. There is no reason for penalizing the sureties when it appears that they are unable, by no fault of their own or of their principal, to perform the condition of the bond. Moreover, to produce for trial an insane person would serve no good purpose, as the trial could not proceed. These considerations have been many times recognized by the courts, which have set aside forfeitures and vacated judgments on bail bonds when the principal has been prevented by death, sickness, or insanity from appearing as required by the bond. Such cases come within the rule which relieves from the obligation of a contract rendered impossible of performance by an act of God. 'Ordinarily, insanity of the principal is a good defense for nonperformance of the obligation of the bond.' 2 R. C. L. p. 55, par. 67. In Chase *v.* People, 2 Colo. 481, this court held that, when a principal in a recognizance was on the return day prevented by sickness from appearing, such sickness not being the result of fault or misconduct on his part, a judgment of forfeiture should be set aside, when the facts were made to appear. In that case it was held that the costs should be paid by the sureties. In Scully *v.* Kirkpatrick, 79 Pa. 324, 21 Am. Rep. 62, a number of cases are cited to the effect that sickness and insanity, as well as death, excuse performance of the condition of a recognizance. The rule is well settled, and has our entire approval."

TAKING MONEY FROM POCKET OF DRUNKEN MAN AS ROBBERY.—It seems that the taking of money from the pocket of a drunken man, which requires no force or violence, is not robbery, although, upon being accused of the theft, the thief assaults his victim. It was so held in People *v.* Jones, 290 Ill. 603, 125 N. E. 256, the court saying: "'Robbery' is the felonious and violent taking of money, goods, or other valuable thing from the person of another by force or intimidation, and is punishable by imprisonment in the penitentiary not less than one year nor more than fourteen years. Private stealing from the person is declared by the statute to be deemed larceny, and is punishable, if the property stolen exceed $15 in value, by imprisonment in the penitentiary not less than one year nor more than ten years. The statute makes the distinction, and it is the duty of the courts to enforce the statute. The distinction is that, while any felonious stealing of the personal goods of another is larceny, it is necessary, to constitute robbery, that the taking be by force or intimidation. The force or intimidation is the gist of the offense, and the crime of robbery is not committed unless the property stolen is taken from the person by force or intimidation. Burke *v.* People, 148 Ill. 70, 35 N. E. 376; Hall *v.* People, 171 Ill. 540, 49 N. E. 495. In the latter case Hall unbuttoned his victim's vest and took the pocketbook from his inside vest pocket, using no more force than the mere physical effort of taking the pocketbook from the victim's pocket and transferring it to his own, and the court said that if that is robbery, then no practical distinction between

that crime and larceny from the person exists. The owner's power to retain his property must be overcome by the use of actual violence or by fear. People *v.* Ryan, 239 Ill. 410, 88 N. E. 170. In People *v.* Campbell, 234 Ill. 391, 123 Am. St. Rep. 107, 14 Ann. Cas. 186, 84 N. E. 1035, it was held that the force required to tear a diamond stud from the wearer's shirt front, to which it was attached by a spiral pin, and the struggle to retain the pin, constituted the taking robbery. In the present case the incriminating evidence tended to show only a stealthy taking of the pocketbook from Kehl's pocket and transferring of it to Jones's pocket. The evidence excluded any attempt to use violence. There was no evidence of a struggle to retain possession of the pocketbook, but only an accusation of the theft after it occurred, which the plaintiff in error resented by assaulting the accuser. The actions of the plaintiff in error as testified to were those of a pickpocket, and not of a highwayman."

POWER OF MAJORITY OF RELIGIOUS SOCIETY TO CONVEY CHURCH PROPERTY.—In Baptist City Mission Society *v.* People's Tabernacle (Colo.), 174 Pac. 1118, reported and annotated in 8 A. L. R. 102, it was held that the majority present at a church meeting cannot convey church property to another religious denomination against the protest of the minority, although no express trust was established by those donating the funds with which the property was purchased. The court said: "Can a majority of those present, at a meeting called for that purpose, order the execution of a deed to their church property to another denomination practically without consideration, thereby leaving their own church society without any church edifice or other place within which to worship, and where the result of the transaction makes it practically a gift of the property from one denomination to another, leaving the grantor organization with nothing for its members to do but to go into the other denomination, disperse, or again raise money with which to rent or buy another edifice within which to carry on its worship? In other words, can a majority only of those present at a meeting (although called for that purpose) of a church organization of one denomination turn its temporalities over to another denomination for the use and benefit of the latter denomination as here attempted? The trial court was of opinion that it could not be thus acomplished. We are in accord with this conclusion, which is supported by the great weight of authority. Marien *v.* Evangelical Creed Cong. Church, 132 Wis. 650, 113 N. W. 66; Roshi's Appeal, 69 Pa. 463 Am. Rep. 275; Smith *v.* Pedigo, 145 Ind. 361, 19 L. R. A. 433, 32 L. R. A. 838, 33 N. E. 777, 44 N. E. 363; Lindstrom *v.* Tell, 131 Minn. 203, 154 N. W. 969; Mt. Helen Baptist Church *v.* Jones, 79 Miss. 488, 30 So. 714; Mt. Zion Baptist Church *v.* Whitmore, 83 Iowa 138, 13 L. R. A. 198, 49 N. W. 881; Landrith *v.* Hudgins, 121 Tenn. 556, 120 S. W. 783; Rottmann *v.* Bartling, 22 Neb. 375, 35 N. W. 126; Franke *v.* Mann, 106 Wis. 118, 48 L. R. A. 856, 81 N. W. 1014; Madison Ave. Baptist Church *v.* Baptist Church, 46 N. Y. 131; Everett *v.* Jennings, 137 Ga. 253, 73 S. E. 375; Schnorr's Appeal, 67 Pa. 138, 5 Am. Rep. 415; Cape *v.* Plymouth Cong. Church, 130 Wis. 174, 109 N. W. 928; Watson *v.* Jones, 13 Wall. 679, 20 L. ed. 666; Lemp *v.* Raven, 113 Mich. 375, 71 N. W. 627; Krecker *v.* Shirey, 163 Pa. 534, 29 L. R. A. 476, 30 Atl. 440; Brundage *v.* Deardorf (C. C.) 55 Fed. 839; Berry *v.* Second Baptist Church, 37 Okla. 117, 130 Pac. 585, 34 Cyc. 1167, 1169; Madison Ave. Baptist Church *v.* Baptist Church, 73 N. Y. 82. While it is true that the language in the deeds from the original grantors to the defendant in error for the lots in controversy does not contain a declaration pertaining to the use or the purposes for which they were secured, it is clearly shown that they were secured for these uses, and were being used for these purposes, and not otherwise. In such cases the weight of authority is that, when not set out in the deed, the purposes for which they were secured and being used can be otherwise shown to exist. Landrith *v.* Hudgins, 121 Tenn. 556, 120 S. W. 783; Lindstrom *v.* Tell, 131 Minn. 203, 154 N. W. 969; Smith *v.* Pedigo, 145 Ind. 361, 19 L. R. A. 433, 32 L. R. A. 838, 33 N. E. 777, 44 N. E. 363; Franke *v.* Mann, 106 Wis. 118, 48 L. R. A. 856, 81 N. W. 1014; Hale *v.* Everett, 53 N. H. 9, 16 Am. Rep. 82."

RIGHT OF PERSONAL REPRESENTATIVE OF MURDERED PERSON TO RECOVER INSURANCE MONEY FOR SOLE BENEFIT OF MURDERER.—In Johnston *v.* Metropolitan Life Ins. Co., (W. Va.) 100 S. E. 865, reported and annotated in 7 A. L. R. 823, it was held that the personal representative of a murdered person could not recover the proceeds of an insurance policy on the life of the deceased where the murderer was the sole distributee of the estate of the insured person. The court said: "The defendant insists that the personal representative should not be allowed to recover, for the reason that such recovery would be for the benefit of the murderess. The insured had no children, and his widow, under the Law of Descents and Distributions, is the sole distributee of his personal estate. The fact that the courts will not, on grounds of public policy, permit her to bring suit to recover this fund, does not bar her from taking the estate of her deceased husband. Under our law there is no longer corruption of blood or forfeiture of estates upon conviction of crime, and there is no exception in our Statutes of Descents and Distributions precluding one from inheriting in a case like this. The laws governing the devolution of property are an expression of the public policy of the state, contained in its Constitution and legislative acts, and the courts are not justified in attaching to these acts exceptions or limitations which have not been placed thereon by the lawmaking bodies. It therefore follows that if the personal representative of the insured in this case is permitted to recover this fund, the beneficiary will accomplish by indirection that which she could not do directly. That the property of one who has been murdered will devolve upon the murderer, where such is the course of distribution provided by law, seems to be well settled in most of the American states. . . . Will the courts, then, allow themselves to be used for the purpose of bringing into existence an estate which will, by operation of law, devolve on one who, because of his conduct, is not entitled to it? The administrator has no interest in the subject-matter. It is agreed here that the insured left no debts, and it follows that every dollar of the fund recovered by the administrator in his representative capacity must go to the murderess. The suit is simply in his name for the benefit of the one who feloniously caused the insured's death. . . . In some of the cases we have above cited, permitting a recovery by the administrator of the insured where the beneficiary had caused the death, it was suggested that part of the fund might go to the beneficiary under the law of Descents and Distributions, but that was held not to defeat recovery. That may be true where only part of the fund goes to the guilty party. It may be that the courts would not allow the innocent to be deprived of the property to which they are entitled, for the sole reason that to enforce their rights would also confer a benefit upon a guilty party. However, that question does not arise here, and we express no opinion thereon. We are of opinion, however, that where the guilty party would take

the whole of the recovery in case one is allowed, the policy of our law as effectually denies recovery as it would were the suit brought in the name of the guilty party himself."

LIABILITY FOR DAMAGE BY VESSEL TO FISH TRAP.—A navigator is liable in damages, it seems, for negligently destroying a licensed fish trap in a public navigable water. It was so held in Anderson *v.* Columbia Contract Co., (Oregon) 184 Pac. 240, wherein the court said: "Stated in general terms, the right of fishery must give way to the right of navigation. Expressed in more accurate language, the paramountcy of the right of navigation does not extinguish the right of fishery, although the former does, whenever there is a necessary conflict, limit the latter, and compel it to yield so far as the right of fisher interferes with the fair, useful, and legitimate exercise of the right of navigation. . . . Continuing to employ general terms when referring to the right of navigation, in the abstract, a boat has a right to 'take her course,' and to go when and where it is necessary to go, and is not obliged to stop or go out of her way, or wait upon the movements of those who are managing a fishing seine or net; and yet this right of navigation, which entitles the public to the unobstructed use of every part of the stream which is capable of navigation by boats, and authorizes a boat to 'take her course,' cannot be exercised without regard to the rights of others. The navigator of a public stream must manage his craft with ordinary care and with due regard to the rights, property, and lives of others. 1 Farnham, Waters, §§ 27, 31, 33; John Spry Lumber Co. *v.* The C. H. Green, 76 Mich. 320, 332, 43 N. W. 576. While a boat may 'take her course,' nevertheless a navigator cannot with impunity do unnecessary damage to a fisherman or his property; but, upon the contrary, the paramount right of navigation must be exercised fairly, and not arbitrarily, and with due regard to the subordinate right of fishery, and a boat must be so navigated as not to do unnecessary damage. 1 Farnham, Waters, § 33a; Gould, Waters, 2d ed. § 87; Porter *v.* Allen, 8 Ind. 1, 65 Am. Dec. 750; Lewis *v.* Keeling, 46 N. C. (1 Jones, L.) 299, 307, 62 Am. Dec. 168; Post *v.* Munn, 4 N. J. L. 61, 7 Am. Dec. 570. For example, if nets are placed across the channel of a river, so as to be a bar to navigation, a vessel may, if reasonably necessary to do so, run over the nets; but, if a navigator is warned or ought to have known of his approach toward the net of a fisherman, he is liable for damage resulting from his negligent failure to avoid doing damage, if he can do so without prejudice to the reasonable prosecution of his voyage. Horst *v.* Columbia Contract Co., 89 Or. 344, 350, 352, 174 Pac. 161; Hopkins *v.* Norfolk & S. R. Co., 131 N. C. 463, 42 S. E. 902; Cobb *v.* Bennett, 75 Pa. 326, 329, 15 Am. Rep. 752; Wright *v.* Mulvaney, 78 Wis. 89, 9 L. R. A. 807, 23 Am. St. Rep. 393, 46 N. W. 1045. The ruling in Wright *v.* Mulvaney is of peculiar interest, for the reason that there, as here, a pound net fish trap was injured by a boat with a tow, and some of the other material particulars were like the facts presented here. The court says: 'But it does not necessarily result from this [the paramount right of navigation] that the navigator may carelessly and negligently run his vessel upon the nets of fishermen and destroy them, and escape liability therefor merely because he did not do so maliciously or wantonly. Such a proposition shocks any proper sense of justice. The benefit which the navigator is entitled to claim by reason of his paramount right is, we apprehend, that when the two rights necessarily conflict, the inferior must yield to the superior right. But he may not by his own negligence unnecessarily force the two rights into conflict, and then claim the benefit of the paramount right.' "

VALIDITY OF STATUTE PROVIDING FOR DESTRUCTION OF DISEASED OR INJURED ANIMAL.—The police power, it seems, does not extend to the destruction of an animal, as diseased or injured beyond recovery, without notice to the owner and opportunity for him to be heard, and a statute providing for such summary destruction is invalid. It was so held in Randall *v.* Patch, (Me.) 108 Atl. 97, reported and annotated in 8 A. L. R. 65, wherein the court said: "Trover for a horse taken from the plaintiff's possession against his objection and killed by the defendant. It is conceded that when the acts complained of were done the defendant was an officer or agent of the Society for the Prevention of Cruelty to Animals, and that he had complied with all the provisions of § 59 of chapter 126, Rev. Stat. The constitutionality of § 59 is challenged. The section is as follows: 'Any officer or agent of any society for the prevention of cruelty to animals may lawfully cause to be destroyed forthwith, any animal found abandoned or not properly cared for, appearing in the judgment of two reputable persons called by him to view the same in his presence, to be diseased or injured or in a condition from lack of food, water or shelter, past recovery for any useful purpose.' . . . The plaintiff claims that he has been deprived of his property without 'due process of law' (U. S. Const. 14th Amend.) and in contravention of 'the law of the land' (Me. Const. art. 1, § 6). The quoted phrases are identical in meaning. State *v.* Knight, 43 Me. 122; Bennett *v.* Davis, 90 Me. 105, 37 Atl. 864. Notice and opportunity for hearing are of the essence of due process of law. Bennett *v.* Davis, supra; Rusk *v.* Thompson, 170 Mo. App. 76, 1556 S. W. 64; Smith *v.* State Medical Examiners, 140 Iowa 66, 117 N. W. 1117. A hearing before a judicial tribunal is not essential, but there must be notice and a reasonable opportunity for a hearing before some tribunal. Bennett *v.* Davis, supra; People *v.* Apfelbaum, 251 Ill. 18, 95 N. E. 995. An act that purports to authorize procedure depriving an owner of his property without opportunity for hearing and without notice violates both the Federal and State Constitutions. . . . The defendant contends that § 59 is a valid exercise of the police power. No court has ever undertaken to define the limits of the police power of the state. New occasions teach new applications of it. It is based upon society's right of self-defense and is co-extensive with that right. State *v.* Starkey, 112 Me. 12, 90 Atl. 431, Ann. Cas. 1917A 196. Under the police power the use by the owner of many species of private property has been held to be subject to uncompensated restriction and regulation. For numerous illustrations see State *v.* Robb, 100 Me. 186, 60 Atl. 874, 4 Ann. Cas. 275; Opinion of Justices, 103 Me. 506, 19 L. R. A. (N. S.) 422, 69 Atl. 627, 13 Ann. Cas. 745; State *v.* Starkey, 112 Me. 10, 90 Atl. 431, Ann. Cas. 1917A 196. In cases of extreme and urgent necessity, as conflagrations (Farmer *v.* Portland, 63 Me. 47), or epidemics (Seavey *v.* Preble, 64 Me. 121), it justifies the destruction of property without preliminary notice or hearing, and even without compensation. But § 59 provides for the destruction of property, and not for restrictions upon or regulation of its use, and it cannot be justified as a measure of urgent necessity. If § 59, now as in its original form in the Act of 1883, related to abandoned animals merely, our conclusion might be different. The destruction by public authority of an abandoned animal deprives nobody of property. But the section in its present form does not refer to abandoned animals only. It purports to authorize the defendant to do, without notice or hearing, what the agreed statement says he did, to wit, that he 'took the horse from the plaintiff's possession against his objection' and killed it. It thus contravenes an explicit constitutional mandate."

PEACE OFFICER EMPLOYED AT PRIVATE PLANT AS WITHIN PURVIEW OF WORKMEN'S COMPENSATION ACT.—A deputy sheriff employed by the operator of a mine to preserve order on its premises is acting in the course of his employment within the meaning of the Workmen's Compensation Act when quelling a riot in a shack owned by the operator, and situated adjacent to its property, so as to be entitled to compensation, although the statute excludes from the definition of employee any person holding an appointment as deputy sheriff appointed for the convenience of the appointee, but receiving no compensation from the public for service, and providing that such last exclusion shall not prevent any person so deputized from recovering against a private person employing him, for injury occurring in the course of and arising out of such employment. It was so held in Engels Copper Mining Co. *v.* Industrial Accident Commission, (Cal.) 185 Pac. 182, wherein the court said: "Where a private company or individual employs a watchman or special officer, and in making its selection deliberately chooses an officer of the law, in order to take advantage of his authority, as did petitioner in the instant case, and where such officer performs acts advantageous to and expressly or impliedly directed by the employer, which happen at the same time to be acts which it would be his official duty to perform, is such an employee acting in the course of employment within the meaning of the Workmen's Compensation Act? Respondent relies upon § 8 (a) of the statute (Stat. 1917, p. 835), which defines the term 'employee' and includes 'all elected and appointed paid public officers,' but excludes 'any person holding an appointment as deputy clerk, deputy sheriff, or deputy constable appointed for the convenience of such appointee, who receives no compensation from the county or municipal corporation, or from the citizens thereof for services as such deputy.' The section, however, provides 'that such last exclusion shall not deprive any person so deputized from recourse against any private person employing him for injury occurring in the course of and arising out of such employment.' The question presented in the instant case evolves the construction to be placed upon the words of the proviso above quoted. Petitioner contends that the 'employment' referred to in the proviso has no relation to the performance of official acts, and that a deputized person can be an employee only when performing some act in no wise connected with his official duties. With this construction we cannot agree. It would not, we think, require an express statutory reservation to secure to a deputy sheriff the right to compensation for an injury received in the course of working at a mechanical art or trade. The clause in question should not be regarded as intended to effect this purpose, and thereby be interpreted as a purely supererogatory enactment, if it may fairly be construed in such a manner as to give it a rational purpose. In our opinion the statute is to be construed in the light of the common practice of property owners to choose as watchmen or special officers men who are deputized officers of the law, and to secure the deputization of such watchmen or special officers engaged by them as are not already deputies. It is obviously to this class of deputies that the excluding clause of the statute refers, in sharp contrast to the provisions of the including clause. It is in the light of the meaning of the excluding clause that the proviso in question must be read. So read, its clear effect is to provide that, where a deputy performs acts which, while official in their nature, are advantageous to the employer and directed by him, not incidentally merely, but as part of the duties prescribed and contemplated in the contract of employment, then such deputy is acting in the course of his private employment within the meaning of the provisions of the Workmen's Compensation Act."

WHAT CONSTITUTES DEATH FROM FREEZING WITHIN ACCIDENT INSURANCE POLICY.—In Continental Casualty Co. *v.* Hardenbergh, (Miss.) 83 So. 278, reported and annotated in 8 A. L. R. 229, wherein was involved the application of a provision in an accident insurance policy limiting the recovery in case the loss resulted from freezing, the facts and the holding of the court were thus stated in the opinion: "The facts relating to the death are undisputed, and present a very pathetic picture. The insured went duck hunting on the morning of December 28, 1917, at a small station on the Illinois Central Railroad a few miles north of New Orleans, named La Branche. There was a hunting clubhouse at this place, and the keeper upon parting with the deceased that morning agreed to meet him at a certain point at 5 o'clock in the afternoon. The hunting ground was over a marshy swamp practically covered with water. The deceased wore hip boots and carried his gun and ammunition. It was a very cold day, and the wind was blowing almost a gale during the day. The thermometer stood at about 10 degrees above zero. The deceased failed to keep his appointment that afternoon with the lodge keeper. A fruitless search was made by the keeper and others for the deceased until midnight that night. Signal lights were also displayed to guide the deceased to his place of destination. The next morning a party of searchers was led to the body of the deceased by a hunting dog which belonged to the gamekeeper, but had accompanied the deceased on the hunt. The deceased was lying on his back dead about 150 yards from the agreed meeting point with the gamekeeper. The water around his body had frozen. His face and the upper part of his body were not submerged, however. The body itself was frozen stiff. The left leg was sunk to the knee in a hole of some kind, and there was some little trouble in extricating it. There were one or two empty shells near the body, indicating that the deceased had fired his gun after getting his foot caught in this hole. About a mile from the body was found a string of twenty-one ducks evidently killed by the deceased in his hunt of that day. The undisputed testimony shows that the body of the deceased was frozen stiff, and that the water around his body had become frozen, and the ice had to be broken before it could be moved. The faithful dog had remained with the deceased all night, and the dog hair upon the clothing of the deceased showed that the dog had slept on the chest of the deceased. It was the contention of the appellee in the lower court, and is his contention here, that it was a question of fact to be decided by the jury whether or not the proximate cause of the death of the deceased was getting his foot caught and mired in the hole. The jury adopted this theory and returned a verdict in favor of the appellee for $1000. The appellant contends that the uncontradicted testimony shows that the deceased met his death by freezing, and that under the terms of the policy above set out only one-eighth of the principal sum can be recovered. The insuring clause of this policy provides that where the insured shall receive personal injury which is effected directly and independently of all other causes, etc. Under part III caption 'Special indemnities,' and eliminating those parts not material to this issue, clause 3 reads as follows: 'Where either the accidental injury causing the loss or the loss itself results from . . . freezing sustained by the insured while not engaged in his occupation.' Under this clause the insurer is liable for only one-eighth of the amount of the policy, first, where the injury causing the loss results from freezing; or, second, where the loss itself results from freezing. This clause of the policy is plain and unambiguous. It is a valid and binding clause. The parties to the contract were sui juris and had the right to make a contract with this clause therein. The uncontradicted facts in this case conclusively show that the

death was the result of freezing, and under the plain terms of the insurance contract above set out the recovery must be limited to one-eighth of the principal amount."

RELEASE OF SURETIES ON BAIL BOND WHERE PRINCIPAL REFUSES FURLOUGH TO ATTEND TRIAL.—In Briggs *v.* Commonwealth, 185 Ky. 340, 214 S. W. 975, reported and annotated in 8 A. L. R. 363, it was held that the sureties on criminal bail bonds were not released by the fact that their principals had been inducted into the military service of the United States, where it appeared that the principals had declined furloughs offered to them for the purpose of attending the trial. The court said: "The question for our decision might thus be stated: Where a person indicted for a felony has been inducted into the military service of the United States government, either voluntarily or by draft under the Selective Service Act, where the defendant and his surety were instrumental in securing his induction, and at the time of trial is stationed at a camp within forty miles of the place of trial, a two-hours' ride by rail, and upon application to the proper officer, by the accused or his bail, a pass or furlough would be granted to enable defendant to attend court, but such request is not made, should the bond for his appearance be forfeited? We answer in the affirmative. There is not the least doubt that both defendants could have attended court June 5, 1918, had they so desired. The undertaking of the bond is that accused shall be in court on the day fixed to answer the charge against him, and shall at all times render himself amenable to the orders and process of the court. Failing so to do, the amount of the bond shall be paid to the commonwealth. Crim. Code, § 82. Not the slightest attempt was made to comply with this obligation, a hand was not turned, nor the scratch of a pen, in an effort to have the defendants in court. Appellants had been warned that a continuance would not be granted, and had any portion of the diligence exercised in the endeavor to get defendants in the Army been directed toward the obtention of a brief leave of absence, the forfeiture could have been prevented. Those who gave up their positions, left home and loved ones, and entered the Army or Navy, and unselfishly offered their lives, if need be, to protect and defend those rights and privileges for which our forefathers fought, are deserving of our highest praise and commendation—real patriots these. But, obedience being one of the chief characteristics of a true soldier, it seems that a sense of honor and duty would have constrained defendants to have done everything in their power to have been on hand when their cases were called. . . . We find no case holding that the nonappearance of the accused, due merely to the fact that he was in the military service, releases the surety, where it was within the power of the defendant and his sureties to have the former present at the trial of the indictment; but no attempt was made by either to have the accused on hand. A splendid statement of the rule governing the case at bar is found in 3 R. C. L. § 65, under the head of Bail, which is as follows: 'The imprisonment of a citizen by legitimate orders of a military commander has the same force and effect as if he were confined upon a proper warrant from a civil tribunal. And therefore, if the principal in a bail bond is arrested and imprisoned by military or naval authorities, and the sureties are prevented thereby from procuring his appearance at the trial, they will be excused from complying with the conditions of the bond; and the enforced military or naval service of the principal will be a sufficient excuse for his nonappearance in accordance with his recognizance. Where the principal is at the time of the execution of his bail enlisted in the Federal Army and is refused a furlough which he asks for in order to be present at his trial, the bail are exonerated. There is some difference of opinion as to whether the voluntary enlistment of a principal in the Army or Navy after the entry of bail, whereby it is made impossible for him to appear in accordance with the condition of the recognizance, will relieve the sureties from their obligation. It is held in some of the cases that, where the principal enlists without the knowledge or consent of his sureties, their consequent inability to retake him into custody is ground either for their release or at least for a continuance where it is shown that they were reasonably diligent in their endeavor to secure the appearance of the principal. The better authorities hold, however, that voluntary enlistment, being the act of the obligor, cannot release either him or his sureties from his obligations. The reason for not exonerating the bail will be still stronger if the enlistment was with the advice and consent of the surety, and where this is the case it seems that the detention of the principal is not a good defense even in those jurisdictions where the decisions have treated the sureties most leniently. In every case where such a defense is advanced, it should be shown that proper effort has been made to secure the person of the principal from the military authorities. The fact that the principal has been captured by foreign soldiers and detained in another country may be advanced as a defense by his sureties, and, if the taking is not connived at by the principal, will relieve against a forfeiture for his failure to appear at the time specified."

News of the Profession

CITY PROSECUTOR OF CHICAGO RESIGNS.—Harry B. Miller, city prosecutor of Chicago, has resigned to enter private practice.

CLEVELAND BAR ASSOCIATION.—A series of four lectures was recently arranged by the Cleveland Bar Association to follow fortnightly dinners.

JUDICIAL CHANGE IN TEXAS.—Former District Attorney W. B. Quinn of Nacogdoches, Texas, has become a judge of the Court of Civil Appeals at Beaumont.

SHREVEPORT BAR ASSOCIATION.—Members of the Shreveport Bar Association, Louisiana, have elected Judge R. D. Webb president for the coming year.

DEATH OF UNITED STATES DISTRICT ATTORNEY OF OHIO.—The death of Sherman McPherson, a former United States District Attorney in Ohio, occurred recently.

KENTUCKY JURIST PASSES AWAY.—Judge William H. Yost, 70 years old, and formerly associate judge of the Superior Court of Kentucky, is dead. His home was in Madisonville.

UNITED STATES DISTRICT ATTORNEY FOR MONTANA APPOINTED.—George S. Shelton of Butte, Montana, has been appointed United States attorney for the district of Montana.

FORMER LECTURER IN YALE LAW SCHOOL DEAD.—Morris Woodruff Seymour of Litchfield, Connecticut, a former lecturer in Yale Law School, is dead. He graduated from Yale in 1866.

SOUTH CAROLINA HAS NEW ASSISTANT ATTORNEY GENERAL.—John M. Daniel of the Greenville bar, South Carolina, has been appointed an assistant attorney general succeeding Morris C. Lumpkin.

STATE'S ATTORNEYS IN CHICAGO RESIGN.—The resignations as state's attorneys of Edwin J. Raber and Ora P. Lightfoot of Chicago have been received by State's Attorney Hoyne.

RESIGNATION OF DAYTON PROSECUTOR.—Joseph D. Chamberlain, city prosecutor of Dayton, Ohio, has resigned. He was at one time speaker of the Ohio House of Representatives.

DEATH OF PROMINENT TEXAS ATTORNEY.—Judge John I. Guion of Ballinger, Texas, one of the most prominent attorneys of that state, is dead. He was son of a former Governor or Mississippi.

HENNEPIN COUNTY BAR ASSOCIATION.—At the fall meeting of the Hennepin County Bar Association of Minnesota F. Dumont Smith, author of the bill creating the Kansas Industrial Court, spoke on its work.

PROMINENT BALTIMORE LAWYER DEAD.—Hugo Steiner, 55 years old, of Baltimore, died recently from injuries received in a motor car accident. He was born in Austria and educated in Maryland universities.

ASSISTANT UNITED STATES ATTORNEY APPOINTED FOR MINNESOTA.—N. E. Pardee of Minneapolis has been appointed assistant United States district attorney in the office of Alfred Jacques of St. Paul.

WACO LAWYERS REORGANIZE LAWYERS' CLUB.—The lawyers of Waco, Texas, have reorganized the Lawyers' Club which was abandoned when the United States entered the world war. I. N. Gallagher is president.

FORMER ASSISTANT SECRETARY OF TREASURY JOINS NEW YORK LAW FIRM.—R. C. Leffingwell, formerly assistant Secretary of the Treasury has become a member of the firm of Cravath and Henderson, New York.

FORMER NEW HAMPSHIRE JUDGE DEAD.—Thomas Leavitt of Exeter, New Hampshire, 88 years of age and for many years a judge of the Rockingham county probate court, is dead. He was one of the oldest Bowdoin alumni, having graduated in 1856.

WOMAN PRESIDENT OF CRIMINAL BAR ASSOCIATION OF NEW YORK.—Mrs. Pauline O. Field, who has been honored with the presidency of the Criminal Bar Association of New York city, is the only woman member of that organization.

BIGGEST LAW SCHOOL IN UNITED STATES.—Georgetown University Law School with 1079 students is the largest law school in the United States. A golden jubilee celebration will be held December 4 and 5.

WELL-KNOWN WEST VIRGINIA LAWYER DEAD.—Guy R. C. Allen, aged 66 years, one of the most prominent practicing lawyers of the Ober county bar, died recently at Wheeling, West Virginia. He was graduated from the law department of the University of Virginia in 1878.

NEW FIRST ASSISTANT CORPORATION COUNSEL OF CHICAGO NAMED.—The position of first assistant corporation counsel made vacant by the election of Frank Righeimer to be a judge has been filled by the appointment of second assistant corporation counsel James W. Breen.

MARYLAND JUDGE CONTINUED IN OFFICE BY APPOINTMENT.—By appointment, Governor Ritchie has continued Judge Frank I. Duncan as Associate Judge of the Third Judicial Court from November 7 until the elections next year.

GEORGIA JUDGE TO LEAVE BENCH.—Judge G. H. Howard of Columbus, Georgia, manager of the campaign of Thomas W. Hardwick for governor and judge of the Superior Courts of the Chattahoochee Judicial Circuit, is to retire at the expiration of his term and practice law in Atlanta.

LOUISVILLE BAR ASSOCIATION.—At the annual session of the Louisville Bar Association held recently it was decided to establish a legal aid society for the needy. The new president of the association is Judge Shackelford Miller. He succeeds Leon P. Lewis.

KANSAS BAR ASSOCIATION.—The annual meeting of the Kansas Bar Association was held at Leavenworth, November 22 and 23. Hon. Albert J. Beveridge was the principal speaker. Chief Justice Johnson of the Kansas Supreme Court was toastmaster at the banquet which followed the meeting.

MASSACHUSETTS DEATHS.—Recent deaths among the Massachusetts bar include John L. Thorndike of Boston; Charles Steere of Hingham; Albert P. Warthen of Weymouth; George E. Howe of Cambridge; John W. Converse of Somerville; Frederick W. Brown of Boston, and Stanley Bishop of the same city.

UNITED STATES DISTRICT JUDGE FOR WISCONSIN DEAD.—Judge Arthur L. Sanborn of the United States District Court for the district of Wisconsin died recently. He was born in Brasher Falls, N. Y., in 1850 and was appointed to the District Court in 1905. He was once a law partner of the late Senator Spooner.

NEBRASKA BAR ASSOCIATION.—The twenty-first annual convention of the Nebraska State Bar Association will be held at Lincoln on December 27 and 28. An important matter of business will relate to the proposed incorporation of the bar of the state. The annual president's address will be delivered by Judge William M. Morning of Lincoln.

NEW JUDGE OF UNITED STATES CIRCUIT COURT OF APPEALS FOR THIRD CIRCUIT.—United States District Judge J. Warren Davis of Lawrenceville, New Jersey, is the new Judge of the United States Circuit Court of Appeals for the Third Circuit succeeding Judge Haight. He was educated for the ministry but became a teacher of Hebrew and Greek and later entered the University of Pennsylvania Law School, graduating in 1906.

DEATH OF FORMER PRESIDENT OF AMERICAN BAR ASSOCIATION.—Stephen S. Gregory, former president of the American Bar Association, died at his home in Chicago recently. He went to Chicago from Madison, Wisconsin, in 1874 and was 71 years of age. He was born in Unadilla, Otsego county, New York, and in childhood moved with his parents to Wisconsin. He was educated at the University of Wisconsin.

CHANGES AT GEORGE WASHINGTON LAW SCHOOL.—Wilbur La Roe, lecturer in public utilities at the George Washington University Law School, has resigned to enter practice. Until recently Mr. La Roe was chief examiner at the Interstate Commerce Commission. Mr. La Roe will be succeeded at the Law School by Harleigh H. Hartman, an examiner at the Interstate Commerce Commission.

TWENTY-FIFTH ANNIVERSARY OF APPOINTMENT OF ILLINOIS JUDGE TO BE CELEBRATED.—Members of the Illinois bar and prominent citizens of the state are looking forward with much interest to the celebration on December 17 of the twenty-fifth anniversary of James H. Cartwright's election as a justice of the Illinois Supreme Court. Justice Cartwright, whose quarter-century term of service has been equaled only a few times in the history of the Supreme bench, was born in a log cabin in Iowa territory, December 1, 1842.

NEW EDITOR OF NEW YORK LAW JOURNAL.—Prof. I. Maurice Wormser of the faculty of Fordham University Law School for the last eight years, and from time to time in charge of

the editorial department of the New York *Law Journal,* has become editor of that publication. In addition to being an active practitioner in New York, Prof. Wormser is well known for his writings on legal subjects. He prepared the third edition of "Clark on Corporations," the second edition of "Kirchwey's Cases on Mortgages" and the second edition of "Keener's Cases on Contracts." He also has served as a member of the law faculty at the University of Illinois and was editor of the Columbia *Law Review.*

English Notes*

THE GAME OF "PUCKAPOO."—Conditions of life among the Chinese residents in the East End of London have been attracting some attention, and, in particular, interest has been aroused in the game known as "puckapoo." Sometimes it is spelt pak-ah-pu, or some corresponding form. The game is well known to the courts in Australia according to Mr. Bedwell's new "Australasian Judicial Dictionary." Under the title of "lottery," "the Chinese game of pak-ah-pu" is defined to be "a complicated contrivance by which a person pays a small sum on the chance of receiving a larger one. There is no exercise of forethought. The thing is decided by mere chance. If he chooses the winning number he gains a prize. The game therefore is a lottery within the meaning of 10 Will. 3, c. 23 (Reg. *v.* Ah Tow and others (1886), 7 N. S. W. L. 347)." There has also been a series of New Zealand decisions on the subject, including one that premises used for the sale of pak-ah-pu tickets are a common gaming-house. Owing to the action of the police a number of gaming-houses have been closed in the Limehouse district, but the whole question of alien colonies in the metropolis requires consideration.

SOME OLD LAW BOOKS.—Usually offers of Year Books are to be found in the catalogues of the law booksellers, but a West End bookseller has an interesting collection on sale, which came from Lord Romilly's library. There are five lots, whose total value is estimated to be sixty-one guineas. They are all from Tottel's Press, "within Temple Barre at the signe of the hand and starre." Another volume in the same catalogue, which is also Tottel's work, is the first folio edition, published in 1569, of Bracton's "De Legibus." The price is £4 10s. In the previous year was published by him Sir William Staunford's "Exposicion of the Kinges prerogative collected out of the great abridgment of Justice Fitzherbert and other olde writers of the lawes of England." The copy afterwards belonged to Sir Robert Cotton, founder of the famous collection of manuscripts now preserved in the British Museum, and is valued at eight guineas. Nearly a century later is a copy of the first edition of Evelyn's translation in verse of Lucretius' "De Rerum Natura," offered in the same shop for eight guineas. It was printed "for Gabriel Bedle and Thomas Colins and are (sic) to be sold at this shop at the Middle Temple-Gate in Fleet-street," 1656. Gabriel Bedle was probably a member of one of the earliest colonizing parties to Virginia, but returned to settle down in the Inn which had so many associations with the new colony.

THE INTERNATIONAL SCHOOL OF INTERNATIONAL LAW.—The project for the "École internationale de droit international," the promoters of which are the well-known international jurists MM. Alvarez, Fauchille and de Lapradelle, is well on the way to realization. The object is to provide a course for those who intend to devote themselves to a diplomatic career, and the school is under the patronage of "L'Union juridique international," the University of Paris, and the Academy of Moral and Political Sciences, while the approbation of the League of Nations is awaited as a matter of course, after its next sitting. The committee, among others, consists of the Rector of the University of Paris, the Dean of the Faculty of Law in that seat of learning, the director of the School of Political Science, M. Poincaré, Mr. A. J. Balfour, M. Leon Bourgeois, M. Hanotaux, M. Karneboeck, M. Lyon-Caen, M. Ribot, Mr. Elihu Root, M. Scialoja, and M. Venizelos. The Faculty of Law in Paris has placed class rooms at the disposal of the school, and the classes were inaugurated last month. The lecturers already chosen include M. Leon Bourgeois, president of the League of Nations, and jurists of world repute. Among the subjects to be dealt with are European, American and the Asiatic conceptions of international law, together with the doctrines and accepted rules of international law in the principal States of Europe, Asia and America. Many Governments have promised to send students to the new école.

POLITICAL CRITICISM BY AMERICAN JOURNAL.—The *American Journal of International Law,* supported by the wealth of the Carnegie Endowment, has attained a foremost position among journals devoted to the subject. Its articles, although occasionally somewhat wordy, are marked by impartiality and breadth of view, but there have been deviations lately, which its warmest friends have noted with regret. In the latest number to reach this country there is an editorial comment upon "the mandate over Armenia," which, under a veneer of law and history, is a political attack upon the European Powers, especially Great Britain. "The chief concern of the European Powers is, apparently," says the writer, "not for the welfare of the oppressed nationalities of the Near East, but the attainment of selfish materialistic ends. And having reached a fairly satisfactory division of territory, they now appeal to the United States to accept the thorniest and the most undesirable task of caring for the grossly neglected and unloved Armenians." These may be from the American point of view, as the writer adds, "unpleasant facts" which should be "borne in mind," but in the *American Journal of International Law* one expects to find even unpleasant facts pleasantly stated and with judicial impartiality. In the realm of law we are accustomed to think in unity with our friends across the Atlantic, but this kind of line, which has been noticeable during the last few years in the *American Journal of International Law,* does not tend to promote concord even among the best of friends.—*Law Times.*

PRESENTATION OF WOMEN'S PETITION TO PARLIAMENT.—The refusal of the Miners' Conference to admit a deputation of the National Women's Political League to interview the miners' delegates, while at the same time permitting a petition in favor of peace, which they presented, to be read to the conference by Mr. Smillie, has its analogy, if not its parallel, in a noted incident in Parliamentary history, in which women petitioners were treated with similar tact and courtesy, in the early days of the Long Parliament, on the initiative of Mr. Pym, the celebrated Parliamentary leader. The Parliamentary History records that on the 4th Feb., 1641, a few days before the passing of the first Triennial Act, a "No Popery" petition was presented to the House of Commons from several gentlewomen and tradesmen's wives in the city. When they first approached

* With credit to English legal periodicals.

the House of Commons the commander of the guard applied to the House to know what to do with them. The House advised him to speak them fair and send them home again. Subsequently, however, they came down in great numbers. The statutes prohibiting tumultuous presentation of petitions to both or either of the Houses of Parliament, and limiting the number of persons with whom the persons presenting petitions may be accompanied (13 Car. 2, c. 5; 57 Geo. 3, c. 14, s. 23), had not then been passed. The women's petition, which was presented by Mrs. Anne Stagge, a gentlewoman and a brewer's wife, was received and read. Mr. Pym came to the door of the House and thanked the women for the petition, promising it would receive due attention, and requested the petitioners to return home. Butler is supposed to allude to this incident in the couplet:

"The oyster women locked their fish up,
And trudged away to cry 'No Bishop!'"

PROCEDURE IN ANCIENT GREEK COURTS.—In an article on "The Antiquity of Arbitration" which appeared in the *Law Times* a few years ago, the procedure in cases before the Greek Courts of Arbitration was fully described, especial attention being given to the time limit by the clepsydra, or water clock, imposed on counsel's speeches. Sir Frederic G. Kenyon, in his Atheniensium Respublica, translated, published by the Oxford Press, gives details of the general procedure in the Greek courts, from which the following is taken: "Preliminaries being concluded, the cases are called on. If it is a day for private cases, the private litigants are called. Four cases are taken in each of the categories defined in the law, and the litigants swear to confine their speeches to the point at issue. If it is a day for public causes, the public litigants are called, and only one case is tried. Water clocks are provided having small supply tubes, into which the water is poured by which the length of the proceedings is to be regulated. Ten gallons are allowed for each case in which an amount of more than five thousand drachmas is involved, and three for the second speech on each side. When the amount is between one and five thousand drachmas, seven gallons are allowed for the first speech and two for the second; when it is less than one thousand, five and two. Six gallons are allowed for arbitrations between rival claimants, in which there is no second speech. The official chosen by lot to superintend the water clock places his hand on the supply tube whenever the clerk is about to read a resolution or law or affidavit or treaty. When, however, a case is conducted according to a set measurement of the day, he does not stop the supply, but each party receives an equal allowance of water. The standard measurement is the length of the days in the month Poseideon. . . . The measured day is employed in cases when imprisonment, death, exile, loss of civil rights, or confiscation of goods is assigned as the penalty. Most of the courts consist of 500 members . . . and, when it is necessary to bring public cases before a jury of 1000 members two courts combine for the purpose [while the most important cases of all are brought before] 1500 jurors, or three courts. The ballot balls are made of brass with stems running through the center, half of them having the stem pierced [for the plaintiff] and the other half solid [for the defendant]. . . . If the votes are equal the verdict is for the defendant. Then, if damages are to be awarded, they vote again in the same way. . . . Half a gallon of water is allowed for each party for the discussion of the damages." This was an effectual check on superfluous forensic eloquence, for when the water had run out counsel had to resume his seat, his argument complete or otherwise, as was pointed out in the articles before cited. For those who may have forgotten their Greek, it may be observed that a drachma was about 1s. 9¾d., and that the month Poseideon was the sixth month of the Attic year, answering to the latter half of December and the first half of January in modern times.

FOREIGN TRADER AND PASSING OFF.—The principles governing cases of passing off by the use of the plaintiff's name were enunciated in the well-known case of Burgess *v.* Burgess (3 De G. M. & G. 896), in which Lord Justice Knight Bruce said that it does not follow that because the defendant has the same name as the plaintiff, he is selling his goods as those of the plaintiff; on the other hand, Lord Justice Turner (at p. 905) said that if another person not having that name is using it, it may be presumed that he uses it to represent the goods sold by himself as the goods of the person in whose name he sells the goods. It may be a fraudulent use, and would not be innocent after the user's attention had been called to the matter. In the recent case of Poiret *v.* Jules Poiret Limited and Nash (37 Rep. Pat. Cas. 177) the second defendant, at first personally and then under the name of the defendant company, had used the uncommon surname of the plaintiff, Paul Poiret, the well-known costumier of Paris, in connection with the extensive business of theatrical costumiers founded by Nash and afterwards carried on under the name of Jules Poiret by him and the defendant company in London. The point was taken on the defendants' behalf that although the plaintiff had acquired a reputation for his goods and "creations" in this country before the war, yet he had no place of busines in England, and under these circumstances was not entitled to an injunction protecting that reputation. Mr. Justice P. O. Lawrence, however, did not accede to that argument, saying, as reported: "The defendant Nash seems to consider that, because Paul Poiret has no place of business in London, he is not entitled to protect his reputation in business in this country, and that he, the defendant Nash, is at liberty to take the name of 'Poiret' and use it in respect of his goods in spite of the fact that the plaintiff's goods are known in the English market as 'Poiret' gowns and 'Poiret' creations. In my opinion this view is entirely mistaken. Paul Poiret is, in my judgment, in the circumstances of this case entitled to protect his goods and the reputation he has acquired in this country notwithstanding the fact that he has not a place of business here, and he is entitled to open a branch in England and to make use of the reputation that he has already obtained in the English market without having the interference of the defendant, because of the adoption of the name of Poiret." The question raised was not bare of authority (La Société Anonyme des Anciens Etablissements Panhard et Levassor *v.* Panhard Levassor Mortor Company Limited, 85 L. T. Rep. 20; [1920] 2 Ch. 513), and, having regard to the view which the learned judge took of the circumstances attending the inception of the use of the plaintiff's surname, it is not surprising that an injunction was granted against its further use by the defendants in connection with their goods.

WAR AS A RELATION OF INDIVIDUALS.—The Lord Chancellor in the House of Lords, in deprecating the application of the term "confiscation" to the arrangement under the provisions of the Peace Treaty whereby the German nation is to compensate its own nationals for such property as they may have lost in this country, declared in the strongest terms that the late war had destroyed the doctrine that war is a relation of states and not of individuals. "The argument," said the Lord Chancellor, "that war was a conflict of states and not of individuals might have been accurate in 1913 or early in 1914, but it had been destroyed by the experiences of the late war. During that war there was

no man, woman, or child in this country who was not liable to be affected or destroyed by our late enemies if the smallest consideration of policy suggested the adoption of this course." This statement, which is irrefragable, constitutes in itself an imperative demand for the establishment of a League of Nations as an effective institution. The annihilation of the doctrine that war is a relation of states, not of individuals, which has been one of the results of the late great war, may be realized by contrasting the words of the Lord Chancellor with the views of Dr. Hannis Taylor, the eminent American jurist and diplomatist, writing in 1902 in exposition of the principles of international public law: "In the wars of ancient times," writes Dr. Hannis Taylor, "every citizen was expected to do all the harm he could to every citizen of the hostile country. In modern times, since the advent of standing armies, there has been a differentiation between combatants and noncombatants, not as the result of any theory, but because of the cruel and inconclusive result of the older practice. Vattel in his time [he was born in 1714] could say that it had become the practice for the troops alone to carry on the war while the rest of the nation remain in peace. The theory of war was then so changed as to explain what had become the practice. Rousseau said war was a relation of states. . . . The gradual increase of humanitarian feeling had led to the general adoption by publicists of the doctrine, and the trend of their teaching is to consider war as the affair of armies which private citizens may regard with little personal interest. While the Romans distinguished *hostis* from *inimicus*, a public from a private foe, it is certainly true that the citizen is now differentiated from his state as he never was in ancient times. As the American Regulations express it, 'protection of the inoffensive citizen of the hostile country is the rule, privations and disturbance of private relations are the exceptions.' International practice has so far ameliorated the conditions of war as to induce many to believe that we are approaching the quasi-millennial time when the unarmed population of traders, peasants, and workmen shall go on undisturbed in their occupations, when private cargoes may be transported anywhere without risk, leaving armies and navies to carry on their work of injuring each other as little as possible." Dr. Hannis Taylor asks a question to which the experience of the late war gives the answer: "Can the new theory ultimately prevail against the fact that states and their governments are merely representatives of the people?"

COMPETENCY OF WITNESS IN PROCEEDING INVOLVING ADULTERY.—The London *Times*, in a leading article published recently entitled "Perjury in the Divorce Court," in relation primarily to the Bamberger case, says: "Mrs. Bamberger's conviction was a foregone conclusion, but it has led many people to regard it as the climax of a defective system. The remedy is hard to find, for, let the law be what it may, it is not every witness in the Divorce Court who will swear away his or another's moral character. When social, religious, and ethical restraints have failed, a woman will not admit guilt unless she be collusive, and a man will still think it chivalrous at all costs to deny misconduct." At common law the parties and their husbands and wives were incompetent in all cases. This incompetency was removed as to parties in civil but not in criminal cases by 14 & 15 Vict. c. 99, s. 2, and as to their husbands and wives by 16 & 17 Vict. c. 83, ss. 1, 2. But sect. 2 expressly reserved the common law as to criminal cases and proceedings instituted in consequence of adultery. The powerful observation of Mr. (Lord Chief Justice) Denman, quoted by Lord Brougham, constitutes a strange anticipation of the conclusions of the writer of the article in the *Times*. Mr. (Lord Chief Justice) Denman, speaking in Queen Caroline's Trial as her Solicitor-General, said: "We have been told that Bergami might be produced as a witness in our [the Queen's] exculpation, but we know this to be a fiction of the lawyers which common sense and natural feeling would reject. The very call [of Bergami] as a witness is one of the unparalleled circumstances of this extraordinary case. From the very beginning of the world no instance is to be found of a man accused of adultery being called as a witness to disprove it. . . . How shameful an inquisition would the contrary practice engender! Great as is the obligation to veracity, the circumstances might raise a doubt in the most conscientious mind whether it ought to prevail. Mere casuist might dispute with plausible arguments on either side, but the natural feelings of mankind would be likely to triumph over their moral doctrines. Supposing the existence of guilt, perjury in itself would be thought venial in comparison with the exposure of a confiding woman. It follows that no such question ought in any case to be administered, nor such temptation given to tamper with the sanctity of oaths." It is an irony in legal history that Mr. (Justice) Denman, a son of the Lord Chief Justice who uttered these sentiments, carried through Parliament the Evidence (Further Amendment) Act of 1869 (32 & 33 Vict. c. 68, s. 3), which, after repealing the 4th section of the Evidence Act 1851, and so much of the 2nd section of the Evidence Amendment Act 1853 as is contained in the words "or in any proceeding instituted in consequence of adultery," enacts that "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery unless such witness shall already have given evidence in the same proceedings in disproof of his or her alleged adultery." The law as to the competency of witnesses was formerly the most, or nearly the most, extensive and important branch of the law of evidence. The principle of absolute exclusion from the witness-box, in the cases of parties to the suit, of persons interested in the evidence they had to give, however slight that interest might be, and of persons who were "infamous," that is, of such character that they might be challenged as jurors *propter delictum*, though once among the most settled peculiarities of the English law, has been eradicated from it by modern Acts of Parliament, and the objection is now admissible only as affecting the credibility and not the competency of the witness. Bentham's attack upon the theory on which the rules as to the incompetency of witnesses was founded has, in the words of Sir Fitzjames Stephen, "met with a success so nearly complete" that his great work, Rationale of Judicial Evidence, "has itself become obsolete."

"One striking difference between the artificial and a natural person is, that the latter can do anything not forbidden by law, while the former can do only what is so permitted."—Per Swayne, J., in Northwestern Fertilizing Co. *v.* Hyde Park, 97 U. S. 666.

"The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts."—Per Harlan, J., in New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 672.

Obiter Dicta

HOW THEY VOTED.—People *v.* Cox, 155 Pac. 1010.

THE WOMEN TOO.—Salley *v.* Cox, 94 S. Car. 216.

THE REASON WHY.—Cox *v.* Justice, 197 S. W. 1060.

EXCOMMUNICATED.—Christian *v.* Catholic Church, (N. J.) 110 Atl. 579.

STALLED.—In Ford *v.* Hill, 92 Wis. 188, the defendant won in both courts.

MUST HAVE HAD HIS HAIR CUT.—In New York, New Haven, etc., R. Co. *v.* Sampson, 222 Mass. 311, the defendant fought a losing fight all the way.

THE LAST LAUGH.—In Laughter *v.* United States, 259 Fed. 94, a conviction of Laughter for transporting intoxicating liquors in defiance of the law was affirmed.

SUED THE WRONG PARTY?—In Hollipeter, Shonyo & Co. *v.* Maxwell, (Mo.) 224 S. W. 113, the plaintiff sued in replevin to recover a Ford automobile and lost out.

JUST A COINCIDENCE.—We assume it to be a mere chance that in volume 5A of the American Digest series the title "Bathing" is followed by the title "Beauty Doctors—Necessity of License."

AMONG THE PERILS OF WAR.—"The applicant enlisted as a soldier early in the war. He went overseas but did not reach France. His only casualty was inflicted by some female in London."—See In re O, [1920] 3 W. R. R. 394.

OTHERWISE IT WAS ALL RIGHT.—"In the first place there was no evidence to warrant such an instruction; in the second place there is no law to warrant such an instruction."—Per Sherwood, J., in State *v.* Bartlett, 170 Mo. 658.

BEFORE THEY ARE ALL GONE.—Seeing that F. P. A. of the New York *Tribune* has announced himself as in a receptive mood with respect to President-elect Harding's superabundance of Christmas cigars, we beg to say that we, too, are an inveterate smoker and a loyal Republican.

BATHING IN LOUISIANA.—In the Index to the Louisiana Sessions Laws for 1912, we find the following line: "Bathtubs, when immovable by notice." We can think of no other explanation than that notice must be given in Louisiana of an intention to take a bath, if the prospective bather would find his tub in place.

EXACTLY SO.—"What I venture to insist upon is that it cannot possibly be a matter of the law of equity to decide what a writ of fi. fa. catches or attaches upon. Whatever in law it catches, why, it just catches and what it does not catch it does not catch, that is all."—Per Stuart, J., in Marshall Wells Alta. Co. *v.* Alliance Trust Co., [1920] 1 W. W. R. 911.

A NEW LAW MAGAZINE.—*The Journal* heretofore issued by the American Bar Association in quarterly pamphlet form will hereafter appear in a new dress. It will be published monthly and with all the concomitants of a regular law magazine. LAW NOTES welcomes the newcomer because it believes the field to be large enough for two good magazines devoted to the interests of the legal profession.

FUNERAL ODE BY W. C. T. U.

We have done away with whiskey—
And all drinks that make one frisky,
  And we've got tobacco backed against the wall.
But the one thing to remember
Is our victory this November
  For we've rid the world of "Wilson—that is all!"

THE SNUFF OF NORTH DAKOTA.—"We hold therefore, and we believe that there is enough of state sovereignty still left in America for us to hold that, no matter how the word 'snuff' may be limited in its meaning in other jurisdictions, in North Dakota it embraces tobacco which is intended to be used upon the gums as well as tobacco that is intended to be used in the nose." Per Bruce, J., in State *v.* Olson, 26 N. Dak. 304.

A NEW KIND OF SUIT.—The syllabus to Truckee R. G. E. Co. *v.* Anderson, 28 Cal. App. Dec. 783, reads as follows: "In view of Sec. 318 C. C. P., no action for the recovery of the possession of real property can be maintained unless the plaintiff or his predecessor was seized or possessed of the property within five years *after* commencement of the action." Which is to say, as we construe it, that in California a suit to recover possession of real property must be anticipatory of the right of the plaintiff or his *predecessor* to possession. Reason it out for yourself.

"OLD BILL" OSBORNE.—To the *Saturday Evening Post* for November 13, our friend and correspondent William Hamilton Osborne contributes a corking good story entitled "Swift Work." The leading character is a young lawyer yclept "Old Bill," who conducts successfully for his sweetheart a rather remarkable lawsuit. Well, it may be mean to give the whole thing away, but we are simply bursting with the knowledge that "Old Bill" is none other than the gifted author himself. As proof of the fact, we beg to refer to the case of Eggers *v.* Anderson, 63 N. J. Eq. 264, wherein one William H. Osborne was attorney for the respondents. The interested reader may pursue the subject further by comparing the case and the story, but in final comment we will say merely that while "Old Bill" won out in the *Post*, he didn't win in the New Jersey courts.

THEORY AND FACT.—It seems to be a characteristic tendency of fine-spun theories to explode when brought in contact with hard, cold facts (e.g., the League of Nations theory and November 2, 1920). A concrete and rather amusing illustration of such an explosion may be found in the recent case of Pullman Co. *v.* Pulliam, (Ky.) 218 S. W. 1005. The action being brought to recover damages for assaults committed on the plaintiff while occupying a berth in the defendant's sleeping car, the defendant alleged that the plaintiff dreamed it all. Said the court: "Appellant's dream theory does not impress us. While not specifically versed in the phenomenon of dreams, our limited knowledge thereof is such as to dispel any idea that plaintiff could have had three separate visions within the space of a few hours that some one was attacking or attempting to assault her, especially when she says she never closed her eyes after the first experience."

"The very meaning of public policy is the interest of others than the parties and that interest is not to be at the mercy of the defendant alone."—Per Holmes, J., in Beasely *v.* Texas, etc., R. Co., 191 U. S. 498.

Correspondence

THE LAWYERS INSTITUTE OF SAN DIEGO.

To the Editor of LAW NOTES.

SIR: I have read with considerable interest your editorial in the October number of LAW NOTES headed, "Bar Association Recommendation of Judicial Candidates."

There are some suggestions contained in the latter part of that editorial that in a very feeble way we have tried to work out in this city. I am enclosing herewith the articles of incorporation and rules and by-laws of the "Lawyers Institute of San Diego." This may be of some interest to you and to the profession at large.

Practically all of the practicing attorneys of this city are members of the Institute and practically the only ones excluded are those whose fitness is subject to serious question. By this organization we have attempted to meet some of the objections which are properly made to the present method of organization of other associations in general. The Institute co-operates with the local bar association in its activities in connection with the other associations of the state and the American Bar Association.

San Diego, Cal. DEMPSTER MCKEE.

"In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws."—Per Story, J., in Swift *v.* Tyson, 16 Pet. 18.

"Passionate ardor for a client's cause, eagerness for victory, the enthusiasm and interest that comes to one imbued with the justness and righteousness of his side of a lawsuit, will oftentimes lead an attorney in argument to overstep the bounds of propriety, forget the law and the evidence, get outside the record, and bring to the attention of the jury matters having no bearing upon the questions involved."—Per Quin, J., in Pullman Co. *v.* Pulliam, (Ky.) 218 S. W. 1007.

"The fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilizations under the reign of just and equal laws."—Per Matthews, J., in Yick Yo *v.* Hopkins, 118 U. S. 370.

PATENTS

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WATSON E. COLEMAN,

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STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912,

of LAW NOTES, published monthly at Northport, L. I., N. Y., for Oct. 1, 1920.

State of New York } ss.
County of Suffolk }

Before me, a Notary Public in and for the State and county aforesaid, personally appeared M. B. Wailes, who, having been duly sworn according to law, deposes and says that he is the President of the Edward Thompson Co., the publishers of LAW NOTES, and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management, etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 443, Postal Laws and Regulations, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

NAME OF—	POST OFFICE ADDRESS
Publisher, Edward Thompson Co.	Northport, N.Y.
Editor, M. B. Wailes	" "

2. That the owners are:

Edward Thompson	" "
Edward Pidgeon	" "
Estate of James Cockcroft	" "
Sarah M. Thompson	" "
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Wm. M. McKinney	San Francisco, Cal.
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F. W. Wheeler	Northport, N. Y.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: none.

4. That the two paragraphs, next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

M. B. Wailes, Prest.

Sworn to and subscribed before me this 24th day of Sept., 1920. Geo. Babcock, Notary Public [SEAL]. (My commission expires March 30th, 1921.)

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Law Notes

JANUARY, 1921

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F. W. WHEELER, *Secretary and Treasurer.*

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The Blue Laws.

As might have been expected, the success of the prohibition movement has been followed by the beginning of an organized effort to put through a considerable program of pharisaical legislation—anti-cigarette laws, anti-Sunday amusement laws, and the like. Forewarned is forearmed, and it is not likely that a compact and clamorous minority will be able to duplicate the easy success of the advocates of the Eighteenth Amendment. But if this daring attempt to undo the work of two centuries of progress is to be defeated, the work must not be left entirely to those who, like the motion picture producers, the tobacco manufacturers, and the like, have a financial interest to protect. Every man who feels that his rights would be impaired by the proposed legislation must consider the fight his own and make it with every power at his command. The issue is in truth a paramount one. Neither Bolshevism nor the most extreme reactionary measures which it may evoke carry the threat to American liberty that is contained in this attempted revival of middle age bigotry. There is a perfectly definite political reason why an organized minority is able to enact a measure repugnant to the interest and wishes of the majority. A Congressman confronted with a proposed measure knows that if he votes against it five men will become irreconcilably opposed to him. If he votes for it ten men will be displeased but nine of them will vote for him at the next election in spite of it. Under those conditions it is easy to forecast that he will decide to lose the one vote rather than the five. If Congressmen once come to understand that if they vote for the proposed blue laws they will lose the political support of every man opposed to such legislation, the project will be dead beyond recall. The duty thus to confront the propaganda under consideration is dictated by something more than the necessity of preventing the visiting on our people of medieval bigotry. Organization of active minority interests supported by powerful lobbies is rapidly making a farce of representative government. If the United States is to remain a republic, if the majority is to rule in fact as well as in theory, the majority must throw off its supine indifference and call its servants to account; its members must cease to hope that some one else will save them and bestir themselves for their own salvation and that of the nation.

The Crime Wave.

The extraordinary prevalence of crime throughout the United States is not to be wondered at when it is remembered that practically all the causes to which crime may reasonably be ascribed are now, to borrow a phrase from the astrologers, in conjunction. It has been repeatedly demonstrated by statistics that crimes against property increase with the cost of living, and the present conditions in that particular require no discussion. Moreover several of the largest cities in the United States are coincidentally enjoying one of those periods of incompetent administration which seem inseparable from municipal government, and the police force is always among the first of municipal agencies to deteriorate at such times. There is in every city a considerable element which breaks into activity at the least relaxation in the vigor and intelligence of police supervision. Again, the various forms of ultra radical propaganda are spreading broadcast the doctrine that property rights have no moral basis and that the poor man is poor not because of his own fault but through the fraud of others. The wholesale looting which prevails wherever that element comes into a clear ascendency argues plainly that its doctrines must lead to individual depredations in the preliminary stages. Another not inconsiderable element is the prohibition laws. Thoughtful men have for years called attention to the fact that the multiplication of offenses which are merely malum prohibitum and have no appeal to the conscience tends strongly to breed a contempt for law which extends rapidly to laws other than that which generated it. Perhaps at no time in the history of the United States have the people had so persistently forced on their attention laws which do not command the respect or acceptance of a large number of normally law-abiding citizens, and the effect cannot fail to be widespread. Yet another factor of no small importance is the prevalence of profiteering in the necessities of life and the impunity with which it is practised. The resentment thus inspired necessarily leads to a considerable antagonism against men of property and must in the minds of some justify crimes against those whom they regard as but licensed thieves. With this complex of causes all working in one direction, the wonder is not that there is so much crime but that there is not more. Barring a diminution in some of the causes referred to, a further increase in crime in the near future is probable, since crimes against property usually increase with the aggravated economic conditions of winter. From a consideration of the reasons for the prevalence of crime it is clear that there is no short and easy road to its suppression. Better police methods will do much, but the real solution must be found in a change of moral and economic conditions.

Foreign Flags.

RECENT events have again brought to attention the possibility of international complications from demonstrations against foreign flags displayed on American soil. Affront offered to a national flag on foreign soil is by long tradition a matter of which governmental cognizance may be taken; it may under some circumstances lead to war. And though, as in the recent instances of affront to the British flag in the United States, the good sense of the offended nation leads it to ignore the incident, a certain amount of ill will must of necessity be engendered. The matter is one which calls for some federal regulation, for, while an offense against local laws is usually committed, it too often happens that the local authorities are deterred by political considerations from vigorous prosecution. But just what form the regulation should take is not so clear. An Act of Congress penalizing any affront to the flag of any nation with which the United States is at peace would, prima facie, be proper, but just at the present time it would be inexpedient, for even after technical peace is restored he would be a poor American who would tolerate the display of a German flag on our soil. A protection to the flags of nations with which the United States has been at peace for ten years might afford sufficient "cooling time." The suggestion has also been made that the display of foreign flags except at consulates, embassies and the like should be forbidden. Such a regulation would, however, cut off a graceful method of promoting international amity and would be peculiarly inappropriate at this time when we may with profit to ourselves recall the anniversaries of the great struggle in which we were allied with the other leaders of civilization to save the world from Prussian domination. The possibility of affront to a foreign flag is of course merely a symptom of a spirit which is one of the most serious bits of slag in our melting pot, the disposition of citizens of foreign birth to perpetuate in America the racial or national antagonisms of their birthplace. There are but few manifestations of this evil which are capable of being reached by legislation, but those which can be so reached should not be tolerated for a moment.

Free Trade in Ideas.

WITH the contention of those worthies who, after a wild denunciation of our system of government, appeal to the Constitution for protection when threatened with arrest, no sensible lawyer has any patience. There are however some lawyers of ability and patriotism who, having no sympathy with sedition, nevertheless believe that the legal suppression of seditious discussion jeopardizes the freedom of our institutions. Of this number is Mr. George Palmer Garrett who in the August issue of the *Journal of Criminal Law and Criminology* contributes a forcible article under the foregoing caption. "We have built," he says, "our temple to house our ark and now it seems we must (it is alleged) destroy our ark to preserve our temple." This view, which finds more or less direct support in the utterances of such jurists as Mr. Hughes and Mr. Justice Holmes, seems to proceed on a mistaken assumption as to what it is sought to prohibit. Certainly no one seeks to re-enact the sedition law of 1798, so often and so misleadingly referred to as showing the impolicy of sedition laws; a law which was enforced only to penalize criticisms of the policy and ability of the President. There is no possibility that any law will be passed which attempts to fetter criticism of official conduct or of our governmental or industrial system. The attempt, for example, to pass a constitutional amendment abolishing private property in land is every bit as legitimate as the recently successful attempt to destroy private property in wine. Any group of men desiring to have a law passed or a constitutional amendment adopted is entitled to the fullest opportunity for the public advocacy of its proposition. But when it comes to advocating sabotage, revolution, a "general strike" or an "uprising of the workers" that is another matter altogether, and it is hard to comprehend the viewpoint which sees any jeopardy to our institutions in its legal prohibition. In other words, any agitation which is based on the rule of the majority as expressed by lawfully cast ballots is and must remain legal. Agitation for a change in our governmental system or policy by any other means should be illegal, for the plain reason that it seeks rule by a minority. The essence of American liberty, the "ark" which our temple protects is the unfettered power of self-government by the majority after its will has been ascertained in an orderly manner on full discussion. It is that very principle which our imported "radicalism" seeks to destroy, substituting for it the rule of a minority, privately organized and enforcing its will by economic pressure if not by armed violence.

Vagaries of Censorship.

THE motion picture censorship of one populous eastern state has recently decreed that no photoplay there exhibited shall depict crime or criminals as successful or prosperous at any stage. It is not enough under this ruling that the final reel shall show the triumph of retributive justice; the criminal must not be an object of envy or admiration at any time. Aside from the sin against the scenario writer who is thus ruthlessly deprived of a dramatic asset dear from long association, this ruling is positively mischievous. There is no spectator so immature as not to know that in real life crime often meets with temporary success; that the wicked man in his day flourishes like a green bay tree. This patent fact may be offset by showing an ultimate day of reckoning, but it is too well established for any denial to be effective. Consequently those whom it is sought to protect from temptation to crime will naturally conclude that the dénouement is of a piece with the obviously false incidents, and whatever of warning against crime the play may give is destroyed instead of strengthened. It is very similar to the temperance literature issued to the young twenty or thirty years ago, which depicted the saloon as a place of indescribable filth and vulgarity presided over by a low-browed ruffian "filled with strange oaths" who forced drinks on any young man who strayed into his unhallowed precincts. It was all very terrifying—until the young man saw his first city barroom. Then in casting out of his mind the proven falsehood he threw away with it whatever of truth about the effect of intoxicants there was joined to it. The motion picture has infinite possibilities for good, appealing as it does to a class which is reached by very little printed or spoken instruction. Those possibilities are all based on the fact that the photoplay interests a class of persons who are not interested in any

other form of mental recreation. Destroy the interest and you destroy the possibility of usefulness. Conform the "movies" to the taste of the Rev. Mr. Prosy who has already preached the church empty, and he will empty the motion picture theater with even greater celerity. A like destruction of the usefulness of the photo-play will result from any attempt to falsify the known facts of life. Lizzie the factory girl and Harold her "gentleman friend" are realists of necessity. Tell them that crime never brings prosperity, that vice never flaunts itself in silk and diamonds and virtue never goes in rags, and they will not merely laugh in your face—what is much more important, they will never believe anything else that you tell them. The entire idea of motion picture censorship should be cast out root and branch and the photo-play left to stand, as does the spoken drama, on its conformity to the criminal law. But until that happy result is reached let us at least have censors who are not too respectable to have a little common sense.

Common Law Marriages.

COMMENT has been made several times in LAW NOTES with respect to the sound public policy which sustains the common law marriage doctrine, the only evil resulting from its recognition being the possibility that the mistress of some wealthy profligate may after his death establish by perjury a claim to his estate. This possibility is trivial compared with that presented by an insistence on ceremonial marriage. A recent Oklahoma case well illustrates the class of cases in which the common law marriage doctrine intervenes to save the reputation of an honest woman and the legitimacy of her innocent children. In *Draughn* v. *State,* 158 Pac. 890, the facts were stated by the court as follows: "The defendant for some time kept company with the prosecutrix, Nettie Crabtree, won her confidence and affection, and promised to marry her. Due to his employment, he and the prosecutrix were separated for some time, and he finally wrote her to come to him and they would get married, and sent her the money on which to make the trip. She met him at the designated time and place, and he produced a man purporting to be a minister, with a paper which purported to be a marriage license. They stood up before this person and took the marriage vows. They then went to Sulphur, Okla., and lived as husband and wife. The defendant introduced her to his friends and acquaintances as his wife, provided for her, paid her doctor bills, and in every way they for more than three years maintained the relation of husband and wife, visited both his and her people, lived in other communities than Sulphur, and everywhere he supported her, cohabited with her, and treated her in every respect as his wife. Three children were born to them, and he seemed to be proud of the offspring, and as a doting father presented them to his friends and acquaintances as the children of himself and his wife. But finally he abandoned this woman, and the next she heard of him he was married to another." Holding that there was a valid common law marriage the court quoted with approval the eloquent words of an earlier decision, from the same jurisdiction: "At the trial of this suit a little daughter, the result of this union, sat innocently by, unconscious that her very name and future status were being determined there. We infer from the record that the property involved is insignificant, and was probably little in mind, while this woman fought for the relation of wife and for a name for her little girl. She is entitled to both. We do not propose to sit here, considering the most sacred relation of life, and construe away the status of this woman, who appears to have acted in good faith; neither will we turn the innocent result of this common law union out into the world a nameless thing. She was begotten by a man who had voluntarily assumed the relation of husband, and she shall have the right to be called his child and bear his name." Ecclesiastical influence, that dead hand from the dark ages of the world, still retains in a few states the requirement of a ceremonial marriage, but the number of these is decreasing and it is to be hoped that the last trace of the willingness to bastardize an innocent child rather than impair a dogma will soon vanish.

Disclaiming Intent to Defame.

PROBABLY as a result of the decision in *Corrigan* v. *Bobbs Merrill Co.* (126 N. E. 260), a novel published several years ago contains by way of foreword the following disclaimer: "The characters in this story are entirely fictitious and bear no relation to any living person. Where, for the development of the plot, persons holding public offices are mentioned, these are entirely imaginary creations." The writer feels estopped to express an opinion as to whether there is anything of defamatory reference in the book in question, since he read "God's Man" without the least suspicion that reflection on any actual judge was intended. But supposing that covert defamation is found in its pages against some person of name but slightly differing from that of one of the "fictitious" characters, what if any legal potency is there in the disclaimer which has been quoted? Certainly it would not be conclusive. Probably it would be deemed to be a question of fact whether the entire volume, including the disclaimer, could reasonably be taken as intending a reflection on any person under cover of an apparent fiction. It is a question admitting of some doubt whether such a notice does not have an effect exactly opposite to that intended, awakening the mind of the reader to the idea that perhaps some application to real persons is intended and making him alert to see analogies and resemblances which might otherwise not have been noticed. The average man reads a novel with no idea that the characters and scenes are other than fictitious; but once suggest that such may not be the fact, and he will be keen to discover applications which were far from the author's intent. It is another case of the lady protesting too much. And yet, what else is there that the best intentioned publisher can do except insert some such notice? Under the broad doctrine of the Corrigan case it would seem to be unsafe to publish a novel in which any actual office is referred to unless the incumbent is described as a paragon of personal and official virtue. Even if the venue of the story is described as "New Jerusalem" or "Wilsonia" the same judicial discernment which found that "Cornegan" was intended to refer to "Corrigan" will penetrate the fiction. Must the publishers in self-defense revert to the ancient type of romantic novel wherein neither the characters nor their doings could be accused of resembling anything on earth? Surely there must have been somewhere in the south a slave owner whose name was something like Legree. If he had only sued Harriet Beecher Stowe for libel the

civil war might have been averted. There may be, of course, a genuine case of defamation by work of fiction, and in such a case the law should give a remedy. But in its broad aspect the decision in the Corrigan case leads to results so fantastic that it is quite likely to be limited when next the question arises.

Soldiers' Wills.

IT is to be expected that a number of cases will arise in the United States wherein nuncupative wills of soldiers in the world war will be presented for probate. Such a will was recently admitted in the Surrogate Court of New York county (*In re Hickey's Estate,* 184 N. Y. S. 399.) An American soldier in active service overseas, having a government insurance policy payable to his estate, wrote a letter to a minor sister saying: "Did you ever receive my insurance policy from the government? I tried to make it payable to you, but they said it would have to be one of my parents or a brother or sister over 21, so I had to make it out to myself, but Sis will get the money if anything does happen to me." In another letter he said, "My insurance is made out to Nan," referring to the sister. These expressions were held to be a valid bequest of the insurance policy and as such were admitted to probate, the theory of the law being said to be that "from the absolute necessities of military service the solemn and formal rules as to testaments are relaxed in favor of soldiers." At this point the question very naturally arises why the "solemn and formal rules as to testaments" should not be relaxed in other cases. Putting aside the traditions with which it is surrounded, the making of a will is not a whit more solemn than any other form of disposition of property. True it is an instrument effective only after the death of the maker, and as such gives peculiar opportunities for fraud. Therefore the requirement of two witnesses to the testamentary act can doubtless be justified. But the technical requirements as to form serve no substantial purpose and invalidate every year efforts of undoubted genuineness to make a testamentary disposition of property.

Simplifying Administration of Estates.

IN case of a considerable estate the present system of administration is in a general way an admirable one. But in the case of a small estate, practically without debts and free from conflicting claims to inheritance, every practitioner will bear witness that the system is slow, cumbersome and unduly expensive. As a result in many instances a family agreement followed by the making of deeds by all the heirs is resorted to to save time and expense. In many instances, however, the objection of one heir prevents such a solution. It would seem to be possible to provide an informal method of administering small solvent estates which would obviate the delay and expense of going through the same procedure as is required in case of a large and complicated inheritance. In Washington and perhaps in other states, provision is made for the settlement of certain testate estates without administration. The Washington statute provides: "In all cases where it is provided in the last will and testament of the deceased that the estate shall be settled in a manner provided in such last will and testament, and that letters testamentary or of administration shall not be required, and where it also duly appears to the court, by the inventory filed, and other proof, that the estate is fully solvent, which fact may be established by an order of the court on the coming in of the inventory, it shall not be necessary to take out letters testamentary or of administration, except to admit to probate such will, and to file a true inventory of all the property of such estate in the manner required by existing laws. And after the probate of such will and the filing of such inventory all such estates may be managed and settled without the intervention of the court, if the said last will and testament shall so provide." It is further provided that in case debts are not paid within a year or if the trustee under the will does not administer the estate faithfully the matter may be brought into court by a citation. The act quoted has been in force for many years and appears to have given general satisfaction and to have caused but little litigation. It should not be difficult to frame a statute allowing similar informal administration of an intestate estate which is solvent and does not exceed in value say ten thousand dollars.

Misleading Cross-examination.

EVERY practicing attorney has heard witnesses asked on cross-examination whether they have talked with counsel about the matter testified to. Few indeed have forborne to ask the question on occasion or to smile significantly at the jury when the witness says that he has talked with the counsel of the party calling him. The general attitude of laymen toward the legal profession is such that it is very probable that jurymen frequently draw from such a question and answer an inference more or less definite that the witness has been unduly influenced, if not suborned. Yet it is well known to every practitioner that a lawyer would be culpably negligent if he put a witness on the stand without having had an interview with him and ascertaining just what he would testify. The advisory lectures given to young lawyers enjoin the utmost care and thoroughness in this detail of the preparation for trial. It is hard to understand why trial judges, who are perfectly familiar with the entire situation, permit a question so unfair in its tendencies to be asked. It should be met always with a sharp rebuke and a judicial statement to the jury that it is necessary and proper that counsel should interview the witnesses before trial. This is but one of an infinite number of the tricks of advocacy by which jury trials are all too frequently converted into a game in which success goes to the most skilful player. Entire equality in the trial court is of course out of the question. There must always be a preponderance of ability on one side or the other. So far as that ability is manifested in careful preparation of the case and lucid presentation of the theory of counsel it cannot and should not be in any manner handicapped. But trial judges should realize much more fully than they seem to do that they sit not merely to see that the rules of the game are observed but to see that justice is done. The average lawyer feels a distinct grievance if the trial judge interposes in such manner as to deprive him of a tactical advantage, a point of view which seems to be wholly American and not wholly creditable. There can be little doubt that the courts which dispense with formality attain a higher percentage of substantial justice than results from formal trials. If the legal profession is to survive the

strong present trend toward methods of trial which dispense with the services of counsel, it must demonstrate that the success of informal tribunals is attained in spite of and not because of the absence of professional assistance. There is room for a strong contention that such is the fact, and its test needs no reformed system of procedure. It can be made at any time when trial judges are willing to assume the powers which they possess and appellate judges cease to reverse just judgments for technical errors of procedure.

FIRST STEPS TOWARD A SELF-GOVERNING BAR

MANY members of the bar are already conscious of the fact that the status of the legal profession in the United States as one of the factors in the administration of justice lacks much of the dignity and importance which it should possess. Individually our lawyers are second to none in learning and ability. Individually they enjoy the confidence of the courts and the respect of the communities in which they live. But the bar as an entity is a mere figure of speech for the aggregate of its individual members. Its organizations contain but a small minority and their functions are largely confined to an annual meeting where a few admirable reports are presented and then forgotten. Except in a few of the largest cities bar associations are usually state-wide, having no efficient local existence and no local influence. As a means of invoking an expression of the views of a number of leading lawyers on some question of general interest, these organizations serve admirably, but beyond that they are almost useless. Their public influence is negligible. Their endorsement or reprobation of a candidate for judicial office is not as important as that of the Tinsmiths' Union. They have no power to enforce any code of ethics which they may adopt for the betterment of the profession. Compared with the powers and the independence enjoyed by the professional organizations of Europe the status of their American brethren is almost ludicrous.

Much of this must be corrected, if at all, by legislation, but much may be done by voluntary organization. A letter of Mr. Dempster McKee, published in LAW NOTES for December, 1920, calling attention to the Lawyers' Institute of San Diego, California, has led to some study of that organization and to the conclusion that it may well be taken as a model for the first step toward a self-governing bar. The Institute is incorporated, and its purposes and policies are fixed by a series of by-laws. Passing without discussion those purely formal by-laws which deal with membership (open to all lawyers of the city on election by the directors), meetings, officers, dues (not to exceed $3 per month) and the like, it is provided that each member "solemnly undertakes to comply with" certain rules of practice. It is further provided as to the effect of membership, the Rules and By-Laws shall be subscribed to by each member. "The effect of such subscription shall be to bind such member to the other members and to the Corporation, with the force and effect of a contract entered into jointly and severally between them, in all particulars provided for in the Rules and By-Laws in force at the time of his admission and all subsequent amendments or additions thereto. As a part of the consideration for his admission, each member voluntarily assumes the burdens, as well as the privileges of such relation, and submits himself to all regulations and discipline in the manner herein provided; and specifically waives all claim for any loss, prejudice or damage which he may suffer by reason of the enforcement of any regulations or discipline. It being the intention to release the said Corporation, its officers and agents from all liability arising from any act herein provided for. All burdens and liabilities and all privileges and all property rights vested by participation in this Corporation are limited to the period of membership therein, and upon termination of membership for any cause whatever the member shall thereby surrender all right or claim to any such privileges or property rights, the same thereby reverting to the Corporation as a part of the consideration for such member's admission to membership in the first instance."

Active touch by the Institute with its members is maintained through a Counsel for the Institution concerning whom the by-laws prescribe: "The Counsel of the Institute shall be appointed and removed at will by the Board of Directors. He shall be a member of the Institute, but may not, at the time, be a Director thereof. The Counsel shall be the chief administrative and advisory agent of the Board of Directors and of the Institute. Among such other duties as may be delegated to him, it shall be incumbent upon him to keep in touch with all members of the Institute; to receive from them reports of affairs touching the Institute; to investigate any reported violation of the Rules and By-Laws and to require conformity therewith on the part of all members; to arrange arbitration in disputed cases when necessary; to conduct actions or prosecutions against members or non-members of the Institute when so required by the Board of Directors; to represent and promote the interests of the Institute before the Courts and the Judges thereof, before any other tribunals and before the public." Further power is given to the Counsel by the following by-law: "Any member will, upon demand, disclose to the authorized Counsel of the Institute the full facts (aside from confidential information) of any matter pertaining to compliance or non-compliance with the foregoing rules. He will also permit such Counsel to examine his books and accounts upon the subject of such matter; any information so received, however, to be held confidential by such Counsel and divulged only in proper case to a Board of Arbiters or to the Board of Directors."

If the Institute proves in practice to be anything more than a friendly and innocuous professional coterie it will be because of the wise and impartial exercise of the powers conferred by the foregoing provisions. Indeed the weak point in the scheme seems to be that the proper administration of the duties imposed on the Counsel calls for a degree of tact and ability which it is too much to expect to be always available. The theory, nevertheless, is an admirable one. A grievance committee, acting only on complaint, inevitably hears only of the most aggravated cases. Discredit necessarily attaches to any member of the profession who is called before such a committee and therefore its action is invoked only in cases demanding drastic action. The Counsel of the San Diego Institute on the other hand is empowered to proceed on his own initiative, his investigations may be privately made, and by his

activities may hold in check the minor departures from the by-laws which lead to the disintegration of any association to maintain ethical standards.

The standards of professional conduct to which the members of the Institute bind themselves are so admirably expressed as to invite full quotation:

"To exercise toward his client in every instance the highest good faith and to charge for his services only such a fee as is fair and proper; to give to any client no cause for dissatisfaction, but in the event of known dissatisfaction on the part of a client, as to any act or omission of his attorney, to report the circumstances thereof, forthwith, to the duly authorized Counsel of the Institute; to report confidentially to such Counsel any case of dissatisfaction on the part of a client existing against any other practitioner of law."

"To prevent and discourage unnecessary and unfruitful litigation; to refuse employment in cases prosecuted or defended chiefly out of spite or for the purpose of harassing or delaying another. In all litigation where the opposing party is represented by a member of the Institute, to bring the same to final determination at the earliest possible moment; to appear promptly in response to process; to file no groundless demurrer for purpose of delay; to stipulate to the taking of depositions and such other proceedings as might be secured as a matter of course upon motion or notice; to require no justification of surety, etc., except upon good cause; to hasten the course of trial by stipulation of all known provable facts; to attempt the introduction of no improper evidence; to refrain from unsupportable objections and specious arguments; to waive findings of fact when not requisite to the safety of the client; to take or prosecute no appeal except in good faith on actual merit."

"To treat every member of the Institute with consideration in the conduct of mutual business; to require no unnecessary act or effort from opposing counsel; to take no default or penalty against a member, except after notice of intention to do so; to make and receive freely and, in good faith, abide by, oral stipulations; to waive notice of rulings and settings for trial whenever present at the occasion thereof; to accompany all general demurrers with a specification of the particulars in which it is claimed the pleading is insufficient; to submit demurrer without arguments unless a favorable ruling is expected in good faith; to make no charge of professional misconduct against another member of the Institute, or against any Judge, to anyone but a member of the Board of Directors, or the authorized Counsel or Board of Arbiters of the Institute. (Provided, that nothing herein contained shall prevent a member from testifying before a Court or other tribunal, nor from making statements in good faith on the occasion of the campaign of such person for election to public office.)"

The foregoing by-laws it will be observed go far beyond the rules for the violation of which judicial discipline may be imposed. They deal with matters of controversy between counsel and client though no wrongdoing or dishonesty on the part of the former is charged, and by so doing their administration cannot but be helpful to the standing of the profession by tending to adjust the numerous cases wherein a client feels that he has not been fairly treated but has no legal remedy. The by-laws quoted also go to considerable length in enjoining that courtesy and fairness between opposing counsel which have in the past been observed by the better class of the profession and ignored by the others. A strong influence is thus exerted to raise the general standard of professional conduct to that practiced by the best members of the profession.

Provision is also made for the arbitration of differences between members or between a member and his client, such arbitration being of course voluntary as to the client, but compulsory under penalty of expulsion on the attorney. This provision properly administered will fill a long felt want. Attorneys are naturally very reluctant to institute proceedings against a fellow practitioner. Unless the grievance of a client is very substantial he finds it difficult to secure an attorney to espouse his cause. As a result there are many instances of clients who feel that in some particular they have been unfairly treated and that it is impossible for them to secure redress, and not only loss of reputation but loss of business results to the profession as a result of this feeling. It is a matter worthy of consideration whether this provision could not profitably be extended to claims against attorneys held by persons other than clients. The well-known reluctance to bring suit against a fellow practitioner causes the loss of many accounts which would have been collected had the debtor been of any other vocation, and this cannot but engender considerable ill-feeling on the part of the creditor.

A by-law of considerable length prescribes a minimum scale of fees. To this, however, the following proviso is added:

"Provided, however, that nothing herein contained shall be construed as preventing any member from rendering gratuitous services as a matter of professional courtesy to a brother attorney, or to a member of a brother attorney's family, or from accepting from such attorney or such member of his family a fee below the minimum herein; or from making no charge at all, or accepting a smaller fee than the minimum fee, in such cases or matters only where he conscientiously believes that the case or matter in hand is worthy of his charity; or when his professional or other relation to the client is such as would make it embarrassing for him to make the minimum charge, or any charge at all; but such circumstances as justify the waiver of any fee or the receiving of a fee less than the minimum, must be exceptional and in every instance the member must act in reference thereto in the utmost good faith, and in no event shall his fee be less than the minimum, or the fee waived, where the effect thereof would be to underbid another member, or where the same would be a violation of the spirit and intent of the obligation, which every member upon his honor assumes, to abide by the minimum fees hereinafter provided."

The adoption of such a scale and the amount of the fees to be charged if one is adopted are peculiarly local questions to be determined in the light of local conditions. The viewpoint may be an impractical one, but nevertheless it seems that the adoption of such a scale is unwise unless some local condition imperatively requires it. It is difficult to keep a proper proportion between idealistic and sordid considerations once the two are mixed, and the maintenance of the standard charges may very readily come to be regarded as the prime purpose of the organization, and its violation the only offense certain of reprobation. A similar condition now prevails in the medical profession, which has an excellent code of ethics, every provision of which may be violated with impunity except that which forbids advertising for business. Moreover it is very easy for the idea to become fixed in the public mind that the association is essentially a trade union, the primary purpose of which is to establish a wage scale, and with that impression prevailing the influence of the association outside its own membership becomes negligible.

An association such as that described is of course but a small beginning of limited and local usefulness, but it seems to contain the possibilities of development. Our most important institutions, including the bar itself, grew from beginnings no more pretentious. Given such an Institute in each locality, a state Institute of delegates from each would be truly representative of the profession and could act for it with some degree of effectiveness and authority. At this point legislative extension of the powers of the Institute would be possible. To a profession

thus organized could well be delegated the power to discipline its own members, the power to suspend or disbar being conferred on a local committee, subject to review by a Committee of the State Institute. In practical effect, there probably would be no difference in the result in a particular case between such a mode of trial and that now obtaining. The difference lies in the moral effect. Whatever may be the result with a mixed population, with a body of intelligent and educated men self-government brings a deep sense of responsibility. The maintenance of professional good conduct would no longer be a matter of official concern as to which the individual practitioner could disclaim responsibility, but would rest squarely on every individual, and it is not too much to hope that the profession would rise to meet that responsibility. The relation between bench and bar would be changed from one of authority and subservience to one of partnership, and again the bar would not fail to respond adequately to the demands of its new status, until the American lawyer might claim a position of equal dignity with that of a member of the bar of Belgium whose status was stated by the Batonnier of the Order of Advocates as follows: "The bar is not an administrative body. It is an autonomous and a free organization. Placed by law at the side of the magistracy to accomplish with it the joint task of justice, it knows neither the guardianship nor the control of any political power. It receives orders or injunctions from no one. It exercises this liberty without restraint, not in the interest of its members but in the interest of its mission. It has developed in its heart more discipline than pride, it has created a code of severe rules of honor which only the chosen can endure."

Moreover, such an organization of the bar would permit of a much needed reform in the rules of procedure. At the present time the administrative side of the law is in a most unsatisfactory condition, due to the fact that procedure rests either on outworn tradition or on inflexible statutes. Time and money are wasted by courts struggling with an inelastic system; justice is often lost sight of because an elaborate code of rules must be observed if reversal is to be avoided. A simple, elastic and yet adequate set of rules of procedure cannot be formulated except by the legal profession, and not by it until it is mobilized in some form to act as a profession and not as a large number of individuals. To a commission of the bench and the representatives of an organized bar the making of rules of practice, to be revised annually, could be committed with the certainty that most of the confusion of our present system would be obviated.

The realization of these possibilities is merely a matter of organization. "The lawyer has been scolded and exhorted so long that he would feel neglected if his critics should cease. But nobody has ever suggested the practical steps to be taken to enable him to work out his salvation. The time has come to stop moralizing and consider a definite plan for integrating the bar so it can realize its highest ideals." Journal of American Society of Judicature, Dec., 1918. There are several local bar associations which are doing good work, the New York County Lawyers Association for example, but the San Diego Institute seems to possess some distinctive features which justify bringing it specifically to the attention of those in similar communities who are interested in the first step in the task of integrating the bar.

W. A. S.

FEDERAL CONTROL OF INTRASTATE RATES

ONWARD the march of "centralization" takes its way. Slowly but surely the ramparts of states' rights are crumbling, and unless the greed of the nationalist is checked the time is not far distant when the doctrine will be but a myth to be taught to the student of American constitutional government as one of the fallacies put forward so confidently by the founders of our government and the framers of its Constitution. After the inroads on the doctrine made in comparatively recent years, the latest step in the gradual dethroning of state sovereignty is not surprising. This is found in the ruling of the Interstate Commerce Commission virtually to the effect that under the "Transportation Act" returning the railroads to the control of their private owners, it is empowered to regulate the intrastate as well as the interstate rates of transportation companies.

While it is not the purpose of this article to enter into a general discussion of the doctrine of states' rights except in so far as it is necessarily involved in any discussion concerning the power of Congress over intrastate rates, the writer cannot refrain from an expression of regret and concern at the evident trend of modern legislators to discard this timber in the ship of state, so long considered its most essential member, the keel as it were. The court in *United States* v. *Scott,* 148 Fed. 431, was moved by somewhat the same fear when it said: "While the tide of advancing events has wisely and inevitably forced upon the courts the necessity of giving broad and apparently ever-expanding latitude to the commerce clause of the Constitution, still it may be that there should be a limit to its elasticity, and possibly it might not be an altogether unmixed evil for some of the people now, as was once the habit, to call for a strict construction of that instrument. If such call served no other purpose, it might be useful as the occasional hoisting of a cautionary signal. Our government was organized and has greatly prospered under a system of 'checks and balances,' and it should always be remembered that those checks and balances yet remain for most essential purposes."

The cautionary signals have been flown at the time of every encroachment by Congress on the power of the states, flown by some of the ablest minds among the navigators of the sea of constitutional law, but they have not been heeded by the nationalist pilots—blind or without the will to see. The Supreme Court also recognizes as one of its chief duties the duty to apply the "checks and balances" provided by the Constitution. "This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution." *Hammer* v. *Dagenhart,* 247 U. S. 276. What they think of the result of the failure to apply such checks is forcibly expressed in the same case when they say of an attempt by Congress to regulate a purely state matter under cover of the authority conferred on it by the commerce clause of the Constitution that "the far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority . . . the power of the states over local matters may be eliminated, and

thus our system of government be practically destroyed." Strong language of a surety, and vastly comforting to the adherents of the doctrine of states' rights were it not for the fact that this particular case is a woefully lonesome instance of the application of the much talked of "checks and balances."

The latest attempt to encroach on the domain of the rights of the states may in a measure be said to be an aftermath of the indulgence by Congress in the unlimited power resulting from a state of war. In order to hasten the winning of the war Congress under its war powers very wisely took over the control and operation of the transportation system of the country. But when the object sought was accomplished—the war won—and the time came to return the railroads to their private owners, Congress found it hard to relinquish entirely the unusual power it had enjoyed. The taste of power still lingered and its exercise had become a habit difficult to discard absolutely. Like the intemperate smoker or drinker, while recognizing that the time had come to stop, Congress could not bring itself to do so altogether and at once, but decided it would "taper off," so to speak. At least this is the effect of the act of renunciation, or, to continue the simile, "swearing off" as interpreted by the Interstate Commerce Commission.

This act, known as the "Transportation Act" (Act Feb. 28, 1920, Fed. Stat. Ann. Pamphlet Supp. No. 23, pp. 12-72) provides as follows: "Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding." In pursuance of the power conferred on the Interstate Commerce Commission by this act they have ordered or empowered various transportation companies to raise their intrastate rates to the level of that prescribed by the commission for purely interstate traffic. In answer to the objections of the various state authorities that Congress had no power under the commerce clause of the Constitution to regulate purely intrastate rates, the commission ruled that Congress has an implied power, in the absence of the exercise of its war power, to legislate in relation to intrastate rates in order to make effective the regulation of interstate commerce which has been expressly entrusted to its care, apparently whether the connection between the intrastate and interstate rates is direct or indirect only.

It is well here briefly to review the source and extent of the power of Congress over interstate commerce. The only authority that Congress has over interstate commerce is derived from that provision of the Constitution known as the "commerce clause," art. I, § 8, cl. 3, 10 Fed. Stat. Ann. (2d ed.) 410 et seq., which provides that "the Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes." This broad general power is subject to no limitations except those imposed by the terms of the Constitution itself, chief among which may be said to be the Fifth Amendment guaranteeing due process of law, and the oft invoked Tenth Amendment that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

There can be no doubt but that exclusive power has been conferred on Congress in respect to the regulation of commerce among the several states. The difficulty has never been as to the existence of this power, but as to what is to be deemed an unjustifiable extension of it by Congress or encroachment upon it by the states. Indeed it has been said: "The most perplexing topic of American constitutional law seems to be the demarcation of the federal power over commerce, and the powers of the states and nation have been referred to as like the intervening colors between black and white, which approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them." *Peoples* v. *Downs,* 136 N. Y. S. 440. In fact so hazy is the line which separates the powers of the states from this exclusive power of Congress that it has been said: "It would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved." *Hall* v. *DeCuir,* 95 U. S. 485.

While the courts have been loth to lay down any arbitrary rule by which intrastate and interstate commerce may be definitely separated and labeled certain general principles have become firmly established. It is, as was said in *Rosenberger* v. *Pacific Express Co.,* 241 U. S. 48, "too elementary to require anything but statement that speaking generally the States are without power to directly burden interstate commerce." On the other hand the proposition that the states have the sole control over purely internal commerce, likewise is too well settled by the reiterated statements of the courts, both state and federal, to need citations to support it. It is a part of the power reserved to states under the Tenth Amendment and is nowhere denied, at least in principle, though it may be in application. So long as the action of the states is not repugnant to, does not interfere with, place burdens upon, or undertake to regulate interstate commerce it is not invalid unless the interference is direct. It is not enough that the state act is similar to the federal act on the same subject. In order to render it invalid it must in operation interfere directly or substantially with interstate commerce, and not be an incidental or casual interference, or remotely affect it hurtfully. As was said in *Austin* v. *Tennessee,* 179 U. S. 343: "We have had repeated occasion to hold, where state legislation has been attacked as violative either of the power of Congress over interstate commerce, or of the Fourteenth Amendment to the Constitution, that if the action of the state legislature were a bona fide exercise of its police power, and dictated by a genuine regard for the preservation of the public

health or safety, such legislation would be respected, though it might interfere indirectly with interstate commerce."

Between the two extremes of exclusive federal and exclusive state jurisdiction there lies a kind of a twilight zone in which the acts of either Congress or the state may be valid according to circumstances. In this zone may be found matters relating to interstate commerce on which Congress may act, but in the absence of such action state laws relative thereto are appropriate and valid. When, however, Congress sees fit to exercise its authority the state laws must give away. In the language of the Supreme Court, "the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power." As will be seen it is the assertion of this paramount power of Congress which the Interstate Commerce Commission invokes in support of its recent ruling.

The Commission assumes that under the commerce clause of the Constitution Congress has always been invested with the power to regulate intrastate rates where those prescribed by the state authorities operated to the prejudice of interstate commerce, that until the Transportation Act it had not seen fit fully to exercise this power and that while during that period of inaction on the part of Congress the states might lawfully regulate intrastate rates, although such regulation indirectly affected interstate commerce, by the passage of that act Congress asserted fully its power and therefore all state legislation in conflict therewith became null and void. The particular sections of the act whereby Congress has asserted its power over interstate commerce formerly left in abeyance are declared to be section 416, paragraph 4, quoted above, and section 422 of the Act, added as section 15*a* of the Interstate Commerce Act, relating to the adjustment of rates so as to insure a fair return upon the aggregate value of railway property. By that section it is provided: "In the exercise of its powers to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country." And further by clause three of this section, "that during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments, or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account."

In interpreting these two sections as giving it power to regulate intrastate rates the Commission bases its ruling largely on the construction placed by the Supreme Court on section 3 of the former Interstate Commerce Act. This section provides as follows: "It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." As may be seen this section relates to discriminations which injuriously affect persons and localities in interstate commerce, and it stands unamended by the Transportation Act of 1920 by which clause 4 was added to the Interstate Commerce Act. In *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, commonly known as the "Shreveport Case" the validity of an order prescribing maximum reasonable rates from Shreveport, La., to points in Texas and requiring the removal of undue prejudice against Shreveport as to traffic to Texas points found to result from lower state commission made rates from Dallas and Houston, Texas, toward Shreveport for equal distances, was in question. In passing on the power of Congress to enact section 3 of the Interstate Commerce Act and in construing the effect of that section the court said: "It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation.' By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce as well as of interstate com-

merce does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the State and not the Nation would be supreme within the national field. . . . While these decisions [referring to cases cited] sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled." And in *Minnesota Rate Cases,* 230 U. S. 352, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A 18, 33 Sup. Ct. 121, 57 L. ed. 1151, it was said: "If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments, the measure of the regulation it should supply."

According to the decision of the Commission, by clause 4, Congress has gone further than declaring that there shall be no undue or unreasonable advantage, preference, or prejudice as between persons and localities as provided in section 3, and has forbidden and declared unlawful "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce." In the language of the Commission: "The terms of the act are sufficiently broad to forbid unjust discrimination against interstate commerce without reference to particular persons or localities. Considering the conditions existing at the time of the passage of the act, the purpose of the act to correct those conditions, and the legislative scheme adopted by Congress to carry out that purpose, we have no doubt that Congress meant to give full import to the language used, and that the prohibition against 'undue, unreasonable, or unjust discrimination against interstate or foreign commerce' is not limited to particular persons or localities, but is applicable to such discrimination against interstate or foreign commerce in their broad definitions." Applying the doctrine laid down by the Supreme Court in the two cases quoted from in construing section 3 of the Interstate Commerce Act to the added clause 4 the Commission says of its construction of that clause: "This construction of the act cannot be said to be an encroachment on states' rights. The power to regulate interstate commerce was granted Congress chiefly as a means of protection against commercial hostilities and reprisals between the various states which overwhelmed the Confederation and threatened the commercial destruction of some of the states. The existence of that exclusive power in Congress is of greater importance now than at the time of the adoption of the constitution, for the protection of the states themselves. To-day railroads run the length and breadth of the country. Many of the roads traverse with their own lines a number of states. Even though a carrier's rails may be confined wholly within a state, it is ordinarily an important link in the transportation of commerce from and to other states. Each state, therefore, is vitally interested in the transportation conditions in the other. A narrow or selfish policy with respect to the transportation instrumentalities within a state may cripple or suppress the commerce of the other states. It was stated on argument that about 31 states had permitted the same increases in fares as we fixed in Increased Rates, 1920, supra. Are the transportation facilities of these states and of the nation to be put in jeopardy by reason of the failure of the other states to conform to the plan adopted by the Congress for the welfare of the nation as a whole? The states gave to Congress the power to protect and promote the instrumentalities of interstate commerce and as the states' right they look to Congress to exercise that power."

The decision of the Commission would seem to be justified in so far as it relates to the regulation of the rates of carriers whose interstate and intrastate business has become so intermingled as to render a separation thereof impracticable. But the extension of the doctrine to purely intrastate roads, as the Commission seemingly does in its construction of the power conferred on it by that section of the act authorizing it to fix rates so as to insure a reasonable return on the value of the investment, is such an extreme step in derogation of the rights of the states as to be open to grave doubt as to its validity. On this phase of the question the Commission in speaking of its ruling in a former case said: "In that case, conformably to the act, in the exercise of our power to prescribe just and reasonable rates, we determined the increased fares that were necessary in order that the passenger traffic should contribute its proper proportion to a fair return to the aggregate property value. If, without good reason, the fares within a state are lower than those authorized and established for interstate application, intrastate passenger traffic will not contribute its just share to the passenger revenues of the carriers, and the carriers may not earn the statutory return without further increases in the transportation charges on other traffic, including interstate traffic, thus unjustly discriminating against such commerce. Such a situation will also result, as the record discloses, in depleting the revenues from interstate commerce by diverting to intrastate channels what otherwise would form part of interstate passenger traffic. Thus, the existence, side by side with interstate fares, of intrastate fares fixed at a lower level constitutes an obstruction to interstate commerce, thereby unduly, unreasonably and unjustly discriminating against such commerce, in contravention of the act."

Aside from any question of the desirability of the extension of federal control over the transportation systems of the country, as witnessed by the hardship on the purely state road resulting from enforced rates lower than those

allowed an interstate carrier operating between the same points, or the difficulty found by the commission in fixing rates so as to produce the statutory return, both of which are apparent, the question remains whether Congress in the exercise of its power over interstate commerce may entirely override the power of the states as to intrastate rates, if in its opinion such action is necessary to carry out its policies regarding interstate commerce. Suppose for instance that a state itself should build or otherwise acquire and operate a railroad between two points wholly within its limits which are already connected by a privately owned interstate road, and it is beyond question that the state has the power to do this. Has Congress the power under the commerce clause of the Constitution to compel the state to raise or lower the rates on its road to conform with those established by the Interstate Commerce Commission for the interstate road in order that the latter may not be hindered by the competition of the former in earning what Congress has declared to be a fair return on its investment? The Interstate Commerce Commission has said it could. Although the particular roads included in the various orders of the commission were privately owned the principle announced would be equally applicable to a state owned road. It is also true that there are few roads in the country to-day whose business is not composed of both intrastate and interstate commerce, in many instances so intermingled as to have become inseparable, but can the existence of that fact be allowed to overturn one of the fundamental laws of the country and force the minority to give up a right guaranteed under the Constitution because it would be of benefit to the majority? In our system of government provision is made to meet such emergencies and it would certainly seem to be the wiser course to follow such provision than to attain the end desired by doubtful interpretation involving the destruction of a right long considered as preserved to the states by the Constitution.

To base the right of Congress to regulate purely intrastate rates on the fact that the federal government has assumed the obligation to enable the railroads to earn a fair return on the capital invested in them, would result for all practical purposes in depriving the states of any control whatever over the rates to be charged by the transportation companies within their borders. That this view is shared by the layman as well as the lawyer is witnessed by the comments of the press on the Commissioner's ruling. See, for example, the following comment by the *Dallas News:*

"Its plea must be not that an intrastate passenger fare of less than 3.6 cents a mile is discriminative in the sense of impeding interstate commerce, but that it interferes with the discharge of an obligation which the federal government has assumed. . . . If the Supreme Court sustains this theory, then there will be nothing left of state regulatory powers over the railroads, and state commissions will exist merely as coadjutors of the Interstate Commerce Commission."

This is a far cry from the doctrine as stated by the Supreme Court in *Minnesota Rate Cases,* 230 U. S. 352, where it was said: "The decisions of this court since the passage of the Act to Regulate Commerce have uniformly recognized that it was competent for the state to fix such rates, applicable throughout its territory. If it be said that in the contests that have been waged over state laws during the past twenty-five years, the question of interference with interstate commerce by the establishment of statewide rates for intrastate traffic has seldom been raised, this fact itself attests the common conception of the scope of state authority. And the decisions recognizing and defining the state power wholly refute the contention that the making of such rates either constitutes a direct burden upon interstate commerce or is repugnant to the federal statute."

As has been seen, the Supreme Court said in the Shreveport case that while Congress had no power to regulate the internal commerce of a state as such, under its power to foster and protect interstate commerce it may take all necessary measures appropriate to that end, although intrastate transactions of interstate carriers may be thereby controlled. In the course of time it will undoubtedly be called upon to pass on the ruling of the Interstate Commerce Commission and to say whether it meant by the statement in the Shreveport case that if necessary to enable an interstate road to earn the income fixed as reasonable, Congress could in effect forbid all state regulation of intrastate rates.

MINOR BRONAUGH.

BONUS SHARES AS CAPITAL OR INCOME

THE question of the exact effect of distributing among members of a company undivided profits in the form of new shares—generally called "bonus shares"—continues to be one of great difficulty. The latest illustration is a recent decision of the Court of Appeal in Inland Revenue Commissioners *v.* Blott. The point at issue was whether super-tax was payable on an allotment of bonus shares, and the Court of Appeal held that the tax was not payable. To arrive at a decision it was necessary to determine whether the new shares were to be treated as capital or income in the hands of the allottees. This is the difficulty in all cases of the kind—to determine whether the shares are capital or income of the owners.

Mr. Justice Rowlatt had held, on the authority of Bouch *v.* Sproule (57 L. T. Rep. 345; 12 App. Cas. 385), that the shares in question were to be regarded as capital, not income, and so were not liable to tax, and this decision was affirmed on the same ground. The company had power to increase its capital, to distribute profits in the shape of paid-up shares, and to create reserve funds. The resolution to allot the shares was as follows: "That it is desirable to capitalize the sum of £33,333 6s. 8d., being part of the undivided profits of the company, and accordingly that a bonus at the rate of $33^1/_3$ per cent. per share . . . is hereby declared, and they are hereby authorized to satisfy such bonus by the distribution among the members . . . of 33,316 of the unissued second preference shares of £1 each in the company credited as fully paid in satisfaction of such bonus." The report of the directors spoke of this allotment as a "dividend," though this word did not occur in the resolution. The contention of the Crown was that the respondent must be treated as if he had received a cash dividend, and had been free to spend it. As to this the Master of the Rolls said: "It seems to me he is obviously not in this position, and the question is whether he is to be considered to be so in law. In my opinion, it has been decided by the House of Lords in Bouch *v.* Sproule that he is not," and Bouch *v.* Sproule was held to be indistinguishable from the present case, notwithstanding that the House of Lords case had to do with tenant for life and remainderman. It was said in Bouch *v.* Sproule

"that in substance the whole transaction was, and was intended to be, to convert the undivided profits into paid-up capital upon newly-created shares," and this applied to the present case. A difficulty was caused by some parts of the judgment in the Privy Council case of Swan Brewery Company *v.* The King (110 L. T. Rep. 211; (1914) A. C. 231), where the view was taken that the shareholder received so much dividend out of undivided profits, and then used it in paying for the new shares. That case, however, turned on the construction of the word "dividend" in an oversea statute, and might therefore be distinguished from Bouch *v.* Sproule. The Master of the Rolls nevertheless said: "I find it very difficult to reconcile the reasoning of the two cases; if, however, they cannot be reconciled, I consider that we are bound to follow Bouch *v.* Sproule." The bonus shares were therefore, as in Bouch *v.* Sproule, held to be capital and so not taxable as income. In Bouch *v.* Sproule the shares had been held to be capital, and so not to belong, as income, to the tenant for life. In Swan Brewery Company *v.* The King the shares had been held to be taxable as "dividends" —equivalent to saying they were taxable as income—but the word "dividend" was, in the Western Australian Act taxing the value of the shares, defined so as to include "every profit, advantage, or gain intended to be paid or credited to or distributed among the members of any company."

Looking at the two cases of Bouch *v.* Sproule and Swan Brewery Company *v.* The King, it is plain that the operation of issuing bonus shares as a means of absorbing undivided profits can be regarded in two different ways, according as the feature of increasing the company's capital or the feature of increasing the shareholder's holding is emphasized. Apparently, the difficulty in every case is to discover which of the two features will present itself to the judicial mind as the most prominent. Precisely the same difficulty has arisen in regard to a series of cases in the Australian courts, where, of course, Bouch *v.* Sproule is a binding authority as in the English courts. In Australia, however, Swan Brewery Company *v.* The King would be technically binding (as a decision of the Privy Council) in a manner in which it is not binding on the English courts.

The question whether a distribution of cash or shares is to be regarded as payment of income or payment of capital has come before the High Court of Australia in two cases somewhat recently—Knowles *v.* Balarat Trustees Company (1916, 22 Commonw. L. R. 212) and Fisher *v.* Fisher (1917, 23 Commonw. L. R. 337). Both cases were concerned with ascertaining whether tenant for life or remainderman was entitled to the property distributed. In both it was held that the undivided profits distributed were to be regarded as capital, and accordingly that they did not belong to the tenant for life. In the first of these cases the payments were made in cash, in the second shares were distributed, but the principle of both was the same, and Bouch *v.* Sproule held to be the governing authority. In Knowles *v.* Ballarat Trustees Company, where the distribution was in cash, there was, of course, no question of increasing the company's capital, but the sums distributed were held to be part of the capital of the company, distributed as on a winding-up.

Still more recently both these last-mentioned cases had to be considered in the Supreme Court of New South Wales—Drew *v.* Vickery (1919, 19 State Rep. (N.S.W.) 245), before Mr. Justice Harvey. This also was a tenant for life and remainderman case, and eventually it was held that a sum of cash distributed among the shareholders by way of bonus was to be considered as income and (where a particular holding of shares was settled) as belonging, therefore, to the tenant for life. The company was authorized to increase its capital, and to distribute among the members any property "by way of bonus, dividend, or otherwise." A resolution was passed authorizing the distribution of £100,000, "being part of the undivided profits of the company accumulated and carried to the company's reserve account . . . by way of bonus." Reference is made in the judgment to the difficulty of deciding the question, in view of the many cases both in England and Australia that had arisen on the subject: "But it appears to be still the law that the intention of the company decides whether a distribution of profits is to be regarded as a distribution of income or capital." With respect to Knowles *v.* Balarat Trustees Company and Fisher *v.* Fisher, these cases did not "in any way depart from what is generally taken to be the rule in these cases, namely, that the tenant for life is entitled to receive whatever the company does deliberately distribute as profits." It is otherwise "if the company expresses that it is making a distribution of profits, but in effect is doing that with a view to converting its profits into capital . . . or if it states that it is making a distribution of its assets." If in fact "there is a deliberate distribution as profits with no intention of increasing the capital of the company or of making some capital adjustment," the tenant for life would primâ facie be entitled. Consistently with the principles of the two Australian cases cited, though an opposite result was arrived at, it was held that in the present case the tenant for life was entitled to the fund distributed as bonus in respect of the shares in question. The case was treated as similar to the English case of Re Thomas (114 L. T. Rep. 885; (1916) 1 Ch. 383). It is to be observed that Swan Brewery Company *v.* The King was not cited.

A comparison of this New South Wales with the latest English case—Inland Revenue Commissioners *v.* Blott (sup.)— will show a fundamental identity of reasoning, notwithstanding the difference in the respective circumstances of the two cases.—*Law Times.*

Cases of Interest

LIABILITY OF PUBLIC ACCOUNTANT.—It seems that a public accountant is not, merely because of negligence in making an audit of the books of a corporation, under contract with it, liable for losses sustained by one who purchases corporate stock in reliance on the audit. It was so held in Landell *v.* Lybrand, 264 Pa. St. 406, 107 Atl. 783, reported and annotated in 8 A. L. R. 461, wherein the opinion of the court was as follows: "Appellees, defendants below, are certified public accountants, and, as such, audited the books and accounts of the Employers' Indemnity Company for the year 1911. The appellant, plaintiff below, averred in his statement of claim that he had been induced to buy eleven shares of the capital stock of that company, at the price of $200 per share, on the strength of the report made by the appellees as to its assets and liabilities at the close of the year 1911; the report having been shown by someone who suggested that he purchase the stock. A further averment was that the report was false and untrue, that the stock purchased by him on the strength of it is valueless, and for the loss he sustained he averred the defendants were liable. To enforce this liability an action in trespass was brought against them. In their affidavit of defense they averred that the statement of claim disclosed no cause of action, and asked that this be disposed of by the court below as a matter of law, under the provisions of § 20 of the Practice Act of May 14, 1915 (P. L. 483). It was so disposed of by the court below in entering judgment for the defendants. There were no contractual relations between

the plaintiff and defendants, and if there is any liability from them to him, it must arise out of some breach of duty, for there is no averment that they made the report with intent to deceive him. The averment in the statement of claim is that the defendants were careless and negligent in making their report; but the plaintiff was a stranger to them and to it, and, as no duty rested upon them to him, they cannot be guilty of any negligence of which he can complain. Schiffer *v.* Sauer Co. 238 Pa. 550, 86 Atl. 479. This was the correct view of the court below, and the judgment is accordingly affirmed.

JUSTIFIABLE HOMICIDE IN PREVENTING ELOPEMENT.—In State *v.* Douglas (S. Car.) 101 S. E. 648, reported and annotated in 8 A. L. R. 656, it was held that a man and his son have the right to stop the attempted carrying out of a conspiracy to steal his infant daughter for the purpose of marrying her to a person objectionable to the father; and if the son is assaulted by one of the conspirators, the father may protect him even to the taking of life if that is apparently necessary. The court said: "If the deceased was engaged in carrying out an unlawful act by prearrangement and design on his part, acting in concert with the others, going to the house, or near it, after dark, for the purpose of assisting in the elopement of the daughter, under eighteen years of age, for the purpose of marrying her to a man objectionable to the father and without his consent, then the father and son were clearly within their rights in going out to stop it and prevent its accomplishment. It was for the jury to say whether the defendants went out for this purpose and whether or not the deceased stopped them or obstructed them. The evidence shows deceased was beating the son. From all the evidence in the case no other inference can be drawn; that they did not meet by accident. It was for the jury to say whether or not the deceased was not there by a preconceived agreement with another or others, to assist in an unlawful act. If the son went out to prevent his sister from eloping, and not to raise a row, then he was acting within his rights. If he was obstructed or stopped by the deceased, then it could not be inferred that he brought on the difficulty. He was engaged in a lawful act, and if deceased was there by a preconceived agreement, to assist in participating in an unlawful act, he had no right to obstruct or stop the defendants or either of them. Both the defendants, father and son, had the right to prevent the elopement of daughter and sister, and were not to be prevented by strangers engaged in an unlawful act, and, if either were assaulted under the circumstances, they had the right to protect themselves and to protect each other. . . . The jury were clearly entitled to consider the plea of self-defense. If Douglas shot in defense of his son, it is within the province of the jury to pass on that. A father or son has the right to protect each other. If the son was without fault in bringing on the difficulty, and was assaulted under such circumstances as would justify a person of ordinary prudence and reason in believing he was in immediate danger of loss of life, or receiving serious bodily harm, from which he had no probable means of escape by retreat or otherwise, then, under circumstances of this sort, he has a right to take life. And under similar circumstances the son can kill to protect his father."

CONVERSATION BY TELEPHONE AS FALSE PRETENSE.—In State *v.* Peterson (Wash.) 186 Pac. 264, reported and annotated in 8 A. L. R. 652, it was held that one may be convicted of attempting to obtain goods by larceny through false pretenses by telephoning a store and ordering goods in the name of a credit customer, although the storekeeper is not deceived and attempts to make a delivery of them for the purpose of entrapping the guilty person. The court said: "It is the appellant's first contention that the evidence fails to connect the appellant with the person who ordered the merchandise over the telephone. There was no direct evidence of the fact, it is true, but the indirect evidence to our minds hardly leaves the matter in doubt. Her conduct at the time of the attempted delivery to the station agent, her subsequent explanations, and her behavior generally, all tended to show that she was either the person who telephoned, or that she had intimate knowledge of the act and the purpose sought to be accomplished thereby. Either conclusion would justify the verdict of the jury. A further contention is that the facts shown do not constitute an attempt to commit a crime. The argument is that, since the employees of the store were not deceived by the false pretense, and since they did not part with the goods because thereof, there would have been no crime of larceny had the appellant procured the goods from the messenger and carried them away, and that the rule is there can be no attempted crime in cases where there could be no crime if the attempt had been successful. But this argument overlooks the fact that the attempt to deceive by the telephone order is as much a part of the offense as was the attempted taking and asportation of the goods at the depot. Had the ruse succeeded in its entirety, there would have been a consummated offense, and it does not follow from the fact that the employees of the merchandise house were not deceived there is taken away from the transaction the element of attempt to deceive. A further contention is that the court erred in admitting evidence of the telephone conversations, and erred in refusing to strike the evidence on a subsequent motion made to that effect. The objection is that the appellant was in no way connected with the conversations. Our conclusion to the effect that the evidence does sufficiently connect the appellant with the conversations is probably a sufficient answer to the objection, but the evidence was properly admitted in any event. It was a part of the circumstances of the transaction, necessary to an understanding thereof, and as much entitled to be shown as any other circumstances connected therewith. Its probative effect to establish the appellant's guilt depended upon the evidence connecting her therewith, but it was admissible regardless of this question."

LIABILITY OF ONE HIRING AUTOMOBILE FOR NEGLIGENCE OF CHAUFFEUR.—In McNamara *v.* Leipzig, 227 N. Y. 291, 125 N. E. 244, reported and annotated in 8 A. L. R. 480, it was held that one who hires the use of an automobile furnished with a chauffeur from a garage keeper for a number of months is not liable for injuries caused by the negligent driving of the chauffeur, where he merely directs the chauffeur as to when and where to go, while the garage keeper hires and pays him and contracts to furnish the fuel and upkeep of the car and procure insurance against accident. The court said inter alia: "A servant lent or let by his master to another does not become the servant of the other because the other directs what work is to be done. If the servant remains subject to the general orders of the person who hires and pays him, he is still his servant, although specific directions may be given him by the other from time to time as to the work to be done. The other person has the right to exercise the degree of control of the servant essential to secure the fulfilment of the agreement between the master and himself. Johnson *v.* Netherlands American Steam Nav. Co. 132 N. Y. 576, 30 N. E. 505; Standard Oil Co. *v.* Anderson, 212 U. S. 215, 226, 53 L. ed. 480, 485, 29 Sup. Ct. Rep. 252; W. S. Quinby Co. *v.* Estey, 221 Mass. 56, 108 N. E. 908. Those principles have been frequently applied to the letting or hiring of a carriage or wagon with horses and a driver to be used for the conveyance of the hirer or his property from place to place. The judicial decisions hold clearly

and almost uniformly that in the care and management of the horses and vehicle the driver does not become the servant of the hirer, but remains subject to the control of the general employer, and that therefore the hirer is not liable for his negligence in driving. . . . The same rule is applied in the letting of an automobile and a chauffeur. Shepard *v.* Jacobs, 204 Mass. 110, 26 L. R. A. (N. S.) 442, 134 Am. St. Rep. 648, 90 N. E. 392; Wallace *v.* Keystone Auto Co. 239 Pa. 110, 86 Atl. 699; Gerretson *v.* Rambler Garage Co. 149 Wis. 528, 40 L. R. A. (N. S.) 457, 136 N. W. 186. In the present case the written agreement defines the relation and liabilities of the parties. It gave for a consideration to the defendant the use, at demand, of the automobile and a chauffeur to operate and run it for a certain period. The company possessed, managed, cared for, and supplied the automobile and selected, employed, and controlled the chauffeur who operated the car for it. The extent of the defendant's control was to direct the chauffeur when and where to come with the automobile, where to go, and where to stop. In obeying those directions the chauffeur was carrying out the company's work under the agreement. The defendant had no authority, management, or care over the automobile, or as to the manner in which it should be treated or driven. The chauffeur did the company's business in his own way, and the orders given him by the defendant merely stated to him the work which the company had arranged to do."

RIGHTS OR PROPERTY INCLUDED IN LEASE OF HOUSE BY STREET NUMBER.—In Meredith *v.* McCormick (Mich.) 175 N. W. 280, reported and annotated in 8 A. L. R. 669, it was held that a lease of a house by the street number includes only so much of the lot on which the building stands as is necessary for the complete enjoyment of the building for the purpose for which it is let. Within this rule, it was held, a lease of a rooming house includes the right to use a portion of the yard in the rear for the storage and seasoning of wood to be used as fuel in the house, and also the right to the use of a walk leading from the house to an alley in the rear for the purposes of ingress and egress, the removal of garbage, and the like. The court said: "It is the contention of the defendant that the plaintiff, having leased 145 Harper avenue, did not lease the building and its appurtenances, but only the house. He contends: 'He therefore had no right to anything but the house, and he has not been denied any right in the occupancy of the house.' We think this is too narrow a view of the matter. There was testimony offered and received tending to show the understanding of the parties independent of the written lease. We think evidence could not be introduced to vary the terms of the lease. The intent of the parties is to be found by an examination of the lease. There ought not to be much question about the law that should govern this case, for defendant's counsel say: 'We accept counsel's statement of the law applicable to this case. "The general rule is that a description of premises in a lease of a building by the street number includes so much of the lot upon which the building is situated, as is necessary to the complete enjoyment of the building for the purpose for which it was let, and nothing more.'" Defendant's counsel contend, however, that a different rule should be applied to a rooming house from that of a dwelling house. It is very apparent that a rooming house in Michigan climate must be heated, as well as a dwelling house. We think the use of the portion of the back yard between the cement walk and the east line of the premises might lawfully be used by the plaintiff for the purpose of piling wood to be seasoned for use. That was, in our opinion, necessary to the complete enjoyment of the building for the purpose for which it was let. We think that plaintiff was also entitled to the unobstructed use of the cement walk extending from the rear of No. 145 to the alley, for the purposes of ingress and egress, and for the purpose of removing garbage, and other like uses; and when the defendant proposed to build a garage over the cement walk, thus interfering with access to the alley, he encroached upon the plaintiff's rights as a tenant. It is true that the defendant testified that he planned to deflect this cement walk where it comes to the garage and then at the side, so that the tenant would have access to the alley the same as before. There is no claim by defendant that this has been done. We are of the opinion that the plaintiff will have no just cause to complain of the garage when such proposed cement walk is built around the south and west sides of the garage to the alley. Until that is done, the plaintiff has a right to have the defendant restrained. We think the decree below should be reversed, and instead of dismissing the bill, we think the plaintiff is entitled to an injunction restraining the defendant from interfering with, or molesting or moving, any wood that the plaintiff may put on the east side of the cement walk for the purposes described; and that such piling does not in any manner interfere with the use of said back yard or court by the other tenants in the terrace. We are also of the opinion that the plaintiff is entitled to an injunction restraining the defendant from erecting the garage at the place mentioned, until such time as he shall have built upon the south and west sides of the proposed garage a walk to the alley. When that is done so that the plaintiff has access to the alley over the cement walk, we think the injunction as to the garage should be dissolved, as the same would not materially interfere with the covenant for peaceable possession contained in the lease."

ADMISSIBILITY OF TESTIMONY AS TO DECLARATIONS OF PASSENGERS AND DISPUTE WITH ENGINEER ON ISSUE OF BLOWING OF TRAIN WHISTLE BEFORE COLLISION.—In Panhandle, etc., R. Co. *v.* Laird (Tex.) 224 S. W. 305, it was held that on the issue whether a locomotive whistle was blown prior to a collision at a crossing, neither the testimony of a bystander as to what he heard passengers say about the whistle being blown nor the testimony of several witnesses as to a dispute between such bystander and the engineer as to whether the whistle was sounded, was admissible in evidence. The court said: "The sixth, thirteenth, fourteenth, and fifteenth assignments will be considered together. The sixth complains at the refusal of the court to charge the jury not to consider the testimony of D. A. Brooks as to what he heard passengers say about the whistle being blown. The appellant also objected to the testimony of this witness when it was offered, because it was hearsay. He testified after the collision, and after the train backed up, that he heard one or two passengers say they did not hear the engine whistle for the crossing. The other assignments are to the testimony of several witnesses, to the effect that after the train backed up and passengers alighted and had gone to appellee, and while he was being moved into the train for the purpose of carrying him to the sanitarium, D. A. Brooks said the engineer did not blow the whistle, and the engineer said he did, and Brooks hit the engineer in the mouth. Brooks further said if any one wanted to take it up he was open for all engagements. Some of the witnesses state the engineer said any one who said he did not blow the whistle was a liar. The various witnesses give just a little different version of the occurrence, but all concur that the fight came up over a dispute as to whether the whistle was sounded or not. The following witnesses were permitted to detail this occurrence, over the objection of the appellant, to the effect that it was hearsay, prejudicial to its rights, and not binding on it: Carsteen, Vance, O. E. Brooks,

D. A. Brooks, Smith, Truskitt, Hilton, and Frost. Proper bills of exception were taken to the testimony of each of these witnesses. If the evidence is admissible, it was so because it was a part of the res gestae. We think one of the rules for determining whether evidence is part of the res gestae is to ascertain if the declarations, when made, were a part or a continuation of the transaction sought to be established, or whether it had terminated, and, as held by our courts, such as are made under circumstances as will raise reasonable presumption that they are the spontaneous utterances of thoughts created by or springing out of the transaction itself. . . . We do not think the declaration of one or two passengers who stated the whistle was not blown, as testified to by Brooks, admissible. The evidence does not seem to us to be spontaneous or instinctive. The circumstances show there was a difference of opinion as to the blowing of the whistle by the parties present. These parties were evidently considering the liability or nonliability of the railroad, and were debating the question of negligence, whether in words, at least mentally. The statement has the earmarks of premeditation. Clearly, we think the dispute between Brooks and the engineer and the fight which resulted was not admissible. It is true our courts, with some others, hold the admission of some evidence is in the discretion of the trial court. The facts, however, must be sufficient to justify the reasonable conclusion that the declarations were made under such circumstances that reason and reflection were not dominant, but that they were made from impulse. Railway Company *v.* Huckabee, 207 S. W. 329. This testimony objected to evidently turned the scales in favor of the appellee. The appellant produced several witnesses, who testified positively that the whistle was sounded. Some of them were not connected with the railroad. One, a gentleman from Iowa, who was looking at the country at the time, says when he heard the whistle he thought they were approaching the station, and looked out to see it, and when the train slowed up he saw the wreck. A farmer, driving his team on the dirt road, testifies that appellee passed him in his car near the whistling post, and was running with the train, and that the whistle was sounded, and frightened his team, and after he got them quieted he saw the train stop, and saw the car of appellee as it lay by the way. Others swear positively the whistle was blown. Brooks and appellee swear positively it was not; others that they did not hear it. Brooks put this issue to the test by wager of battle, and in that trial it appears established the truth of his assertion. William the Conqueror may have brought the trial by wager of battle to England, but we are not informed that any one ever brought it to America. This evidence should not have been received or permitted to go to the jury, and ought not to have influenced the discretion of the court in favor of its admission."

News of the Profession

MARQUETTE COUNTY BAR ASSOCIATION OF MICHIGAN.—This association at a recent meeting re-elected C. F. Button president.

SKAGIT COUNTY BAR ASSOCIATION OF WASHINGTON.—At a recent meeting of the Skagit County Bar Association Ben Driftmier of Anacortes was elected president.

FAYETTE COUNTY BAR ASSOCIATION OF PENNSYLVANIA.—At the annual meeting of the above association held recently J. B. Adams was elected president.

OHIO COUNTY BAR ASSOCIATION OF WEST VIRGINIA.—This association has arranged for a series of ten noonday luncheons to be held on alternate Wednesdays.

BAY COUNTY BAR ASSOCIATION OF MICHIGAN.—L. J. Weadlock is the new president of the Bay County Bar Association of Michigan. The annual banquet will be held in February.

KENTUCKY JUDICIAL CHANGES.—Ernest U. Dodson has been elected judge of the Brocken County Court to fill the vacancy caused by the death of Judge W. H. Gibson.

ALABAMA BAR ASSOCIATION.—It has been announced officially that the next annual meeting of the Alabama Bar Association will be held at Birmingham, April 29, 1921.

ALABAMA JUDGE RESIGNS.—Judge Horace C. Wilkinson of the Jefferson County Circuit Court, Alabama, has resigned to practice law with A. G. Smith in Birmingham.

CLEVELAND BAR ASSOCIATION.—Clarence S. Darrow of Chicago addressed the Cleveland Bar Association at a recent meeting. The subject was "Crime and Criminals."

MASSACHUSETTS ASSOCIATION OF WOMEN LAWYERS.—At the Women's City Club of Boston there was recently held a meeting of the Massachusetts Association of Women Lawyers.

JUDICIAL CHANGES IN IOWA.—District Judge Lawrence De Graff of Iowa has been elected to the Supreme Court. James C. Hume of Des Moines will be his successor on the District bench.

INDIANA JUDICIAL CHANGES.—Paul M. Souder, an Indiana lawyer, has become a judge of the Case Circuit Court, succeeding Judge John S. Lairy who had occupied the bench for eighteen years.

NEW ATTORNEY GENERAL OF PENNSYLVANIA.—George E. Alter of Springdale, Allegheny County, Pennsylvania, has been appointed attorney general of the state succeeding William I. Schaffer.

DALLAS COUNTY, TEXAS, HAS YOUTHFUL ASSISTANT PROSECUTOR.—Harry E. MacNicoll, 20 years old, and a member of the Dallas bar, has been appointed assistant district attorney of Dallas county.

ASSISTANT ATTORNEY GENERAL OF ILLINOIS RESIGNS.—Matthew Mills in charge of the Chicago office of the attorney general of Illinois has resigned to join the firm of Defrees, Buckingham & Eaton.

CHANGE IN CALIFORNIA JUDICIARY.—F. B. Brown of San José, California, has been elected a judge of the Superior Court. He was born at Galva, Illinois, and was graduated from Knox College in 1885.

RETIREMENT OF PROMINENT PENNSYLVANIA ATTORNEY.—James S. Moorehead of the Westmoreland County Bar, Pennsylvania, has retired from practice. He was admitted to the bar in 1870 and was educated at Jefferson College.

NEW YORK ASSEMBLY OF 1921 CONTAINS MANY LAWYERS.—More than one-third of the members elected to the 1921 State Assembly of New York are lawyers. Farmers come next with a membership of about one-fifth of the body.

ALLEN COUNTY BAR ASSOCIATION OF INDIANA.—Judge Howard L. Townsend of the Indiana Supreme Court and Judge Dan M. Link of the De Kalb Circuit Court were speakers at a banquet given by the Allen County Bar Association in December.

CHANGES IN CIRCUIT COURT OF CHICAGO.—Francis S. Wilson of Chicago is now a member of the Circuit Court of Chicago, having been inducted into office recently. Judges George F. Barrett and John P. McGoorty of the same court have resigned.

BROOKLYN LAWYER APPOINTED ASSISTANT DISTRICT ATTORNEY.—District Attorney Lewis of Brooklyn has appointed Joseph V. Gallagher as an assistant district attorney. He is a graduate of the law school of the University of Pennsylvania.

DEATH OF WELL KNOWN NEW YORK JUDGE.—Judge James T. Malone of the General Sessions Court of New York city died suddenly in December. He was a graduate of Harvard in the class of 1889 and had the reputation of being an unusually able judge.

NEBRASKA BAR ASSOCIATION.—The twenty-first annual convention of the Nebraska Bar Association was held at Lincoln December 27 and 28. Judge William M. Morning delivered the annual president's address.

LOUISIANA BAR ASSOCIATION.—This association has a definite plan for the reorganization of the judicial system of the state which it will present to the Constitutional Convention. Walker Spencer of New Orleans is chairman of a committee which prepared the plan.

BALTIMORE BAR ASSOCIATION.—Judge Hammond Urner of the Maryland Court of Appeals was the speaker at the recent annual dinner of the Baltimore Bar Association. Another speaker was William F. Frierson, Solicitor General of the United States. Eli Frank was toastmaster.

NEW BAR ASSOCIATION IN IOWA.—A bar association of the Twenty-first Judicial District of Iowa has been organized, and the first annual meeting was held recently at Sheldon. There were lawyers present from the six counties in the district. William Hutchinson was elected president.

VACANCY IN SUPREME COURT OF PENNSYLVANIA FILLED.—The vacancy on the Supreme Court Bench in Pennsylvania caused by the death of Judge John Stewart has been filled by the appointment of Attorney General William I. Schaffer to that position. Judge Schaffer was born in Germantown in 1867.

CHIEF JUSTICE OF KANSAS SUPREME COURT HONORED.—W. A. Johnston of the Kansas City Supreme Court was honored by a banquet at the annual meeting of the Kansas Bar Association held in November. He has been a justice of the Supreme Court for a period of thirty-six years and has written over two thousand opinions.

ILLINOIS BAR ASSOCIATION HONORS JUSTICES OF SUPREME COURT.—The Illinois Bar Association recently gave its annual reception and dinner in honor of the justices of the Illinois Supreme Court. The principal speakers were Chief Justice James H. Cartwright, Justice Clyde E. Stone and Theodore C. Burton.

UNITED STATES ATTORNEY OF OHIO NAMES ASSISTANT.—United States Attorney E. S. Wertz of Ohio has appointed Delos J. Needham as an assistant to fill a vacancy caused by the resignation of Richard S. Douglas. Assistant United States Attorney Joseph C. Breitenstein of the same office has been made chief of trial work in the Toledo office.

FIFTH JUDICIAL DISTRICT ILLINOIS STATE BAR ASSOCIATION.—Members of the Illinois State Bar Association of the Fifth Judicial District held a two days' meeting at Ottawa in December. About one hundred lawyers from the ten counties of the Fifth District were present. Clarence Griggs of Ottawa was elected president. The 1921 meeting will be held at Kewanee.

ASSISTANT STATE'S ATTORNEYS IN CHICAGO RESIGN.—Hartley L. Replogle of Chicago, assistant state's attorney, who conducted for the grand jury the investigation of the baseball scandal in regard to the 1919 world's series, played between Cincinnati and the White Sox, has resigned. Other state's attorneys of Chicago resigning recently are James C. O'Brien, John Prystalski and John Owen.

DEATH OF VERY PROMINENT NEW YORK LAWYER.—Francis Lynde Stetson, senior member of the law firm of Stetson, Jennings & Russell of New York city, and general counsel for J. P. Morgan & Co. and the United States Steel Corporation, died December 5. The late Grover Cleveland was a law partner of Mr. Stetson in the interval between his two terms as President. Mr. Stetson was a member of the Williams College Board of Trustees, and a devoted alumnus of the college, which will get much of his large estate. At the time of the Tilden-Hayes struggle for the presidency Mr. Stetson served as Mr. Tilden's counsel, and he had been Mr. Tilden's secretary while the latter was Governor of the State of New York.

English Notes*

A LOST FRENCH WILL.—An echo of the German invasion of France was heard in the First Chamber of the Civil Tribunal of the Seine recently relative to a will that had disappeared. In 1916 Mlle. Lefranc placed in the custody of Me. Guiard Latour, notary of Saint Quentin, her last will and testament, by which she bequeathed her whole estate to M. Jules Desjardins, and, *à son défaut,* to his children. When St. Quentin had to be evacuated by the civil population, Me. Guiard Latour, following the orders of the German command, placed Mlle. Lefranc's testament, with others, in a strong box, which was deposited in the cellar of his residence, the door of which was bricked in, and on the wall was opposed a notice, signed by the German commander, proclaiming the inviolability of the depot. In October, 1918, Me. Guiard Latour was able to return to St. Quentin, and he then found that his house was demolished, but in the cellar was the strong box broken open and the documents abstracted. A few weeks later, in January, 1919, Mlle. Lefranc died, M. Jules Desjardins having predeceased her. His heirs demanded from the tribunal authorization to reconstitute the will by witnesses and inquiry, a demand in which the court acquiesced, notwithstanding opposition from blood relations of the testatrix. After pleadings by Me. Eugene Cremieux for the *heritiers naturels* and Me. Armand Dorville for the *heritiers* Desjardins, the tribunal has decided that no fault could be imputed to Me. Guiard Latour, and that his testimony ought to be accepted. Consequently the court decided in favor of the heirs of M. Desjardins.

GENERAL CHARITABLE INTENTION.—In the leading case of Moggridge *v.* Trackwell (7 Ves. 36) the testatrix gave all her residue to James Vaston "desiring him to dispose of the same in such charities as he shall think fit," recommending poor clergymen who have large families and good characters. Vaston predeceased the testatrix. Lord Eldon in giving his judgment said: "These cases call on me to say, the general intention of this testatrix, who seems to have been saturated and satiated with the idea of charity, and yet not to have had mind enough herself to determine upon the particular objects, was to devote her property to charity, and, according to these precedents, Vaston was only the means and instrument by which that general intention was to be executed, and therefore this court will carry that general intention into effect." That judgment was affirmed by the House of Lords in 13 Ves. 416, and is regarded as the leading case on the subject. The difficulty which a judge encounters in cases where someone is deputed by the testator to select the charities, and he dies without doing so, is to find out if there is a general charitable intent shown in the will or

*With credit to English legal periodicals.

whether the gift to charities is dependent on the selection by the named person. Mr. Justice Astbury in the recent case of Re Willis took the latter view, where the words of gift were "to such charitable institution or society in England, Russia, or elsewhere as may be selected by my friend M. W. within three calendar months from the time of the decease of my sister," and both the friend and sister predeceased the testatrix. The Court of Appeal have, however, taken the view that there was a general charitable intent which the court will carry into effect.

THE LAUNDRESS PAST AND PRESENT.—The Minister of Labour has given notice in the *London Gazette* that he proposes to consider whether the employment of a person as a charwoman employed in a solicitor's office is or will be such employment as to make the person an employed person within the meaning of the Unemployment Insurance Act 1920. No notice has been given as to laundresses in barristers' chambers, though their functions are somewhat similar. A laundress, however, is more clearly engaged in domestic service and, therefore, exempt from the operation of the act. She holds an office which for centuries has been primarily associated with the most domestic affairs of life. The simple and expeditious method which the laundress adopted of emptying the domestic utensils out of the window regardless of passers-by was a frequent cause of anxiety to the Benchers of the Inns of Court, whose only remedy was to impose fines on the tenants of the chambers. The orders on the subject recur frequently in the records of the Inn for at least three hundred years, as may be shown by a quotation from the Black Books of Lincoln's-inn under date of November 29, 1613, defining the duties of the porter: "Item, that hee bee circumspect and diligent in lookinge to such nuisances as shall happen in the House by the sluttishness of laundresses and others, and that hee shall give notice and warninge of the same to the gentlemen of such chambers from which such nuisances come; and if after such warninge and notice there bee againe anye such faultes committed, the gentlemen of those chambers to bee questioned for the same before the Masters of the Bench." It will be interesting to see what will be the effect of women barristers occupying chambers in which the cleaning, as now understood, is done ostensibly by a laundress.

POISON GAS.—It is well known that a declaration signed at The Hague on July 29, 1899, prohibited the use of projectiles designed solely to spread asphyxiating or harmful gases, that during the war Germany violated the pledge which she then gave, and that in consequence poison gas came into general use. The future of this weapon of chemical warfare is, as Mr. Bonar Law recently stated in the House of Commons, "under the consideration of the League of Nations," and it is a problem that should be solved speedily, for so long as the attitude of the League is unknown, preparations must be made for any eventuality, and expense perhaps needlessly incurred. The problem raises two important questions of principle. The first is whether, having regard to the nature of war, there is sufficient reason for distinguishing between means of attack and defense by permitting some and prohibiting others. The second question, which is of still greater complexity, is whether the peoples of the world are prepared to provide for the enforcement of any prohibitions which their representatives make on their behalf. On the answer to this question the future of this and all other laws of war must depend.

The Assembly of the League will have temptations enough to fall into the errors of its predecessors. The nineteenth century was prolific in international conferences. They legislated for the community of States at peace and at war; their deliberations, and the treaties which they signed, fill volumes; but in the Great War, which they did not prevent, their efforts had little success in mitigating horrors or preserving the fabric of the old order. This was because they created laws without providing a sanction for them. The sanction of the law of peace, both customary and conventional, has always been reasonably strong; but the means available to secure the observance of the laws of war are admittedly inadequate, and the delegates to The Hague did little to strengthen them. If the Assembly of the League is invited to follow in their footsteps, let the fate of the Hague Declaration on poison gases be their warning. No doubt the League was created primarily to prevent war, and, if it should wholly succeed, there would be no further use for poison gas. But if, as now seems inevitable, there are to be more wars, neutrals and belligerents alike will then turn to the League, and the League must be prepared, not only to make declarations concerning the laws of war, but to enforce them.

SUSPENSION FROM THE HOUSE OF COMMONS.—Mr. Bonar Law as Leader of the House of Commons and acting on behalf of the Government, moved recently to rescind the order for the suspension from the service of the House of Commons which had been made a few days before the adjournment in August in the case of Mr. Joseph Devlin. Mr. Law's motion had priority as a motion made by a Minister of the Crown, the Government having control by a resolution of the whole business of the House. A motion to rescind the order for the suspension of a member, or to terminate his suspension, is not entitled to priority as a privilege motion, although the Speaker on one occasion in 1901 accorded such priority to a motion for the rescinding of a motion for the suspension of a member under the special circumstances of the case, as it appeared that the member had been reported in error for disobeying the authority of the Chair. Suspension from the service of the House was a method of punishment very seldom applied in early Parliamentary history. Practically speaking, it was used only in the times of Charles I, the Commonwealth, and Charles II. From 1692 the power had not been put in force till 1877, when the Speaker (Mr. Speaker Brand) solemnly reminded the House of its existence and brought about its revival. Under the rules as they stood before February 13, 1902, a first suspension lasted for a week, a second for a fortnight, and subsequent suspensions for a month. On that day the provisions as to time were struck out, but no new ones were inserted either then or subsequently. The result is that an order of suspension when made now lasts until it is rescinded, or, if it is not sooner rescinded, until the end of the session. The rules therefore stand in the peculiar condition of being silent upon the most important point, the punishment to be awarded for disorder. In the official edition of the Standing Orders the old words appear crossed out, no substitutes for them having been provided. The proposals as to more rigorous penalities for breaches of order were fiercely opposed in 1902. The debates were prolonged over two sittings, and displayed so much opposition, even on the Ministerial benches, that the Government preferred to accept a motion for a temporary postponement, and, in point of fact, the House never returned to the subject. "The House," in the words of Professor Redlich, "showed its good sense and its want of anxiety as to its discipline by leaving the whole question in the air."

DEFINITION OF "BANK."—Mr. Walter Leaf, president of the Institute of Bankers, in his annual address considered the desirability of giving a legal definition to the word "bank," as he understood that a Bill had been drafted for that purpose. The Clearing House Committee had adopted the definition that "a bank, as the term is understood in this country, may be broadly described as a firm or institution whose main business

is to receive from the public moneys on current account repayable on demand by check." Mr. Leaf suggested that in this definition "main business" meant something like "characteristic feature," but even then it might be urged that the "main business of a bank is not the receipt of money from the public, in which its action is largely passive, but the relending of that money." Since there is no statutory definition of a bank, there is no considerable body of judicial opinion upon the subject of banking, but Stroud's Judicial Dictionary directs attention to a useful definition by the Privy Council in considering the word as it occurs in the British North America Act 1867, s. 91. The court considered that the expression is wide enough to embrace every transaction coming within the legitimate business of a banker—e.g., lending money on security of goods or documents: (Tennant *v.* Union Bank of Canada (1894) A. C. 31). In the Supplement to Stroud there is cited an Irish case (Re Shields, 1901, 1 I. R. 172) in which "banker" is defined to be one "who traffics with the money of others for the purpose of making profit. . . . If he keeps open shop for the receipt of money from all who choose to deposit it with him, if his business is to trade for profit in money deposited with him for that purpose, he answers the description of a "banker." In Bedwell's Australasian Judicial Dictionary there is a definition which seems to express the views almost exactly of the president of the Institute of Bankers. In Commissioners of the State Savings Bank of Victoria *v.* Permewan, Wright, and Co. Limited (1914, 19 C. L. R., at p. 470) Mr. Justice Isaacs said that "the essential characteristics of the business of banking are the collection of money by receiving deposits upon loan, repayable when and as expressly or impliedly agreed upon, and the utilization of the money so collected by lending it again in such sums as are required." There is absence of uniformity both of banking law and practice in the Empire which operates against closer business relations. A beginning might be made towards its removal by adopting a common definition of banking.

REVOCATION OF A SHARE OF RESIDUE.—A testator leaves his residue to (say) four named persons in equal shares, and one of those persons cannot take his share because he has died before the testator, or the latter has subsequently revoked his share. Probably the testator intends the other three to take the whole residue between them, but this is merely a conjecture, as when he made his will he intended them to take one fourth each, and the effect as regards them of the death or the revocation of the share of the fourth person may never have been present to his mind, and there is no reason, at any rate in many cases, why we should suppose that, if it had been so present, he would not have substituted another person for the one whose share thus fails. The general law is thus accurately laid down in Jarman on Wills, 6th edit., p. 1056: "Where a testator makes a residuary bequest of all his personal estate, the general rule is that if a gift of a share of the residue fails, it does not accrue to the other shares, but goes to the next of kin. Thus, where a residue is bequeathed to four persons as tenants in common, and one of them predeceases the testator, there is an intestacy as to his fourth share. So, if the bequest to one of them is revoked by a codicil." Mr. Justice Joyce in Re Whiting (108 L. T. Rep. 629; (1913) 2 Ch. 1) broke in on this rule. By his will the testator gave his residuary estate on trust for sale and directed his trustees to hold the net proceeds on trust to divide equally between forty-six persons. By a codicil he revoked the bequests of two of these shares and he confirmed his will. The learned judge asked whether any lawyer, or other rational being, could entertain any doubt as to what was the intention of the testator when he executed the codicil. He came to the conclusion that he intended the other forty-four persons to take the whole of the residue. A lawyer and a rational being has, however, ventured to differ from Mr. Justice Joyce's decision. For Mr. Justice Sargent in the recent case of Re Wilkins (123 L. T. Rep. 571; (1920) 2 Ch. 63) said that that decision was quite contrary to the authorities, though, from certain other words in the codicil before him, he was able to decide that the revoked share was not undisposed of, but went to the other residuary legatees. These points should be present to the mind of the draftsman when drafting the will or making the revocation in the codicil. In order to avoid the possibility of a share or shares being undisposed of owing to the death of some one or more of the legatees, it is as well to give the residue "to such of the following persons—namely, A, B, C, and D—as shall survive me and if more than one in equal shares."

THE SIMILARITY BETWEEN THE AMERICAN ELECTORAL COLLEGE AND THE HOUSE OF COMMONS.—The fact that the election of the Electoral College of America is in reality the election of the President of the United States is an admirable object lesson, says the *Law Times*, of the fact that no Legislature can forecast the effect of its legislation, however deliberately made. It was intended that the deputies—the Electoral College—when assembled should exercise a real discretion and by independent choice select the President. But the primary electors take too much interest. They only elect a deputy to vote for a certain Presidential candidate. The deputy never chooses. He is only a messenger or transmitter; the real decision is in those who chose him, because they know what he would do. Mr. Bagehot thinks that, generally speaking, in a country full of political life and used to the manipulation of popular institutions the election of candidates to elect candidates is a farce, and that the Electoral College of America comes under this category. He thinks, however, that a Cabinet elected by a Legislature is elected in the very best way, and is a case in which secondary election is preferable to primary—taking for an illustration the election by the House of Commons of a Cabinet. "Members," he writes, "are mostly perhaps elected because they will vote for a particular Ministry rather than for purely legislative reasons. But—and here is the capital distinction between the Presidential and the Cabinet system—the functions of the House of Commons are important and continuous. It does not, like the Electoral College in the United States, separate when it has elected its ruler; it watches, legislates, seats and unseats Ministries from day to day. Accordingly it is a real electoral body." In the fifty years which have elapsed since Mr. Bagehot wrote, observers of constitutional development so acute as Sir Sidney Low and Sir William Anson incline to the conclusion that the House of Commons, like the Electoral College of America, has become only a Chamber of Deputies to register the choice of the primary electors. Mr. Bagehot again and again insists on the choosing power of the House of Commons. "The House of Commons," he writes, "is an electoral chamber; it is the assembly which chooses our President." Sir William Anson, however, maintains that the House of Commons is now no longer an electoral chamber. "The capricious exercise of its powers of choice, as exemplified by the fall of Lord Palmerston's Government in 1857 and of Lord Russell's in 1866, would no longer be possible now." Mr. (Sir Sidney) Low puts this very plainly: "It is the constituencies which in fact decide on the combination of party leaders to whom they will from time to time delegate their authority. The member of Parliament sent to the House of Commons by his constituents goes there under a pledge that he will cast his vote under all normal conditions, during the life of the Parliament, for the authorized leaders of his party."

Obiter Dicta

THE GREAT UNWASHED.—People *v.* Soap, 127 Cal. 408.

WHAT THE DRYS DID!—Sprinkle *v.* United States, 244 Fed. 111.

POOR GRAMMAR IN NEBRASKA.—In re Grammer (Neb.) 178 N. W. 624.

NOT TO ANY APPRECIABLE EXTENT!—Bowlby *v.* Thunder, 105 Pa. 173.

NOT SO MUCH OF A KIDDER!—In Kidwell *v.* Oregon Short Line R. Co., 208 Fed. 1, the plaintiff was nonsuited.

NOT BIASED.—In Bias *v.* Insurance Co. (W. Va.) 101 S. E. 247, the jury and the appellate judges found for the defendant.

IT WORKED!—In Bluff *v.* State, 10 Ohio St. 547, the plaintiff in error secured a reversal of his conviction for counterfeiting.

THE USUAL PARTIALITY.—In Jackson *v.* Lady, 140 Ark. 512, the defendant won in both courts, the Chief Justice alone throwing chivalry to the winds.

GONE BUT NOT FORGOTTEN.—The case of Danciger *v.* Atchison, etc., R. Co., (Mo.) 179 S. W. 800, was an action for damages for the loss of a large quantity of intoxicating liquors, and Trimble, J., wrote the opinion. We confidently believe that to most of our readers the joke will still be apparent.

IN THE WAKE OF PROHIBITION.—A man was arrested recently for breaking into one of the Northport, L. I., stores and stealing lemon and vanilla extracts in the evident attempt to satisfy an unquenchable thirst. Simply another of the new crimes for which prohibition is responsible, one might say, to wit, extracting extracts.

"GET 'EM WHILE THEY'RE HOT!"—"The 'wiener' is a small sausage of unknown content, and is commonly called a 'hot dog,' as stated in the case. To a great many people it is a palatable and appetizing article of food, notwithstanding the implication attaching to one of its names."—See State *v.* Shoaf (N. C.) 102 S. E. 705.

A LIVE WIRE?—An Albany newspaper of recent issue contained the following among its want "ads":

> ROOM wanted by young business woman; pleasant, neat, with electricity, preferably in private family. Box 21-D, Knickerbocker Press.

DE MINIMIS NON CURAT LEX.—The history of the case of Pittsburgh, etc., R. Co. *v.* Fink, 40 Sup. Ct. 27, is as follows: The railroad company sued Fink in Justice's court in Ohio to recover $15. The case travelled thence to the Court of Common Pleas, thence to the Court of Appeals, thence to the Supreme Court of Ohio, and thence to the Supreme Court of the United States where the railroad got its fifteen. We wonder what the total bill of costs amounted to.

AGREED!—"No matter what our opinions may be as to the virtue of Scotch whiskey on a fishing expedition the Act does not permit it and it is therefore a question for the Legislature to deal with. I am certain it is the judgment of many people that to permit its use on such occasions as a precaution against chills (the great fear of trout fishermen) would tend to much greater production of fish in these times of scarcity of food."—Per Hyndman, J., in Rex *v.* Rose, [1918] 3 W. R. R. 955.

DIVING AS TEST OF VERACITY.—A unique law custom prevails among the Tangkhul Naga of the State of Manipur in Assam, according to the Rev. William Pettigrew, a Baptist missionary who has spent the past 30 years of his life working with this head-hunting tribe, under the auspices of the American Baptist Foreign Mission Society. The tribe knows so little of truth-telling that court cases usually resolve themselves into a contest of prevaricators, he says. When judges are unable to decide between rival liars, the diving test is applied. "Plaintiff and defendant, with the entire court at their heels, adjourn to the nearest stream," Mr. Pettigrew explains. "The plaintiff and defendant must then dive under the water. The one who remains under for the longest time, wins the case."

NOTHING NEW UNDER THE SUN.—A month or so ago we published in this column, under the caption "It Actually Happened," the story of an incident connected with a trial in a local police court, the point of the tale being the denial by a witness that he had been convicted of a crime because he had pleaded guilty thereto. A correspondent now comes forward, scoffing at our alleged discovery of a new joke, and commands us to read the following extract from the testimony of the accused in Betterton *v.* State (Okla.) 189 Pac. 760:

"Q. Is it true or is it not that you were convicted in Missouri of the crime of having murdered a woman?

"A. Well I was not convicted of a crime at all. I pleaded guilty to that crime."

Well, our joke was a good one while it lasted, anyway.

THE BLUE CAMPAIGN.—Our office boy has become greatly perturbed at the fanatical outburst of those few who fondly imagine the mantle of the Puritans to have descended to their shoulders and who purpose by that token to make us all good on Sunday under penalty of the law. Delving into the dust of the law between calls of the bell he has evolved the following: "I see as how these here guys are agin everythink! Well, they're runnin' true to form, I'll tell the world! They don't want us to do no ridin' around on Sunday, on no railroads (Blue *v.* Railroad Co., 1 Monag. [Pa.] 757) or even in our tin lizzies (Blue *v.* Ford, 12 Ga. 45). Shootin' on Sunday is agin their principles too (Blue *v.* Gunn, 114 Tenn. 414, and Blue *v.* Hunt, 208 Pa. 248). Why, they don't want us to have no fun at all! 'Fraid we'll laugh and grow fat, I suppose (Blue *v.* Stout, 3 Cow. [N. Y.] 354). I notice they don't hook up with any of these regular fellers who do real good in the world (Blue *v.* Hoover, 4 Ky. Law Rep. 889), and, well, may the Saints preserve us, if they kin (Blue *v.* Peter, 40 Kan. 701)!"—One case the bell-hop didn't observe was Blue *v.* Christ, 4 Ill. App. 351.

Correspondence

PERSISTENCY REWARDED

To the Editor of LAW NOTES.

SIR: The item in November LAW NOTES, headed "Patience Rewarded," prompts me to send you the following.

In 1859, a justice of the peace held that one brought before him on a charge of public intoxication could not give bail to appear at the Oyer and Terminer. The defendant was convicted, and his attorney, a young man who less than three years before had been admitted to the bar, sued out a writ of habeas corpus before a Supreme Court justice, who decided that the defendant was entitled to give bail and discharged him from imprisonment. The district attorney by certiorari removed the proceedings into the Supreme Court and that court at the general term reversed the order of the Supreme Court justice. But on writ of error the Court of Appeals (Hill *v.* People, 20 N. Y. 364) held that the Supreme Court justice was right, and reversed the general term.

The defendant's lawyer became a distinguished member of the Bar. His name was Nathaniel C. Moak.

JOHN T. COOK.

Albany, N. Y.

P. S. I might say that this "early" reward encouraged the young lawyer to "persist," which he did.

INTOXICATING LIQUOR AND POISONS

To the Editor of LAW NOTES.

SIR: In the November issue of LAW NOTES on page 141 you say: "Is it not about time that we abated a little our excited legal quest for 1 per cent beer and began to take an interest in the distillation of 100 per cent poison?"

Your position on this question is incontestably sound and I am glad to see that the Bar of America is beginning to take an intelligent interest in this most potent of dangers that threaten the Republic. However, has it ever occurred to you, that the XVIII Amendment has unintelligently given Congress the right to regulate and control the manufacture and sale of 1 per cent or 100 per cent poison whether distilled or not?

The words "intoxicating liquors," in the first section of the XVIII Amendment, are not technical words, that is, they do not apply particularly to any special art or science, but have a general meaning. "Intoxicating" is from the Greek *en*=in, and *toxicon*=poison, and literally means dipped in poison, and was first applied to the habit of the Scythian warriors in dipping their arrows in a liquid poison which infected the animal which they entered.

That an alcoholic liquor is intoxicating is not open to doubt, because it poisons, yet there are many other liquids which though they are non-alcoholic are very intoxicating. We may enumerate Theobroma cacao, or chocolate, which though a delightful beverage is intoxicating, in that it is an aphrodisiac and was used for this purpose long before the white man discovered its properties. Then we have teas made of the Ilex vomitoria, or yaupon, or yapon, a berry very common to the United States, with which the Indians from South America to the Carolinas made their famous "black drink," and is so used today. Then there is the Datura stramonium, or common Jimson weed, from which the Indians made a decoction that was highly intoxicating, and which intoxicated the British soldiers sent to quell Bacon's Rebellion (1675), and it is non-alcoholic, but exceedingly dangerous, inducing acute mania or insanity.

In the above enumeration I have confined my remarks to beverages, as the XVIII Amendment forbids only the manufacture and sale of "liquids" which I presume means beverages. Yet for all of this the danger is not confined to "liquids" or "beverages," for there is the Erythroxylon coca, from which is extracted the deadly cocaine, which the Indians used as we do tobacco or snuff for its intoxicating properties. Now a man may carry enough coca in his pockets to excite many men to homicidal mania; or a man may go into a drug store and carry out under his arm enough glycerine (a harmless and beneficial drug) which he can within a short time convert into nitroglycerine and have enough to destroy hundreds of lives and millions of property; or a traveling man can carry enough cotton wool in his suit case, which he can with a little patience and a knowledge of chemistry change into enough gun-cotton to destroy the Capitol at Washington—and the watch dogs of the law slumber peacefully.

Let, however, a man come out of a drug-store with a package of hops, and immediately the bull dogs of the Anti-saloon League oligarchy begin to growl and snap and foam at the mouth. Macaulay tells us that the Puritans objected to bear-baiting not because it gave pain to the bear but because it gave pleasure to the spectators.

Coca, glycerine, and cotton may be used for incest, murder, incendiarism, and the promotion of anarchy, therefore their use or abuse calls for no special wonder—but hops! they can be used and are used for home brew and exciting hilarity and good fellowship, and their sale must not be tolerated.

When I was a young man studying law, I learned my jurisprudence from James Kent and Joseph Story, and I was so intoxicated with their teachings that I became obsessed with the idea that the legislature could no more make that a fact which was not a fact than it could make an atom of oxygen or carbon, but as I grew older I learned more even if I did not become wiser.

Now the Courts have shown us that the Legislatures and Congress can under the police power make that a fact which is not fact, would it not be well for legislatures under the police power to make those things liquids which are not liquids, and those things beverages which are not beverages, and so put a check upon the manufacture of 1 per cent or 100 per cent poisons? And if not why not?

CHAS. E. CHIDSEY.

Pascagoula, Miss.

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Law Notes

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Increasing the Membership of Congress.

HOWEVER favorably it may be regarded by politicians, it is not likely that the proposition recently made to increase the number of representatives in Congress will meet with popular acclaim. The average man is beginning to believe that many of the ills of the body politic are due to the fact that Congress is now much too large. Every man with any experience in civic work knows that the larger the committee or mass meeting the more difficult it is to get effective and intelligent action. Either time is wasted in rambling talk or else a few men with a considered program run the entire meeting. This is true to a marked extreme in legislative halls. The committee system is designed to remedy this, but while it gives some measure of relief it brings its own train of ills, putting the legislative power largely in the hands of the men who control the principal committees. As a matter of fact, whatever of efficiency our legislative system possesses is due to the fact that the real power is in the hands of a comparatively few men, the leaders of the majority party. Increase the nominal membership as you please and this fact will remain. The vice of it is that it is power without responsibility; power built up through an extra-constitutional system. If it is true that the most efficient legislation can be had through a small assembly, by all means let the power be conferred directly, and with concomitant responsibility.

Need for Legislative Reform.

SOME substantial change in our legislative system seems inevitable in the near future. Two tendencies have recently developed whose combined action will surely produce increasing dissatisfaction. One is the great increase in the legislative power. The extraordinary growth of the police power doctrine is the outstanding feature of the decisions of the last decade. Concurrently with this has come development of intensive and scientific lobbying by compact and zealous minorities, a form of influence which legislatures both state and national have shown themselves unable to resist. With the relaxation of the constitutional limits once enforced by the courts the day of a despotic rule by minorities in the United States is not far off. Of course if the majority was at all times awake to its own interests the situation would soon correct itself. The history of the American people shows however a tendency to submit over long to an abuse and then correct it with undue violence. The line which that popular correction will take is comparatively easy to predict. It is inconceivable that new constitutional limitations on the legislative power will be enacted. There is too much popular dissatisfaction with the judicial nullification of statutes to permit of that course. It is not practicable to check by law the lobbying which is rapidly making a farce of representative government. It is not like the cruder methods of an earlier day, amenable to a penal statute. There remains but one convenient solution,—the referendum. The trend of modern thought is in that direction, and the conditions which are giving it added force have been adverted to. It is very doubtful indeed whether it will work well on a nation-wide scale, or even in one of the more populous states. No thoughtful man can contemplate its advent with unmixed enthusiasm. Modern corporate management, which is probably the highest development thus far made of efficiency, is tending steadily in the opposite direction, toward centralizing authority, toward small bodies of representatives and executives given extensive powers and held responsible for results only. But that system works well only because the responsibility to which business representatives are held is real and not nominal. Men exercise a care and vigilance with respect to their money which they cannot be induced to use in the protection of their civic rights. That attitude on the part of those represented is the sine qua non of good representative government, and unless it can be obtained we might as well reconcile ourselves to the fact that a resort to the clumsier and doubtful expedient of a pure democracy is inevitable.

The Secondary Boycott

THE Supreme Court of the United States has recently rendered a decision of great importance, holding the secondary boycott to be an illegal conspiracy in restraint of trade. The decision points out a distinction which is absolutely sound, and has been long ignored. The right of employees to combine for the purpose of collective bargaining with their employer, to leave his employment in concert if a satisfactory agreement cannot be obtained, to refuse to purchase his goods and to request their friends to do likewise, is hard to deny on grounds satisfactory to the reason. The employees have a direct interest in the terms of employment which they seek to procure, and so long as they avoid violence and intimidation the situation does not differ in principle from business methods whose legality has never been doubted. But such a combination to do acts injurious to a lawful business can be justified only by a direct lawful personal interest to be served. And when the purpose of a concerted action by employees is to force their employer to cease patronizing some third

person because the latter has a dispute with his own employees, that direct interest is absent. Indirect interests are of course present—the general improvement of labor conditions, the making of allies for future conflicts, and others which might be mentioned. But the doctrine of indirect interest once admitted is quite without limit. It has no logical stopping place short of the avowed class war of the syndicalist. The "solidarity of labor" renders necessary the solidarity of capital, and industrial war with its infinite waste of resource is inevitable. The solution of the labor problem is in the last analysis human and not legislative. Like all questions of contract, it is a matter of mutual confidence and fair dealing between men. But this is quite impossible when men strike for a grievance beyond the power of their employer to rectify; shut down a business which has granted every just demand because someone else refuses to make a like concession. If the secondary boycott can be eliminated from the industrial situation it is not too much to hope that a long step has been taken toward an era in which the two necessary factors in production will work in better co-ordination. Industrial courts and the like may or may not work. At their best they are a poor substitute for mutual confidence and fairness between the parties to a contract.

The Clayton Act.

IT was generally believed, prior to the decision referred to in the preceding paragraph, that section 20 of the Clayton Act (6 Fed. Stat. Ann. 2d ed. 141) prevented injunctive relief against the secondary boycott. That act prohibited the issuance of an injunction against picketing, boycotting or the like, in aid of "a dispute concerning terms or conditions of employment." In a recent case (*Vonnegut Mach. Co.* v. *Toledo Mach. Co.,* 263 Fed. 192) it was said with respect to the phrase "terms and conditions of employment": "It is possible, of course, to conceive of things which have a collateral tendency to affect those considerations to which the employee is entitled. He may have a collateral interest in the success of a labor dispute with another employer, so that he nurses an impulse to help through a sympathetic strike against his own employer, with whose conditions of employment he is entirely satisfied. But to enter the field of collateral possibilities is to explore a territory without boundaries, where lurk immeasurable and unbearable restraints upon industrial freedom. A certain line must be drawn somewhere. It surely is at the place where a man whose asset is his daily toil has guaranteed to him sufficient recompense and proper environment. Therefore no conceits or whims, or mere prejudices, of the employee, may be by him elevated to the dignity of terms and conditions of employment, to be protected in any degree by the statute in question, and thereby to become the basis for a demand under it of a discriminatory nature. The employee may refuse to work —that is, he may strike—for any reason, however frivolous; but if he strikes for a whim, the controversy so brought about does not gain that status which would bring into operation the act in question." Judging from the press reports, the decision of the Supreme Court proceeded on similar lines. While these decisions do not undo all the inequality produced by the Clayton Act, they do remove what has been regarded as one of its most objectionable features.

Immigration.

THE problems of reconstruction and Americanization with which the United States is now confronted are admittedly grave, and he is a rash man who proposes with any great degree of confidence a single solution. On one thing, however, all men should, it would seem, agree—that until the problem is solved we should cease to complicate it. In the present situation of Europe any immigration must of necessity contain a large element of undesirables. The predatory will certainly turn their eyes toward the one country whose wealth has been augmented by the World War. The Bolshevist cannot but be attracted by the assurances which are being sent from our shores that the time is almost ripe for the social revolution which will throw the richest land in the world open to pillage. There is little use in talking about an immigration law which will shut out the undesirables and them only. The exclusions embodied in the law under which most of the foreign born trouble makers now in our land came in leave little to be desired—on paper. The provision against the admission of persons afflicted with physical disease is the only one which is capable of enforcement. Criminals carry no outward and visible sign of their infamy—Lombroso to the contrary notwithstanding. Bolshevists and anarchists are not above dissembling their views if an advantage is to be gained thereby. Advance information which will lead to the detection of latent reasons for exclusion cannot be obtained in any considerable number of cases, particularly since there is reason to believe that the authorities abroad are not always averse to the emigration of local criminals. Educational tests are ineffective, for the most dangerous of the immigrants whose advent we may presently fear are men of some education. There would seem to be no feasible course other than an outright prohibition of immigration, without exception or proviso, for a term of at least five years. Some hardships may result, some desirable citizens may be excluded, but this cannot be avoided. We have gone on carelessly for years with the doors practically wide open. It is necessary now to close them at least until we can take stock of the human elements with which we now have to deal and formulate some plan for coping with the perils which we have already imported.

Validity of Sunday Laws.

IN these days of "blue law" agitation it is not untimely to propound the question whether all laws prohibiting Sunday amusements are not invalid. Under the decisions of a past generation which exploited the now discredited aphorism that Christianity is a part of the common law and found in the divine command to keep holy the seventh day a mandate on legislatures to compel the observance of the first, the query would not be permissible. But the more recent decisions have abandoned those untenable positions and put the matter squarely on secular grounds. "Eminent jurists and courts, with practical unanimity, agree that Sunday laws can only be upheld as a civil regulation of a sanitary nature." *Carr* v. *State,* 175 Ind. 241, 93 N. E. 1071. On that basis, a requirement of cessation from labor for one day in seven may well be justified as a measure designed to promote the public health. But it is nothing of this kind which the typical advocate of Sunday laws demands. What he is trying to

get is a law which will prevent men from doing the things which any physician would tell him are most designed to promote health. Any physician would say promptly that if a man is confined to indoor employment for six days nothing is better for his health than to spend the seventh in fishing, gunning, sailing, or athletic games, or, if his tastes be less strenuous, in witnessing some pleasing play or motion picture. Just exactly these things are advocated daily by the medical advisers of men and women broken down by overwork. Yet it is these very things which it is asserted that the legislature has power to prohibit in order to protect the public health and welfare. And it is not as if there was another aspect to be considered. Sunday sports properly carried on affect the participants and no one else. Professional athletics of course do require labor, but the contention that the health of "Babe" Ruth will suffer if he is permitted to make home runs seven days per week is hardly worthy of consideration. The fact seems to be that the courts have entirely changed their position as to the reasons for upholding Sunday laws, and have not yet come to inquire fairly whether, tradition aside, those reasons do not invalidate much of the legislation enacted under the sanction of judicial reasoning which has been discarded as unsound.

Christianity as Part of the Law.

PREVIOUS references in LAW NOTES to the lack of foundation for the saying that Christianity is part of the common law have usually evoked some criticism from persons who read into the statement some reflection on religion. Having occasion to refer again to the subject, it is as well to anticipate the critic, and say that the hostility which lovers of personal liberty have for that aphorism is due not to hostility to the Christian religion but to the bad company in which the aphorism itself is invariably found. Were it urged to command observance of the Golden Rule, were it brought forth to make the Beatitudes true on earth as they are in heaven, were it even carried to the fantastic length of an assertion that the sinner against society should be forgiven unto seventy times seven, and the thief of the cloak should be given the coat also, it would be possible to yield respect if not concurrence. But the aphorism never appears in the law books in an effort to establish love, mercy, or any other precept of the Divine Teacher. It is invoked always in aid of the effort of a bigot to make others conform their outward observances to his beliefs. Whenever it appears in court it carries in its hand not "peace on earth, good will to men," but some narrow sectarian tenet. It is for this reason that it is better for both law and religion that it should be recognized that the saying in question is, in the words of Lord Sumner, nothing but "rhetoric."

Forces that Aid Crime.

IN the Journal of the American Bar Association for December, 1920, Mr. Maclay Hoyne sums up under the above title the result of his eight years of experience as State's Attorney of Cook County, Illinois. The ability and experience of the writer entitle his views to serious consideration. It is to be questioned however whether Mr. Hoyne is not affected by the partisan viewpoint, common to prosecutors, which regards every defense as an attempt of a guilty man to evade justice. For example, he says: "Attorneys for the defense should not be permitted, unrebuked and without subsequently being held to account, to present the so-called 'third degree' defense, when based upon palpable perjury, merely because their clients are wholly without any honest defense. . . . During my eight years in office, in every case these charges were brought by criminals or men indicted for crime, and usually by habitual criminals. When such false charges are fathered by newspapers or respectable attorneys or citizens the tendency must be to break down law enforcement and bring the law into disrepute. I have yet to hear of a reputable citizen who has complained that he has been beaten, abused or subjected to the third degree in my office by my assistants or employees, or the police assigned to my office." Whatever may have been the conduct of Mr. Hoyne's officers the "third degree" is practiced, and its practice justified, by police officers generally. See "Crime, Criminals, etc." (Train), p. 21 et seq.; Wigmore, "Principles of Judicial Proof," p. 550 et seq. That no "reputable citizen" has complained of such treatment is neither surprising nor convincing. It is not citizens who have friends and influence on whom these illegal practices are visited. But whatever may be a man's character or past record, he has, when accused of crime, constitutional rights which must be respected, and it is no answer to his complaint of their violation to call him a criminal, nor is a denial by the accused officers always sufficient to brand the complaint as "palpable perjury." Again Mr. Hoyne says: "The Parole Law has been viciously administered. It is unnecessary with the Probation Law in existence, and with humane Criminal Court Judges and a humane State's Attorney who will show mercy to the first offender. I still believe it should be repealed." Nothing is said however as to just how the invariable humanity of judges and prosecutors may be guaranteed, and it would not be difficult to collate instances where it has been absent. Yet again, he says: "The State's Attorney should have the active support and co-operation of the police department. Police officers who change or falter in their testimony or display sympathy with the defense in criminal cases should be summarily discharged." Every person who has any familiarity with criminal courts knows that the uniform attitude of the police is that every person arrested, particularly if he has a criminal record, is guilty. In more than a few instances this leads to downright perjury by police officers in a conscientious effort to prevent the escape of the miscreant. To get from an officer facts known to him favorable to the accused is well nigh impossible. It seems strange that it should be thought necessary to intensify further this feeling. Other suggestions are made which will be discussed in a later issue, but each seems to require a liberal discount for partisanship before it is accepted.

Conviction of the Innocent.

IN the statement referred to in the preceding paragraph Mr. Hoyne says: "Our present laws are so framed that not only is there no chance of an innocent man being found guilty, but there is an even chance that the guilty man may escape." The second clause seems to be an exaggeration, but, passing that, the first statement is certainly inaccurate. Taking a few prominent instances in recent years, Stielow of New York was convicted of murder,

sentenced to death, and saved only by the devoted work of a volunteer investigator who discovered the real criminal and obtained his confession. Wilson of Alabama was convicted of wife murder and had served several years of a life sentence when the missing wife, who had deserted her family, turned up. And aside from the cases where innocence was actually proven, any reader of the reports finds cases without number of convictions on evidence scarcely sufficient to raise a suspicion. True these are reversed, but there are others of the same kind where the money to take an appeal was wanting. The fact is that a man who is accused unjustly of crime has nothing like an even chance, unless he is the possessor of wealth and position. The resources of the prosecuting attorney's office far surpass any means of investigation available to the average defendant, so that the case for the prosecution is the better prepared. The defendant starts with a very real handicap in the very fact of indictment. His statements are discounted by his interest. The prosecuting attorney comes before the jury as a public officer charged with enforcing the law, and this gives to his utterances a weight which some have been known to abuse. Moreover, it is an unfortunate but no less common trait of the human mind to believe evil of others. A statement that a stranger is of bad character finds ready credence. In our social relations we are prone to condemn on suspicion and surmise, and to convert rumors into positive statements. This trait is inevitably carried into the jury box, and no number of instructions about "reasonable doubt" will eradicate it. It is common knowledge that the indignation aroused by a crime of peculiar atrocity leads to the disposition to convict any one at whom a few suspicious circumstances point. The prevalence of an epidemic of crime makes the average juror prompt to condemn any poorly dressed and unprepossessing man against whom a policeman may testify. The idea that under our system there is no danger of the conviction of an innocent man is a most dangerous one, tending to a relaxation of the safeguards around any man against whom the almost irresistible forces of the state are directed.

The Influence of the Profession.

MR. GEORGE B. ROSE, in a thoughtful address delivered before the Tennessee Bar Association, propounds the proposition that many of the ills of the present day may be attributed to the waning of the influence of the legal profession. He quotes the words of De Tocqueville, "I cannot believe that a republic could subsist at the present time if the influence of lawyers in the public business did not increase in proportion to the power of the people," and points out that the Constitution, despised by the predatory rich and the dissatisfied poor, must look primarily to the legal profession for its maintenance. The diminution in the influence of the lawyer Mr. Rose attributes chiefly to three causes the great increase in the membership of the profession, the fact that its practice does not bring wealth comparable to that of the successful business man, and the extent to which the personality of many leading lawyers is absorbed in the great corporations which they represent. He says on the latter subject: "And, in truth, the attitude of the lawyers in the service of these great corporations is a dependent one. The position of the general practitioner is very independent. He has many clients, and no one can injure him greatly by the withdrawal of his favor. So long as he discharges his duty with fidelity and capacity, he can count upon a substantial income. But the attorney employed by one of these great corporations has only one retainer. The foot of no other client ever crosses his threshold. If he resigns his place or is discharged, he stands absolutely without employment —an attitude appalling to any man, especially if he has a family to support. He must then go forth into the world, and starting at the bottom, must slowly build up a practice. It is extremely difficult for the man so circumstanced to preserve the independence of his opinions in public affairs. The mere habit of the lawyer of looking at things from the standpoint of his client will warp his judgment, and unconsciously he will speak as the mouthpiece of the corporation. That so many lawyers occupying such positions retain their freedom of opinion in all that concerns the welfare of our country is one of the prides of our profession, but it is difficult to get the people at large to believe in their independence." The increase in the power of journalism and the extent to which it gives to laymen a general understanding of public affairs is also referred to as a cause of the loss by the lawyer of his ancient standing in the community. Granting the force of the conditions referred to, it is believed that there is another of even more importance. It is hardly to be denied that however excellent may be the substantive law of the present time its administration leaves much to be desired. Intricate and arbitrary rules of procedure make justice slow and expensive; at times it would seem to an observer that courts exist for the maintenance of the rules of procedure rather than for the doing of justice. The people are better educated than they were a generation ago, and are far less amenable to mere traditions. Seeing these manifest deficiencies of the system; observing the occasional miscarriages and being unable to see their cause, the layman is apt to conclude that lawyers as a class are either incompetent or dishonest. The steady growth of this opinion is perhaps the most potent cause of the fact that while the ability and integrity of the profession have not deteriorated its influence has notably waned.

Relief for the Federal Courts.

IT is to be hoped that some action will be taken in the near future to relieve the pressure of work on the federal district judges. In addition to the normal increase of federal business arising under the Espionage Act as a result of the war, and under the immigration laws as a result of alien disloyalty, recent legislation has given to those courts jurisdiction of a number of newly created crimes, such as offenses under the Volstead act. The result is that a considerable part of the time of the federal judges must be spent in trying cases of the police court order, and the important and complex civil business of their courts must of necessity suffer. It is no reflection on the judges to say that many of the federal decisions of the past year show unmistakable indications of haste. The business which naturally pertains to the federal courts is too important to permit this condition to continue. The natural remedy would seem to be to give court commissioners jurisdiction to try, before a jury, all criminal cases other than the more serious felonies. Commissioners thus empowered would of course be to all intents and purposes

federal judges, and the salary and mode of selection should be such as to secure ability equal to that now represented on the bench. Separate criminal courts have been found to be advantageous wherever the amount of business warranted their creation, and therefore this solution is to be preferred to a multiplication of district judges. Whether the tendency is a good one or not, the future will see a steady growth in the scope of federal law and federal jurisdiction, and the judicial system must be reorganized in such a way as to meet the requirements of that growth. One may of course dream of a reorganization along lines which would make a system of co-ordinated courts with a centralized administration—a real model court. But federal procedure always lags in the rear, and there is no use expecting for the present anything more than a few patches on the more obvious defects of the present system.

The Unjust Lawsuit.

IT is a question admitting of considerable discussion whether a lawyer can justify himself on high ethical grounds in accepting the conduct of a case wherein he believes that his client's position is legally sound but morally unjust. Leaving out of consideration cases which come close to the verge of fraud, suppose that the "meanest man in town" from motives of pure malice seeks to assert a technical and profitless right to the detriment of a neighbor, as by erecting a "spite fence." Is it consistent with the highest standards of professional conduct for a lawyer to accept employment to maintain the right so to do? There is of course room for argument that the duty of a lawyer is to secure for his client every legal right, and that whether the law is wise or unwise is not for him to judge but pertains to the legislative department. There is the extreme view, so forcibly maintained by Von Ihring, that the rigid enforcement of every legal right is a high social virtue. On the other hand it is known to every member of the profession that however just and necessary a law may be it will sometimes work injuriously in practice. This is a vice which inheres in every system of general rules. Is it not the duty of the profession to see to it that in those instances the law is not enforced? The San Diego Lawyers Institute, reviewed in the last issue of LAW NOTES, pledges its members "to refuse employment in cases prosecuted or defended chiefly out of spite or for the purpose of harassing or delaying another." It will be some time before the entire profession avows that ideal; still longer before all its members put it into practice without mental evasion. Law and justice are not always identical. If law is not at times to work injustice, at some point conscience must intervene, and what point is more fitting than that where a member of an honorable profession is asked for his aid to enforce the law in an instance where he cannot but see that injustice will result?

STATE REGULATION OF WAGES AND PRICES OF COMMODITIES.

ARE the wages for which we work or which we pay, the price of the food and clothing and other necessities of life which we buy and sell, the terms of the contracts which we make in our daily business dealings with our fellowmen, to be fixed for us hereafter by our allwise state legislatures? Kansas, the Sunflower State, out of which have come so many new experiments in government, says they are. In fact so accustomed have her sister states become to the innovations from Kansas that they have ceased to be surprised at anything she may do. It would seem that every seed of every flower of her floral emblem contains an embryo pod or issue awaiting only the magic touch of the legislative gardener to germinate into a new variety.

We are all more or less familiar with the growth of the methods devised for the settlement of disputes between employer and employee. The history of the relation, the means adopted by one side or the other, successful and otherwise, may be found in the printed volumes of our law reports as well as in tons of literature on the subject written from every possible angle and presenting the views of all parties. We have seen the lockout on the part of the employer to force his employees to bend to his will, the growth of the labor union with its ever ready strike, the various methods of arbitration conducted directly between the employer and employee or through the additional aid of third persons both private and official. In the exercise of its war powers Congress has gone the limit in the regulation and control of the production, manufacture and transportation of the necessities of life. But until the Kansas act no state has attempted in the exercise of its police power to bring under its supervision the entire industrial life within its borders, including the regulation of prices of food and clothing and the direction of the relation between employer and employee in all its phases. In this act we find the almost complete discard of the constitutional guaranty of life, liberty and property, the sanctity of private contract, which heretofore have been more or less recognized in all attempts by the government to control the industrial relations of its citizens. So radical are its terms that so eminent a lawyer as Mr. George W. Wickersham is moved to say of it in a recent article in the *American Law Review,* that there has been asserted a principle of legislative control of private industry "which constitutes the longest step towards state socialism ever taken by an American commonwealth, not even excepting the North Dakota state business enterprises."

The immediate cause of this attempt at state regulation of private business was the inconvenience and danger threatened by the recent coal strike. The legislature, however, was not content with the mere regulation of the mining business of the state but has attempted to regulate and, if judicial history repeats itself, will succeed in regulating, practically the entire industrial life of the state. The act known as the "Industrial Court Law" creates a so-called "Court of Industrial Relations" and through it seeks to control the conduct and operation of the various industries made subject to its terms. Included among these, in addition to the public utilities generally accepted as proper subjects of state regulation, are the business of mining substances used for fuel, and the manufacture, production and transportation of articles of food and clothing. It is provided that these industries "are determined and declared to be affected with a public interest and therefore subject to supervision by the State . . . for the purpose of preserving the public peace, protecting the public health, preventing industrial strife, disorder and waste,

and securing regular and orderly conduct of the businesses directly affecting the living conditions of the people of this State and in the promotion of the general welfare." It is further provided that it is quite "necessary for the public peace, health and general welfare of the people of this State that the industries, employments, public utilities and common carriers herein specified shall be operated with reasonable continuity and efficiency in order that the people of this State may live in peace and security, and be supplied with the necessaries of life. No person, firm, corporation, or association of persons shall in any manner or to any extent, wilfully hinder, delay, limit or suspend such continuous and efficient operation for the purpose of evading the purpose and intent of the provisions of this act; nor shall any person, firm, corporation, or association of persons do any act or neglect or refuse to perform any duty herein enjoined with the intent to hinder, delay, limit or suspend such continuous and efficient operation as aforesaid, except under the terms and conditions provided by this act." Practically every phase of the conduct of these industries is made subject to the provisions of the act including working and hiring conditions, hours of labor, rules and practices, wages and the right to strike. And its terms apply to employers and employees alike.

With respect to wages and income it is declared to be necessary "for the promotion of the general welfare that workers engaged in any of said industries, employments, utilities, or common carriers shall receive at all times a fair wage and have healthful and moral surroundings while engaged in such labor; and that capital invested therein shall receive at all times a fair rate of return to the owners thereof." And the Industrial Court is given power to fix both after due hearing.

With respect to the right to strike the act specifically acknowledges the right of the individual to quit his employment at any time, but provides that "it shall be unlawful for any such individual employee or other person to conspire with other persons to quit their employment for the purpose of hindering, delaying, interfering with, or suspending the operation of any of the industries, employments, public utilities, or common carriers governed by the provisions of this act, or for any person to engage in what is known as 'picketing,' or to intimidate by threats, abuse, or in any other manner any person or persons with intent to induce such person or persons to quit such employment, or for the purpose of deterring or preventing any other person or persons from accepting employment or from remaining in the employ of any of the industries, employments, public utilities, or common carriers governed by the provisions of this act."

State control and operation of any of the industries affected by the act through the Industrial Court are provided for in case of their threatened suspension or cessation as follows: "If it shall appear to said court that such suspension, limitation, or cessation shall seriously affect the public welfare by endangering the public peace, or threatening the public health, then said court is hereby authorized, empowered and directed to take proper proceedings in any court of competent jurisdiction of this State, to take over, control, direct and operate said industry, employment, public utility or common carrier, and also a fair wage to the workers engaged therein, during the time of such operation under the provisions of this section."

As the basis of its right to invade the private business relations of its citizens the state sets up that oft invoked elastic power known as the police power which someone has loosely defined as "the power to pass unconstitutional laws." Chief Justice Browne of the Florida Supreme Court expresses the same idea when in speaking of it in a recent address before the law class of the University of Florida, he said: "A legal doctrine has taken root in our government—sanctioned, approved and strengthened by judicial decisions, that threatens, and if it has not already destroyed, has seriously impaired constitutional guaranties for the protection of life, liberty and property, and prepared the way for their future destruction. I refer to what is known in the vocabulary of American constitutional law as The Police Power, but which as extended and approved by recent decisions is a Super-constitution." The courts define it generally as the power inherent in sovereign states to enact laws necessary for the preservation of the public health, morals, safety and welfare. Volumes could be written of the history and growth of this power. The purpose of this article, however, is limited to setting out the leading cases dealing with its extension to conditions similar to those embodied in the Kansas act. With these as precedents the power might be said in the last analysis to be wholly a discretionary one lodged in the governing body, whose decision as to what is best for the general welfare of the public is final. As was said in *Lawton* v. *Steele,* 152 U. S. 133, 14 S. Ct. 499, 38 U. S. (L. ed.) 385: "The State may interfere wherever the public interest demands it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

It is true that there is a supposed limitation on this power, and it has often been said that the determination as to what is a proper exercise of the police power is not final or conclusive, but is subject to the supervision of the courts. In theory the state in the exercise of its police power is forbidden to enact laws which are so arbitrary, unreasonable or extravagant as to constitute an abuse of power, and the courts invariably tell us this when upholding some law taking from the public a right long considered as personal and inalienable. We are all familiar with the opinion which declares that while it is admitted that there is a well defined limitation on the exercise of the police power, it cannot be said to apply to the particular facts under consideration. Some day somebody may discover a peculiar state of facts that does exceed the legitimate exercise of the police power and which does violate this mythical limitation on its exercise, but it is difficult to imagine what possible conjunction of command and "verboten" can fulfil the bill. Lawyers and learned judges have attempted to conjure up the awesome results likely to follow the precedent set by upholding some particular inroad on the personal liberties of the people; they have pictured the complete divesting of the freedom of individual thought and action which might logically follow, and have endeavored by the argument of reductio absurdum to forestall the breaking down of the protection afforded to personal liberty by the constitution. We are familiar with the almost invariable answer of the courts: "True such a state of facts might arise, though it is not probable, and when it does it will be time to deal

with it. For the present it is sufficient to say that the law under consideration does not go to such extremes and is a valid exercise of the police power." Step by step, however, the lawmaking bodies have stretched this power to cover the very conditions cited to show that the milder invasion was invalid. And when a new law comes before the courts for construction we find a repetition of the same procedure, viz., the lawyers and dissenting judges working their imaginations overtime and holding up new and fearful results likely to follow the upholding of this new inroad on the private life of the people, and the courts handing down the same old stereotyped reply—maybe so, maybe so, but the present law does not go to that extent. Really it would seem to be advisable for these liberty loving lawyers and judges to refrain from picturing the possible fearsome extent to which some future lawmaking body may feel emboldened to go on the strength of the court's opinion in upholding a particular law. They probably suggest to the legislator some field of human action, some particular liberty or pleasure, which the law has overlooked and which he may never have thought of for himself. In fact a perusal of the dissenting opinions in a few of the leading cases dealing with this subject would seem to bear out this theory.

In *Munn* v. *Illinois,* 94 U. S. 113, 24 U. S. (L. ed.) 77, decided in 1876, we find the pioneer case in which the exercise of the police power by a state over the hitherto supposedly private business affairs of its citizens is upheld by the Supreme Court. This case involved the power of the State to regulate grain elevators and warehouses, among other things fixing prices to be charged for storage, etc. Two justices (Field and Strong) dissented from the majority opinion and the extent to which the doctrine laid down might be carried in future was stated as follows: "If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of the majority of its legislature. The public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for the residences of families, nor, indeed, anything like so great an interest; and, according to the doctrine announced, the legislature may fix the rent of all tenements used for residences, without reference to the cost of their erection. If the owner does not like the rates prescribed, he may cease renting his houses. He has granted to the public, says the court, an interest in the use of the buildings, and 'he may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.' The public is interested in the manufacture of cotton, woolen, and silken fabrics, in the construction of machinery, in the printing and publication of books and periodicals, and in the making of utensils of every variety, useful and ornamental; indeed, there is hardly an enterprise or business engaging the attention and labor of any considerable portion of the community, in which the public has not an interest in the sense in which that term is used by the court in its opinion; and the doctrine which allows the legislature to interfere with and regulate the charges which the owners of property thus employed shall make for its use, that is, the rates at which all these different kinds of business shall be carried on, has never before been asserted, so far as I am aware, by any judicial tribunal in the United States." Justice Field must have been endowed to some extent with the gift of prophecy as he looked into the future and pictured the invasions of private rights to which the decisions of the majority of the court might lead. His forecast of the regulation of the relation of landlord and tenant, the fixing of rents that might be charged, etc., finds its fulfilment to a greater or less extent in the recently enacted rent laws of New York, which so far have been sustained at each ascending step along the judicial highway.

In *Budd* v. *New York,* 143 U. S. 517, 12 S. Ct. 468, 36 U. S. (L. ed.) 247, upholding the New York law fixing among other things the minimum charge for transferring grain between elevators and ships, Mr. Justice Brewer in a dissenting opinion very clearly showed the fallacy of confounding a "public use" with public interest as follows: "Surely the matters in which the public has the most interest are the supplies of food and clothing; yet can it be that by reason of this interest the State may fix the price at which the butcher must sell his meat, or the vendor of boots and shoes his goods? Men are endowed by their Creator with certain unalienable rights, 'life, liberty and the pursuit of happiness'; and to 'secure,' not grant or create, these rights governments are instituted. That property which a man has honestly acquired he retains full control of, subject to these limitations: first, that he shall not use it to his neighbor's injury, and that does not mean that he must use it for his neighbor's benefit; second, that if he devotes it to a public use, he gives to the public a right to control that use; and, third, that whenever the public needs require, the public may take it upon payment of due compensation."

It was in a case arising in ever fruitful Kansas itself that the dissenting judge pictured the attempted regulation by the state of wages of labor as the logical and absurd result of the majority opinion of the court and which later came to pass in the Kansas law under consideration. In *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 34 S. Ct. 612, 58 U. S. (L. ed.) 1011, L. R. A. 1915 C1189, decided in 1914, the Supreme Court upheld the power of a state to regulate fire insurance rates. Mr. Justice Lamar (Chief Justice White and Mr. Justice Van Devanter concurring) in his dissenting opinion said that if public intent and not public use is to be the test applied in determining whether a given business is subject to regulation under the police power, "in view of the amount of property employed and the aggregate number of persons engaged in agriculture and the public's absolute dependence upon that pursuit, it would follow that, farming being affected with a broad and definite public interest, the price of wheat and corn, cotton and wools, beef, pork, mutton and poultry, fruit and vegetables, could be fixed. Or if we take the aggregate of those who labor, and consider the public's absolute dependence upon labor, it would inevitably follow that it, too, was affected with a broad and definite public interest and that wages in the United States of America in this twentieth century could be fixed by law, just as in England between the 14th and 18th centuries. And inasmuch as the prices of agricultural products are dependent on the price of land and labor, and as the price of labor is closely related to the cost of rent and food and clothes and the comforts of life, there would be the power to take the further step and regulate the cost of everything which enters into the cost

of living. Of course, it goes without saying that if the rates for fire insurance can be fixed, then the rates for life and marine insurance can be fixed. By a parity of reasoning the rates of accident, guaranty and fidelity insurance could also be regulated. There seems no escape from the conclusion that the asserted power to fix the price to be paid by one private person to another private person or private corporation for a private contract of indemnity, or for his private contracts of any sort, will become the center of a circle of price making legislation that, in its application, will destroy the right of private property and break down the barriers which the Constitution has thrown around the citizen to protect him in his right of property, which includes his right of contract to make property, his right to fix the price at which his property shall be used by another. By virtue of the liberty which is guaranteed by the Constitution, he also has the right to name the wage for his labor and to fix the terms of contracts of indemnity,—whether they be contracts of endorsement or suretyship, or contracts of indemnity against loss by fire, flood, or accident."

The Kansas act has been declared to be valid by the Supreme Court of Kansas in *State* v. *Howat,* (Kan.) 191 Pac. 585. While the court did not pass on the validity of the act as affected by the alleged unconstitutional extension of the police power, the case going off on the question of the power to punish for contempt for refusal to appear before the Industrial Court as a witness, it did take occasion to say: "Inasmuch as the police power extends to the protection of the welfare and convenience as well as the health, safety, and morals of the public, it may manifestly be invoked, as in the present instance, to prevent the interruption in the production of a commodity so vitally necessary to the people of this state as coal, so long as the means employed are not for some special reason obnoxious to constitutional provisions."

The uniform trend of the courts to uphold the extension of the police power by the states and the extremes to which this course may lead are strikingly shown by Mr. Wickersham in the article already mentioned, which he concludes as follows: "If the whole industry of the manufacture or preparation of food products may be enveloped in a public interest and regulated at will by the Legislature, it need not stop, as does this act, with the process of converting the products of the soil from a natural state to a condition to be used for food, but it may reach back to the farmer, determine the conditions under which he shall labor and employ others to work for him, the prices he may charge for his crops, and the methods by which he may dispose of them. Indeed, there would seem to be no limit to the legislative discretion, and the individual no longer can say: 'Shall I not do what I will with mine own?' Because, as Aristotle says, 'all governments rest on the principle of self-preservation, and at times extreme measures must be allowed,' which is the philosophy upon which rests the police power of the State, are there to be no limits upon the right of the Legislature to interfere with and control the conduct of every man's business, to regulate the cost of his product and the price of his wares? If so, why are constitutions written, and bills of rights formulated? These are questions which naturally suggest themselves to lawyers, as they consider such statutes as the latest Kansas remedy for settling industrial disputes, and the judicial interpretation of the Constitution which would seem to sanction its enactment."

The writer, too, wonders with Mr. Wickersham—why are constitutions written? Also, he knows of two or three little human privileges and pleasures that have so far been left to his individual whim but which undoubtedly could be and would be enveloped in the devouring maw of the police power once the attention of the legislature were called to their unregulated condition. But he will not point them out as examples of to what extremes this trend towards the extension of the police power may lead us for fear that the eager eye of some legislator, seeking whom and what he may regulate, may detect them, and then, farewell to even these remnants of personal liberty.

MINOR BRONAUGH.

SUNDAY BLUE LAWS.

Now that the Eighteenth Amendment has been adopted and inscribed on our statute books, the hordes of reform, emboldened by their success, seek for new worlds to conquer; and it may be said that these gentlemen of conscripted vision never have to look very far for the majority of us are always doing something that we really should not do, things which grieve these good men sorely and which they know will bring us and our country to utter ruin unless stopped in accordance with their advice. As a result we are threatened with a Sunday as blue and cheerless as the reformers and their lobbyists can bring to pass.

The machinery which turned out such a bright and shining article in the case of prohibition is to be duplicated, with perhaps the addition of a new part here and another there to meet the different circumstances involved, and the motive power, supplied in the former instance by the prohibitionists, will issue this time from a new engine of reform.

The officers of the new organization have not disclosed the extent of their program and so it is hard to say how far they intend to go in their attempt to have us all conform to their idea of Sunday observance, but one of them is reported to have mentioned compulsory attendance at Sunday school for children. We should feel inclined to smile at the madness of this good man were it not for the fact that he and his kind are doing most of the smiling at present.

The Sunday reformers however do mean business, and it remains to be seen what we, of the easy going and long suffering majority, shall be ordered to do and not to do of a Sunday, as the result of their machinations.

And what will be the attitude of the courts toward this next program of reform? Will they uphold new laws which may be passed to this end? And will they enforce a stricter observance of the old laws, providing for an idle Sunday, which it is believed are already in existence in all of the states except California and Oregon?

In order to form some idea of what the courts may do let us see what the courts have done in the past as regards the same question. And at this point we desire to commend to the reader the able and comprehensive discussion of the validity of Sunday laws in "The Law of Sun-

day" by James T. Ringgold, and to acknowledge our indebtedness to that book for some of the arguments advanced and many of the citations contained in this article.

It may be said in a general way, that, with a few exceptions, the laws providing for the observance of Sunday by an enforced idleness have been upheld by the courts throughout the Union, although one examining to-day the opinions in many of these cases is little convinced of the strength of the arguments set forth therein.

Such statutes have been attacked as violating the federal constitution, as interfering with the rights of property, and last but not least as infringing the religious liberty which in one form or another is guaranteed by most state constitutions.

In this connection it might be of interest to note the novelty of an argument advanced in defense of a Jew, who, in the case of *Com.* v. *Wolf,* (1817) 3 Serg. & R. (Pa.) 48, was charged with the violation of Sunday observance laws by reason of his having engaged in worldly business on that day. He contended that he was compelled to be idle two days a week, since he was bound to observe both the Jewish Sabbath and the Christian Sunday; wherefore, having only five remaining days in each week on which to toil, he was unable to comply with the injunction of the fourth commandment, which he interpreted as demanding six days of labor in every week.

One regrets that the ingenuity of the man failed to prevail, but it must be said that the arguments of the court in supporting the act are scarcely more convincing than those of the defendant. The statute was upheld because, said the court inter alia, it is impossible to administer the affairs of government without teaching the people to revere the sanctity of an oath and to look to a future state of rewards and punishments for the deeds of this life, which must be done by reminding them of their religious duties at stated periods. This argument is neither better nor worse than many others which have been uttered by the courts in their support of the so-called Sunday laws.

Although we look askance at any union of church and state and in spite of the presence in most state constitutions of a guaranty of religious liberty, some of the courts in discussing the various Sunday acts have not hesitated to lay much stress on what they term the holy nature of the day. It has been spoken of as "consecrated" (*Kilgour* v. *Miles,* (Md.) 6 Gill & J. 268, a case involving Sunday but not "blue" laws); a day clothed by the law "with peculiar sanctity" (*Com.* v. *Jeandelle,* 3 Phila. (Pa.) 509, 16 Leg. Int. 364). This leads one to ask whence comes this legislative authority to sanctify or consecrate a day?

Other decisions seem to hold that the legislatures in passing the acts requiring Sunday observance were merely recognizing or confirming a divine law, already in existence. So in *Johnston* v. *Com.* (1853) 22 Pa. St. 102, it was said that the day was "set apart by divine command and human legislation as a day of rest," the court also remarking: "But we have no right to give up this institution. It has come down to us with the most solemn sanction both of God and man." To the same effect is *Stockden* v. *State,* (1856) 18 Ark. 186.

It has been convincingly argued that the legislature in forbidding work on Sunday as a "desecration" thereby declares a certain thing to be sacred and consequently undertakes ecclesiastical functions which are purely a matter of religious belief; or granting that it is merely recognizing a divine law the legislature is applying "civil authority to the enforcement of religious dogma."

That such was the attitude of the legislatures and of the courts in interpreting the statutes can scarcely be doubted after reading the decisions which speak of the day as one on which "the people may devote themselves to religious and pious exercise" (*Com.* v. *Teamann,* 1 Phila. (Pa.) 460, 10 Leg. Int. 167); "a religious institution held in high reverence by great numbers of their fellow citizens, a civil institution which the state has always cherished" (*Com.* v. *Naylor,* 34 Pa. St. 86); a "day which by our law is dedicated to the duties of religion" (*State* v. *Eskridge,* (Tenn. 1852, 1 Swan.) 413). The Sabbath is time and again emphasized as an institution of Christianity, which the courts simultaneously assert is part of the common law, adopted by us from England, and warning is given of great disaster which must follow any failure to uphold a strict observance of the day. A Pennsylvania court said: "Sunday is a part of Christianity. Upon its peaceful observance Christianity in a great measure depends for its support. Destroy this day, and a revolution of the most astounding character is produced. Whatever conclusion may be arrived at upon the evidence, we cannot assert as law a principle which must lead to the most disastrous results, which must shake Christianity itself." *Com.* v. *Jeandelle,* (1859) 3 Phila. 509, 16 Leg. Int. 364. Our faith in Christianity makes us loath to accept the statement of the court. We refuse to believe that Christian principles depend in the slightest degree on any particular form of Sunday observance. To argue otherwise is to belittle Christianity, which has managed to survive many centuries without the all important protection of Sunday laws. There are other decisions of the same tenor, but when courts resort to such rhetoric we think they do "protest too much." There must be a dearth of sound argument when an opinion must be supported by such unwarranted prognostications. And so as an element of Christianity, a part of the common law, the Sunday acts have been held not to be in conflict with the constitutional guaranties of religious liberty. There are some opinions to the contrary, opinions not lacking in strength, though in the minority. In *Thomasson* v. *State,* 15 Ind. 449, it was held that a Sunday law was unconstitutional if it was "for the protection or enforcement of that day as an institution of the Christian religion." And it was said of a similar law in Alabama that it could not "be justified upon the grounds that such abstinence is enjoined by the Christian religion." *Frolickstein* v. *Mobile,* (1867) 40 Ala. 725.

In a consideration of the biblical authority for an idle Sunday it has been well pointed out that the rest of the Creator on the seventh day of creation, resulting in his blessing and hallowing of the day, could have had no result on man at that time, since he had not yet been cast out of the Garden of Eden and had not known labor; and moreover that when he was cast out he was sentenced to work all the days of his life, apparently including the Sabbath. Hence the sanctification of the day did not imply idleness. And since the abstention from labor was the only form of observance prescribed for the seventh day, abstinence from all forms of recreation could not be imported thereby and it was so interpreted by the Jews, for whom indeed this observance of Sabbath served as a mark of distinction from other peoples.

And where can be found the basis for the observance

of the day as an institution of Christianity? Indeed the early Christians were frequently bidden to have regard for the essentials and not for the outward manner of things, and the Sunday as we know it is the creation of a sect which looked with scant favor on the holy days celebrated by other Christian sects. So while the earlier cases and indeed some of a later date placed their support of the Sunday laws on the basis of religion and while such arguments might be used in a few cases even to-day, it is probable that any question arising at the present time in regard to the validity of the statutes would resolve itself into a discussion of the extent of the state's police power; of the right of the law making body to provide for the physical welfare of the members of the community, by enforced Sunday idleness.

It is sometimes said that the observance of a day of rest is necessary to the physical well being of the individual and occasionally it seems that it is the community which in some vague and undefined manner is the gainer by a cessation of all human activity laborious or otherwise on the first day of the week. So it was said in *Landers* v. *Staten Island R. Co.,* (1872) 13 Abb. Pr. N. S. (N. Y.) 338, that "the evident object of the statute was to prevent the day from being employed in servile work, which is exhausting to the body, or in merely idle pastime, subversive to that order, thrift and economy, which is necessary to the preservation of society." And a particularly good example of reasoning on the same line is to be found in *Lindenmuller* v. *People* (1861) 33 Barb. (N. Y.) 548, wherein the court said: "It is a law of our nature that one day in seven must be observed as a day of relaxation and refreshment if not for public worship. Experience has shown that the observance of one day in seven as a day of rest is of admirable service to the state considered merely as a civil institution. We are so constituted, physically, that the precise portion of time indicated by the decalogue must be observed as a day of rest and relaxation, and nature, in the punishment inflicted for a violation of our physical laws, adds her sanction to the positive law promulgated at Sinai." No proof having been offered to support the court's calculation of the exact period needed for physical refreshment we may question its conclusion in this matter.

If the basis for upholding these laws is the physical welfare of the citizens, why do the acts of so many states by forbidding sports and games on Sunday prohibit the simplest and most efficacious measures in the matter of physical and mental rehabilitation? And if that is the object of the Sunday laws its provisions are about as much to the point as the well-known injunction given by the old lady to her daughter when requested for permission to go swimming. The public must be physically refreshed but it is forbidden to take the most obvious means to that end, namely sports, games and amusements.

There have been many peoples who have not taken one day in seven as a day of rest; there are many peoples to-day who do not take their Sunday "straight" as we do, who enjoy the benefits of that dark, iniquitous institution, a continental Sunday, which is quite in the teeth of our Sunday laws and yet it is never attempted to show that these peoples are physical weaklings;—indeed they have lately given potent evidence to the contrary. Nevertheless the courts one after another assert with varying degrees of insistence that one day of idleness in seven is a necessity based on natural law. And with the same disregard for proof or evidence we find it judicially asserted that an idle Sunday is not only a beneficent institution for the individual but for society as well. See for example the following declaration in *Lindenmuller* v. *People,* (1861) 33 Barb. (N. Y.) 548: "The stability of government, the welfare of the subject, and the interests of society have made it necessary that the day of rest observed by the people of a nation should be uniform and that its observance should be to some extent compulsory." It is suggested by the way that apropos of Sunday laws the court did well in the foregoing sentence to use the word "subject" instead of citizen.

So we find that statutory provisions for Sunday enforcement have been generally upheld, sometimes on a religious basis, sometimes as a police measure and sometimes on both grounds. And yet when all is said and done it must be obvious that such statutes rest on a religious basis; it was a religious consideration which caused them to exist, and their support on the ground of personal and communal welfare is an afterthought which will not bear minute inspection.

In a recent work of fiction, denouncing the failure of men to base their thought and speech, especially on social and economic subjects, on fact and reason, it is suggested that people need a legal training in order that their minds may function efficiently; that they may establish more readily the truth or falsity of things. This is well deserved recognition of a profession which is not the daily recipient of flattery. Since it is indeed the case that in the main the law is based on proof and reason, what explanation can be given for the wild sweeping assertions made by courts in their decisions on Sunday laws, statements such as those cited throughout this article, which are obviously not the result of reason and proof but which are utterly foreign to the exact science of the law? Has not the law been influenced by a particular kind of religious prejudice a thing which it outwardly repudiates?

And now the Sunday reformers threaten us with more stringent enforcement of the statutes, with the passage of new acts and possibly with another amendment of the federal constitution. They have no qualms of conscience about the violation of personal liberty. They honestly admit as much. And like their successful predecessors they allege that most of the ills with which society is afflicted will fold their tents like the Arabs and as "silently steal away" if only they are allowed to dictate and enforce our Sunday behavior. Crime waves, Bolshevistic tendencies and the need for jails will disappear if only we hearken to them and their band of supporters. We have heard this particular strain of wisdom before and we shall hear it again from the next body of reformers and the next, regardless of the nature of their cure-all. And it possesses just as much truth in the mouth of one reform element as in that of another.

Truth and bigotry do not go hand in hand. If the law is to reflect the wisdom of human experience it must be free from the influence of religious superstition and prejudice. Our state constitutions guarantee religious liberty, but religious liberty is not to be had even to-day without a struggle. Other countries have similar conflicts between parties which are clerical and anti-clerical: the subjects of conflict may differ from ours, but the religious source does not. And reformers, who make up in ardor what

they lack in breadth and who are of the same stamp as their successful brothers who pharisaically proclaim themselves to be of the moral element of the community, will not, as remarked before, quail and hesitate before a little thing like a constitutional guaranty. This is course calls for the trite remark that eternal vigilance is the price of liberty.

And if the Sunday reformers "get" us what are the prospects of future Sundays? Perhaps we can get a hint of what we may be permitted from the opinion of the court in *Johnston* v. *Com.*, 22 Pa. St. 102, wherein the defendant was charged with driving his omnibus on Sunday contrary to the provisions of the statute. The court in speaking of certain forms of Sunday recreation which might be within the act said that one who was an invalid or who had been immured for six days within the close walls of a city, requiring a ride into the country as a means of recuperation, might lawfully use a horse and carriage for that purpose. Continuing the judge said: "Equally lawful is the employment of the same means to go to the church of one's choice or to visit the grave of the loved and the lost, to pay the tribute of a tear."

Are we to be relegated to the wild revelry of cemetery visiting and tear dropping as a Sunday diversion in order that thereby we may be refreshed and invigorated for the week's work?

R. S.

TRUSTEES AND SECOND MORTGAGES.

THE practitioner is sometimes asked to advise trustees as to whether they have the power to lend on second mortgage, and, if so, whether they can safely do so. The answer is not necessarily the same in every case. For it might well be that they have the legal power, and yet they might not, and in most cases probably would not, be justified in exercising such power. In this connection, as in many others, all things that are lawful are not always expedient. It is the duty of the trustees, when dealing with other people's money, to act as a prudent man would do in dealing with his own money. Before considering the value of the proposed security, and how much he would lend on it, a prudent man would undoubtedly consider whether it was a suitable security on which to lend at all. Sect. 1 of the Trustee Act 1893 authorizes a trustee to invest on real securities. It says nothing about first or second mortgages. A second mortgage of real property is in law a real security but in practice it very often turns out to be a very unreal one. Sect. 8 of the same act provides (shortly) that a trustee lending money on a security on which he can lawfully lend shall not be chargeable with breach of trust "by reason only" of the proportion borne by the amount of the loan to the value of the property, provided that in making the loan the trustee was acting upon the report of an independent valuer and that the amount of the loan does not exceed two-thirds of the value of the property, and that the loan was made under the advice of such valuer. The words "by reason only" should be specially noticed. A trustee who is contemplating lending trust funds on mortgage has a good deal more to consider than keeping the amount of his loan within the two-thirds of the value of the property. It is not merely a matter of valuation. The nature of the property itself, as well as other circumstances, must also be taken into consideration. Some properties, though covered by the terms of the power, are from their very nature unsuitable as a security for trust funds; and again, other properties, though not wholly unsuitable, demand a larger margin of protection than is usually considered to be necessary in ordinary cases. When the value of the property has been ascertained, it must not be supposed that trustees are necessarily justified in advancing two-thirds of its value, whatever be the nature of the property. The one-third margin of value is the standard of the minimum protection which a trustee should require, and should not be converted into the standard of the normal risk he is entitled to run. The actual margin of protection required should depend upon the nature of the property and upon all the circumstances of the case, but must not be less than one-third of the value of the property. Now, one of the great risks which a person runs in lending, as he thinks, on a second mortgage is that there might, at the time he lends his money, be already a second or third mortgage in existence of which he is unaware, and which is not disclosed when he examines the title. Equitable mortgages rank in the order of the time of their creation—that is, where the equities between them are otherwise equal. Consequently, what the lender thought was a second mortgage might turn out to be only a third, or even a fourth mortgage. But there is another risk which an actual second mortgagee runs, namely, that a subsequent mortgagee, who was not aware of the second mortgage when he advanced his money, might, by acquiring the first mortgagee's interest and thus obtaining the legal estate, squeeze him (the second mortgagee) out of his security. These are only some of the risks which an intending second mortgagee must run. There are cases, such as *Want* v. *Campain* (9 Times L. Rep. 254), which go to show that there is no absolute rule that trustees will under all circumstances be liable for a loss arising from their having lent on a second mortgage. But perhaps the most modern case of importance on the subject is *Chapman* v. *Browne* (86 L. T. Rep. 744; (1902) 1 Ch. 785), which is much stronger the other way. There trustees invested trust funds on the security of a puisne mortgage of land in Ireland which ranked fifth in a series of incumbrances on the mortgaged property. In making the investment the trustees accepted the valuation of the property which had been made by the mortgagor's valuer, and they were not independently advised as to the propriety of the investment. The trust funds were lost. The Court of Appeal held that the trustees were liable for the loss, as, though by the Irish law there is less risk in taking a puisne mortgage in Ireland than is involved in taking the like security in England, owing to the protection of the Irish registration system and that in Ireland tacking and foreclosure are unknown, the investment in question was not one which prudent trustees ought to make. The court further held that, although the trustees had acted "honestly," they had not acted "reasonably," and were therefore not entitled to relief under section 3 of the Judicial Trustees Act 1896. Lord Justice Romer in his judgment said " . . . On the question whether the defendants had committed a breach of trust, there is no difference between the law of Ireland and the law of England. . . . It is clear that if a corresponding security had been taken of land in England it would have been a breach of trust." Again, in the case of *Re Newland; Bush* v. *Summers* (1904) Mr. Justice Kekewich refused to go into the question whether or not an investment on a second mortgage was a breach of trust, being satisfied that it was. The conclusion of the whole matter, therefore, appears to be that, whilst it may be within the literal power of a trustee to lend on a second mortgage, it is not, as a rule, a proper or prudent thing for him to do.—*Law Times.*

Cases of Interest

LIABILITY TO PAY ALIMONY AS DEFENSE TO CONTEMPT PROCEEDING.—Inability to pay is, it seems, a complete defense to a civil contempt proceeding to compel a man to pay alimony past due, under a decree of divorce, although he might have paid instalments as they fell due. See Snook *v.* Snook (Wash.) 188 Pac. 502, reported and annotated in 9 A. L. R. 262, wherein, after reviewing the evidence touching the ability of the defendant to pay alimony awarded by a divorce decree, the court said: "This is not a criminal contempt proceeding. It is a civil contempt proceeding, the object of which is not to punish the appellant, but to coerce him to pay the money in satisfaction of the alimony portion of the decree of divorce. 6 R. C. L. 490. It may be that appellant's past failure to make the payments is of such inexcusable character that he could be punished by fine or imprisonment in a criminal contempt proceeding, regardless of his present inability to make payment thereof; but, if so, such punishment would have to be in the nature of a fine of a fixed amount payable to the state, or to be satisfied by imprisonment at the rate of a fixed sum for each day of imprisonment, or such punishment would have to be imprisonment for a fixed term. Such is not the nature of the judgment sought or rendered in this proceeding. In a contempt proceeding of this character, the object of which is to coerce the payment of money, the lack of ability to pay on the part of the defendant is always a complete defense against enforcing payment from the defendant by imprisonment. In harmony with the law on that subject in most of the jurisdictions of this country, this court has repeatedly so held. Holcomb *v.* Holcomb, 53 Wash. 611, 102 Pac. 653; Boyle *v.* Boyle, 74 Wash. 529, 133 Pac. 1009; Crombie *v.* Crombie, 88 Wash. 520, 153 Pac. 306; Smiley *v.* Smiley, 99 Wash. 577, 169 Pac. 962; Wells *v.* Wells, 99 Wash. 492, L. R. A. 1918C 291, 169 Pac. 970."

LIABILITY OF RAILROAD FOR INJURY CAUSED BY CINDER ENTERING PASSENGER'S EYE WHILE GOING THROUGH TUNNEL.—In Louisville, etc., R. Co. *v.* Roberts (Ky.) 218 S. W. 713, reported and annotated in 9 A. L. R. 94, it was held that a carrier was liable for injury to the eye of a passenger due to a cinder entering the car where a brakeman, contrary to rules, left the door of the car open when the train was passing through a tunnel. The court said: "Plaintiff's testimony is in substance as follows: She got on the train at Jackson. She and her mother took a seat near the door. After the conductor took up the tickets, the train stopped at Dumont. As they went into the tunnel, the brakeman came in and left the door open. The car was filled with cinders, and a cinder went into her eye. In about a week she went to Jackson, and Dr. Back removed the cinder. After that a growth appeared in her eye, and she went to Lexington to consult a specialist, who prescribed for her. Dr. Back testified that he removed something from plaintiff's eye about the size of a pin point, but could not say whether it was a cinder or not. Dr. Wickliffe testified that there was a growth in plaintiff's eye, which he called a 'pterygium,' but that the growth could be removed by an operation. Dr. Hurst testified that he discovered a little growth in plaintiff's eye, and that this growth could have been caused by a cinder. Dr. Offutt, a specialist, deposed that a cinder, if left in the eye, could have caused the growth. On the other hand, Dr. Trapp, another specialist, testified that a cinder could not have caused the growth. It is insisted, not only that the demurrer should have have been sustained to the petition, but that defendant was entitled to a directed verdict. In the case under consideration, it is pointed out that plaintiff did not rely upon the defective spark arrester, or the negligent management of the train, but predicated her case on the fact that the door of the car was left open, which, it is insisted, was not negligence. It may be conceded that ordinarily the fact that the window or door of a car is left open is not evidence of negligence, since passengers are in the habit of raising and lowering windows, and going in and out of doors; but that rule cannot be applied to the facts of this case. Here it was the rule of the company to close the doors of the cars when going through a tunnel. The brakeman was charged with notice of the location of the tunnel. It is a matter of common knowledge that if the door of a car without a vestibule is left open, cinders will probably enter the car. Hence, if the brakeman himself left the door open, just as the train was about to enter the tunnel, and this caused the cinder to enter plaintiff's eye, it cannot be doubted that he was guilty of negligence for which the company was liable."

RIGHT OF HUSBAND TO ENJOIN "NAGGING" BY WIFE.—In Drake *v.* Drake (Minn.) 177 N. W. 624, an action by a husband to restrain his wife from committing acts of misconduct amounting to what is commonly known as "nagging," it was held that such acts were nothing more than a series of personal torts, and that equity would not restrain them. The court followed a previous decision, Strom *v.* Strom, 98 Minn. 427, 107 N. W. 1047, to the effect that the Minnesota legislature, by the enactment of the so-called Married Woman's Act, did not intend to abrogate the rule of the common law by extending to the wife a right of action for torts committed against her by the husband during coverture, and declared that the rule applied equally to the husband. Continuing, the court said: "The authorities in other jurisdictions are not in harmony, though the statutory provisions upon the subject appear substantially the same in all. A majority in number of adjudicated cases apply the rule followed in this state. Thompson *v.* Thompson, 218 U. S. 611, 54 L. ed. 1180, 30 L. R. A. (N. S.) 1153, 31 Sup. Ct. Rep. 111, 21 Ann. Cas. 921 (there was a dissenting opinion in that case by Mr. Justice Harlan, concurred in by two of his associates); Bandfield *v.* Bandfield, 117 Mich. 80, 40 L. R. A. 757, 72 Am. St. Rep. 550, 75 N. W. 287; Schultz *v.* Christopher, 65 Wash. 496, 38 L. R. A. (N. S.) 780, 118 Pac. 629, 13 R. C. L. 1395. The case of Peters *v.* Peters, 156 Cal. 32, 23 L. R. A. (N. S.) 699, 103 Pac. 219, was similar to that at bar, being one by the husband against the wife for assault and battery, and the California supreme court, construing a statute substantially like that of this state, held that it could not be maintained. The contrary was held in Brown *v.* Brown, 88 Conn. 42, 52 L. R. A. (N. S.) 185, 89 Atl. 889, Ann. Cas. 1915D 70, and Fiedler *v.* Fiedler, 42 Okla. 124, 52 L. R. A. (N. S.) 189, 140 Pac. 1022, though the statutes of those states for all practical purposes are the same as in the states where the right of action is denied. We prefer the rule of the Strom case, and think it should be adhered to until such time as the legislature shall deem it wise and prudent to open up a field for marring or disturbing the tranquillity of family relations, heretofore withheld as to actions of this kind, by dragging into court for judicial investigation at the suit of a peevish, fault-finding husband, or at the suit of the nagging, ill-tempered wife, matters of no serious moment, which if permitted to slumber in the home closet would silently be forgiven or forgotten. If that source of litigation is to be opened up at all, it should come about by legislation. Neither husband nor wife is without an appropriate remedy in such matters, where of a character to be redressed by the courts. The divorce courts

are open to them when the facts will justify relief of that character, and when the misconduct complained of is of a nature to constitute a crime the criminal laws will furnish adequate protection. But the welfare of the home, the abiding place of domestic love and affection, the maintenance of which in all its sacredness, undisturbed by a public exposure of trivial family disagreements, is so essential to society, demands and requires that no new grounds for its disturbance or disruption by judicial proceedings be ingrafted on the law by rule of court, not sanctioned or made necessary by express legislation."

CIVIL LIABILITY OF TOWN FOR LIBEL.—In Stanley *v.* Sangerville (Me.) 109 Atl. 189, it was held that a town in its corporate or private as distinguished from its governmental or public capacity was liable in damages for libel in charging one with larceny in a suit for damages for carrying away a culvert belonging to the town. The court said: "The dual capacity of New England towns as municipal corporations, in the absence of special legislation, is firmly established, and has been recognized for many years (Libby *v.* Portland, 105 Me. 370, 26 L. R. A. (N. S.) 141, 74 Atl. 805, 18 Ann. Cas. 547; Eastman *v.* Meredith, 36 N. H. 284, 72 Am. Dec. 302; Oliver *v.* Worcester, 102 Mass, 499, 3 Am. Rep. 485), and the same dual capacity has been recognized elsewhere (Bailey *v.* New York, 3 Hill 531, 38 Am. Dec. 669). In their governmental capacity, as political subdivisions of the state, they discharge certain public duties imposed upon them by the legislature; and for the better discharge of those duties the inhabitants meet in town meeting for the choice of officers, for action upon reports of such officers, or committees, for the transaction of the necessary business connected with the discharge of the public duties imposed, and for the discussion of public affairs. The town upon such occasions acts in a legislative capacity and as a political body, and no action lies against a town for what is done by it as a political body and as a part of the administration of the government. . . . In its corporate capacity as the owner of property held for its profit and advantage, the rights and liabilities of the town are measured strictly by the laws which determine all private rights and liabilities, and under the same conditions as a private corporation. Libby *v.* Portland, *supra;* Oliver *v.* Worcester, 102 Mass. 489, 500, 3 Am. Rep. 485; Woodward *v.* Livermore Falls Water Dist. 116 Me. 86, 91, L. R. A. 1917D 678, 100 Atl. 317. The maxim of 'respondeat superior' may apply to them. 4 Dill. Mun. Corp. 5th ed. § 1655 (974). It does not appear in the writ that the culvert in question was acquired by the town, or was in any way necessary, for the performance of a public duty, or was held in any governmental capacity; nor does it appear that in bringing the trespass action the town was acting in its governmental capacity. Upon the face of the pleadings the inhabitants of the town of Sangerville in bringing the trespass suit were simply asserting their title to an article of property, which the town unquestionably had the right to own (Libby *v.* Portland, supra), and were seeking to recover damages of the present plaintiff for taking and carrying it away. The right to sue is one of the powers of a corporation. . . . The precise question for decision, then, is whether, as stated in the motion, an action for damages for libel lies against a town or against the inhabitants thereof in their corporate capacity. We think that such an action may be maintained. It has been asserted with much wealth of argument that a corporation, being a mere legal entity, is incapable of malice, and that an action in which malice is a necessary element cannot be maintained against the corporation, but should be instituted against the natural persons concerned in the wrong. But a corporation is liable in damages for the publication of a libel, as for other torts. "The result of the cases is that for acts done by the agents of a corporation, either in contractu or in delicto, in the course of its business, and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances."

LIABILITY FOR LOSS OF SUITCASE LEFT IN HOTEL LOBBY.—In Swanner *v.* Conner Hotel Co. (Mo.) 224 S. W. 123, it was held that where a prospective guest at a hotel left his suitcase in the hotel lobby for several hours while waiting to be accommodated with a room, without consigning the suitcase to the care of any of the hotel employees, the hotelkeeper was nevertheless liable for the loss thereof. Said the court: "It is conceded, or rather not questioned, that the relation of innkeeper and guest was created and existed. The law as to an innkeeper's liability is not the same in all jurisdictions. 22 Cyc. 1081 says that the prevailing view is that an innkeeper is liable, like the carrier, for all goods of the guest lost in the inn, unless the loss happened by an act of God or a public enemy or by fault of the owner. Supporting this view Cyc. cites many cases from various states. According to another view an innkeeper is liable only when negligent, but that he owes the highest possible degree of care to his guest: but if such care has been exercised, and the guest's goods have been injured or lost, the innkeeper is not liable. Many cases are cited in support of this rule. The same text also says that, whatever view is adopted, it is agreed that upon loss or injury to the goods of the guest being shown the innkeeper is prima facie liable, and the burden is on him of establishing such facts as will exonerate him. It has been held in our own state that the liability of an innkeeper, while not precisely the same, is analogous to that of a common carrier, and that the reasons for the liability are the same. Batterson *v.* Vogel, 10 Mo. App. 235. In this case the court said: 'The case of the innkeeper is this: He is prima facie liable for the loss of his guest. He may show that he was diligent and that the guest was negligent; but, though ever so diligent, he is liable for the loss of goods of his guest not arising from the negligence of the guest, the act of God, or public enemies.' We have found no case in this state that tends to run counter to the rule as laid down in the Batterson case; hence that seems to be our rule. Defendant urges that plaintiff's baggage was never *infra hospitium*, that is, in the care and under the custody of the innkeeper, and that therefore no liability attached. As stated, the fact that plaintiff was a guest is not questioned. He had put his baggage where it was customary to put baggage while a guest was registering and seeing about a room. Plaintiff did not register immediately after setting his grip by the bell boys' bench, but would have then had there been a room. He was told there would be a room, and he waited for the room. His baggage was where it should have been at least up to the time he asked for and failed to get a room. . . . Should plaintiff's negligence bar recovery as a matter of law? Defendant did not plead contributory negligence, but merely a general denial. But notwithstanding that contributory negligence is not pleaded, yet, under the rule as laid down in Batterson *v.* Vogel, supra, if plaintiff's negligence was the cause of the grip being lost, he cannot recover. Plaintiff's familiarity at defendant's hotel no doubt contributed to his lack of attention to his baggage, and perhaps gave him a feeling of security that a stranger might not have had, but plaintiff is to be considered as he was. We do not think that plaintiff's negligence was any more than a question for the trier of the facts, and therefore we decline to sustain appellant on this feature."

LIABILITY OF ELECTRIC LIGHT COMPANY FOR INJURY TO EMPLOYEE.—It seems that one contracting with a manufacturer to

furnish electrical energy for the factory is not liable to an employee in the factory for injury, caused by permitting the lights to go out, on the theory that he is the manufacturer's agent to furnish the lights, since he owes no duty to the employee. It was so held in Mullican v. Meridian Light, etc., Co. (Miss.) 83 So. 816, reported and annotated in 9 A. L. R. 165, wherein the court said: "The contract imposed no duty upon the light company to furnish lights and keep them burning in the factory for the use and safety of the employees therein. No such service was promised or contemplated under the contract, therefore it necessarily follows that, since there was no such duty on the part of the light company toward the deceased, there can be no liability against it for damages on account of the unfortunate death alleged to have been caused by the extinguishment of the lights in the plant. The appellant contends that the light company was the agent of Crawford, and as such agent negligently failed to keep the plant lighted as a duty owed to Crawford and the deceased employee, Mullican. We have reviewed exhaustively the authorities on the question of the liability of agents for negligence in the performance of duties to principals and third persons, and with much interest we have observed the distinctions made between acts of nonfeasance and misfeasance, or acts of omission and commission. We find our own court in Feltus *v.* Swan, 62 Miss. 415, held that a mere agent is not liable for an omission of duty except to his principal. This rule appears to be well established in the textbooks and many decisions in other states. However, the more modern rule, which we think is based upon better reasoning, is that the relation of agency does not exempt a person from liability for an injury to a third person resulting from his neglect of duty for which he would otherwise be liable. This liability is not based upon the contractual relation existing between the principal and agent, but upon the common-law obligation that every person must so use that which he controls as not to injure another. But it must be borne in mind that this rule of liability always rests upon the question of the duty of the agent toward the injured party and his negligent disregard or violation of that duty, and that where no duty exists there can be no liability. It is the fact that the agent is guilty of a wrongful or negligent act amounting to a breach of duty which he owes to the injured person that makes him liable. It seems, therefore, that the modern rule tends to abolish the distinction between the agent's acts of commission and omission wherever such act involves a breach of duty. 21 R. C. L. 851; Story, Agency, § 309. It is argued, in substance, by the appellants that the light company as agent of Crawford negligently failed to furnish lights continuously burning for the use and protection of the employees in the factory. This contention cannot be maintained, in our judgment, for the reason that there was no privity or other relation between the light company and the deceased which obligated the light company to furnish continuous lighting, or any lights whatever, in the factory. Nor was there any common-law duty imposed upon the light company to furnish a safe and continuously lighted plant for the use and safety of the deceased. In truth, the light company here was not an agent of Crawford to furnish lights in the factory. It had no control or supervision over the lighting of the plant, but was a mere contractor to furnish electrical energy for power purposes at a stipulated price per kilowatt hour. Therefore, in view of the facts alleged in the declaration, there is no liability on the part of the light company for the unfortunate death of Mr. Mullican."

VALIDITY OF SUNDAY LAW DISCRIMINATING AGAINST BARBERS AS TO DEGREE OF PUNISHMENT.—In State *v.* Murray (Neb.) 175 N. W. 666, reported and annotated in 8 A. L. R. 563, it was held that a statute is not unconstitutional, as discriminative class legislation, by reason of the fact that it imposes on barbers a more severe penalty for working at their trade on Sunday than that imposed by the General Sunday Act of the state. Said the court referring to the statute complained of: "It applies equally to all of the members of a certain class, namely, the barbers of the state, and it seems to be a reasonable exercise of the police power. Under this power the legislature in its discretion may impose such reasonable penalty as will apply to all the members of any given class of persons for working on Sunday, as it may deem reasonably necessary to make the act effective. Statutes similar to ours that inflict a heavier penalty for barbering on Sunday than is imposed on other classes of labor for violation of the General Sunday Acts have been held constitutional. Breyer *v.* State, 102 Tenn. 103, 50 S. W. 769; Stanfeal *v.* State, 78 Ohio St. 24, 84 N. E. 419, 14 Ann. Cas. 138; People *v.* Bellet, 99 Mich. 161, 22 L. R. A. 696, 41 Am. St. Rep. 589, 51 N. W. 1094. In the Michigan case the subject is discussed at some length. The court aptly said: 'It is conceded that the state, in the exercise of its police power, has the right to enact Sunday laws, and that it also has the right to provide for the regulation and restriction of those engaged in an employment which in and of itself may prove harmful to the community, such as the liquor traffic. But it is contended that the business of conducting a barber shop is not of this class, and that it is not in the nature of class legislation to prohibit this business under more severe penalties than those provided for the conduct of other legitimate business on Sunday. We do not deem the act in question open to such objection. By class legislation we understand such legislation as denies rights to one which are accorded to others, or inflicts upon one individual a more severe penalty than is imposed upon another in like case offending.' Cooley Const. Lim. 7th ed. 554, is cited in support of the text. Defendant argues too that, in view of the stipulation which provides that Lefler 'was in necessary need of barbering in order to be comfortable and healthy,' this made the barbering a work of necessity. We do not think so. Lefler was barbered in the barber shop. Under the agreed statement of facts he did not come within the class of persons who are excepted from the operation of the statutes, and for whom the services of a barber may lawfully be performed 'in connection with the medical treatment of persons confined to their rooms or in a hospital and being under the care of a physician.' If any of these conditions had obtained, the barbering, under the express terms of the act, would, of course, be construed to be a work of necessity. It will not be presumed that the legislature by this act intended to make it a crime, in a case of emergency, to cut the hair or to remove the beard of a person who has sustained injuries about the head or face, and for whose proper treatment such services are required. The facts stipulated do not present a case of that kind. Defendant's contention that it is not within the province of the legislature to define what is a work of necessity or charity does not seem to be well founded. In Petit *v.* Minnesota, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666, the Supreme Court of the United States commented on and approved this language found in the Minnesota opinion: 'In view of all these facts, we cannot say that the legislature has exceeded the limits of its legislative police power in declaring that as a matter of law, keeping barbers' shops open on Sunday is not a work of necessity or charity, while as to all other kinds of labor they have left that question to be determined as one of fact.'"

"That personal property has no situs seems rather a metaphysical position than a practical and legal truth."—Per Johnson, J., in Smith *v.* Georgetown Union Bank, 5 Pet. 525.

News of the Profession

ILLINOIS BAR ASSOCIATION.—The next annual meeting of the Illinois Bar Association will be held in June at Dixon.

INDIAN ELECTED PROBATE JUDGE.—James Irving, a Yankton Sioux Indian, has been elected judge of the Probate Court at Pipestone, Minnesota.

MINNESOTA JUDGE RETIRES.—After twelve years' service Judge W. C. Crawford has retired from the District Court of the Sixteenth judicial district of Minnesota.

RESIGNATION OF ILLINOIS JUDGE.—Judge C. H. Donnelly of McHenry county has resigned as circuit judge after thirty years of service on the bench. His home is at Woodstock.

LAWYERS PREDOMINATE IN NEW MISSOURI LEGISLATURE.—Lawyers hold a scant majority of two over the farmers in the next Missouri General Assembly. There are forty-one of them.

DISTRICT ATTORNEY IN CALIFORNIA RESIGNS.—After ten years' service as district attorney of Orange county, L. A. West has resigned and returned to private practice in Santa Ana.

BAR ASSOCIATION OF SKAGIT COUNTY, WASHINGTON.—The Skagit County Bar Association of Washington has elected Ben Driftmier of Anacortes, president of that body.

BAR ASSOCIATION OF LINN COUNTY, OREGON.—J. R. Wyatt of Albany, Oregon, has been elected president of the Linn County Bar Association.

RHODE ISLAND BAR ASSOCIATION.—Richard B. Comstock was for a fifth time elected president of the Rhode Island Bar Association at the annual meeting held in December in Providence.

NEBRASKA BAR ASSOCIATION.—The annual convention of this association met at Lincoln in December under the charge of President W. M. Morning of that city.

GRAYSON COUNTY BAR ASSOCIATION OF TEXAS.—At a meeting of the Grayson County Bar Association held in Sherman in December E. J. Smith of Denison was elected president.

FORMER MARYLAND JURIST DEAD.—Former Judge James Alfred Pearce of the Maryland Court of Appeals died at Chesterton, Maryland, recently. He retired from the bench in 1912.

FORMER FEDERAL JUDGE DEAD.—Judge W. H. H. Clayton, aged 80, former United States district judge in Oklahoma, died in December. He was a brother of Gen. Powell Clayton.

JUDICIAL CHANGE IN UTAH.—Albert A. Law of Logan, Utah, has assumed his duties as judge of the District Court of the First Judicial district, succeeding Judge J. D. Call who sat there for eight years.

UNITED STATES DISTRICT ATTORNEY'S OFFICE IN MASSACHUSETTS HAS NEW ASSISTANT.—James F. Aylward, former city solicitor of Cambridge, has been named assistant United States District Attorney.

CHANGES IN MONTANA SUPREME COURT.—Albert J. Galen of Helena and Frank B. Reynolds of Billings have become judges of the Montana Supreme Court, succeeding Justices Hurley of Glasgow and John A. Matthews of Townsend.

NEW UNITED STATES ASSISTANT ATTORNEY GENERAL.—Leslie O. Garnett of Virginia has been appointed an assistant attorney general of the United States and put in charge of the division of public lands.

SAN FRANCISCO JURIST HONORED.—Judge John J. Hunt, who has retired from the Superior Court of California after forty-one consecutive years of service, was recently honored by the San Francisco Bar Association with a luncheon.

FORMER DELAWARE SENATOR TO PRACTICE LAW IN WASHINGTON.—Former United States Senator Willard Saulsbury of Delaware has returned to Washington to practice law, associating himself with the firm of Britton & Gray.

DEATH OF FORMER COLORADO JUDGE.—Wilbur Fisk Stone, formerly a justice of the Colorado Supreme Court, is dead. He was born at Litchfield, Connecticut, and graduated from the University of Indiana in 1857.

KANSAS JUDICIARY HAS ADDITIONAL MEMBER.—George F. Beezeley of Girard, former county attorney, has been appointed judge of the new division of the District Court of Crawford county. He received his legal education at the University of Kansas.

FORMER JUDGE OF WEST VIRGINIA SUPREME COURT OF APPEALS DEAD.—Former Judge Warren Miller of West Virginia died late in December. He served one term as a member of Congress and was one of the judges of the West Virginia Court of Appeals for a number of years.

GENERAL SESSIONS COURT OF NEW YORK CITY.—The recent death of Judge James T. Malone of the General Sessions Court of New York city has caused the appointment of Alfred J. Talley to fill the vacancy. Judge Talley was formerly assistant district attorney for New York county.

ATTORNEY GENERAL OF UTAH ANNOUNCES APPOINTMENTS.—Attorney General Harvey H. Cluff of Utah has announced the appointment of assistants as follows: W. Hall Farr of Ogden; William A. Hilton of Salt Lake City; Lawrence A. Miner of Nephi, and J. Robert Robinson of Vernai.

CIRCUIT JUDGES' ASSOCIATION OF WISCONSIN.—Judge Chester Fowler, of Fond du Lac, was re-elected president of the Circuit Judges' Association of Wisconsin at a recent convention lasting two days. The next annual meeting will be held in December at Milwaukee.

OKLAHOMA BAR ASSOCIATION.—At the annual meeting of the Oklahoma Bar Association held in January at Oklahoma City, Preston C. West of Tulsa was elected president for 1921. Judge C. B. Ames, formerly assistant attorney general of the United States and now practicing law in Oklahoma City, delivered the address of welcome.

CHANGES IN PERSONNEL OF INDIANA SUPREME COURT.—The Supreme Court of Indiana has by the recent election been changed in its personnel, there being two new judges, namely, J. C. Travis of Laporte and Louis Ewbank of Indianapolis, in place of the late Judge Lawson Harvey of Indianapolis and Judge Moses B. Lairy of Logansport.

FEDERATION OF BAR ASSOCIATIONS OF ILLINOIS.—Perry L. Persons of Waukegan, Illinois, has been elected president of the newly formed Federation of Bar Associations of Illinois. Other officers elected are: Vice-president, Ralph C. Austin, Joliet;

treasurer, Mrs. Catherine W. McCulloch, Evanston; secretary, J. Kent Green, Chicago.

WASHINGTON UNIVERSITY LAW SCHOOL.—Beginning with the school year 1923-1924 a minimum of two years of college work will be required by Washington University School of Law, St. Louis, of all who matriculate as regular students. Judge Richard L. Goode, now a member of the Missouri Supreme Court, has resumed his former position as dean of the school.

VACANCY IN UNITED STATES DISTRICT ATTORNEY'S OFFICE IN PHILADELPHIA.—John J. Elcock of Philadelphia has been appointed an assistant to United States District Attorney Charles D. McAvoy succeeding Robert J. Sterrett resigned. He is a son of the late Judge Thomas R. Elcock.

SHARPSBURG, PENNSYLVANIA, LAWYER APPOINTED ASSISTANT DISTRICT ATTORNEY.—District Attorney Harry H. Rowland of Pittsburgh has announced the temporary appointment of Fred C. McCutcheon of Sharpsburg as an assistant district attorney. The new assistant served as a captain of artillery during the World War. He succeeds William E. Walsh who resigned.

WEST VIRGINIA SUPREME COURT OF APPEALS.—Judge Harold A. Ritz of Bluefield, West Virginia, has been designated president of the state Supreme Court in place of Judge L. Judson Williams of Lewisburg whose term has expired. The vacancy caused by the expiration of Judge Williams's term has been filled by the election of former Assistant Attorney General Frank Lively of Charleston.

JUDICIAL CHANGES IN IDAHO.—W. F. McNaughton of Cœur d'Alene, Idaho, has been appointed to the judgeship of the sixth judicial district of that state to fill the vacancy created by the election in November of Judge Robert N. Dunn to the Supreme Court. Chief Justice William M. Morgan of the Supreme Court has retired and was given a banquet by the Ada county bar recently.

BROOKLYN HAS NEW COUNTY JUDGES.—George W. Martin of Brooklyn has been appointed a judge of the Kings county court succeeding Judge Charles J. McDermott who resigned. The new judge is a graduate of Yale College. William R. Bayes is another new appointee of the same court, succeeding Judge Norman S. Dike who has been elected to the Supreme Court. Judge Bayes is a graduate of Ohio Wesleyan University.

CHANGES IN PENNSYLVANIA SUPREME COURT.—The Pennsylvania Supreme Court has a new head in Chief Justice von Moschzisker succeeding Chief Justice Brown whose term has expired. It has also two new associate justices, namely, Sylvester C. Sadler who takes the place of the former chief justice and William I. Schaffer who takes the place of Justice John Stewart, who was killed in a trolley accident.

APPOINTMENT OF NEW ATTORNEY GENERAL OF MINNESOTA.—Clifford L. Hilton, who was re-elected attorney general of Minnesota, has reappointed his old staff of assistants. They are C. Louis Weeks, deputy attorney general; Henry C. Flannery, Egbert S. Oakley, James E. Markham, Rollin S. Smith, Montreville J. Brown, Albert F. Pratt and C. H. Christopherson, assistant attorney general.

PRESIDENT'S SECRETARY TO PRACTICE LAW.—Joseph P. Tumulty, secretary to President Wilson, has announced that he has declined appointment as a chief justice of the Court of Customs Appeal, offered him by the president, and that he will begin the practice of law in Washington after March 4.

NEW EDITOR OF AMERICAN BAR ASSOCIATION JOURNAL.—Major Edgar B. Tolman, who was corporation counsel under Mayor Harrison, has been appointed, by the American Bar Association, editor in chief of the association's journal, to succeed the late Stephen S. Gregory of Chicago. Major Tolman has been president of the Iroquois Club, the Chicago Bar Association and the Illinois State Bar Association. During the war Major Tolman was in charge of the draft work in Chicago, and later assistant to the adjutant-general in Springfield.

ASSOCIATION OF AMERICAN LAW SCHOOLS MAKES DRIVE FOR TEACHERS OF LAW.—A special committee on recruiting the teaching branch of the legal profession has been appointed by the Association of American Law Schools. It is the purpose of the committee to keep as full a record as possible of persons who desire to enter upon the teaching of law; to give information as to persons available for law teaching to law school authorities who desire such information, and to give to young men information with regard to the teaching branch of the profession. Teachers of law are becoming scarcer throughout the country, it is said, and the association hopes interest may be aroused in the younger men about to enter the teaching profession. Prof. Charles K. Burdick, of Cornell University, is chairman of the committee. Other members are: Dean William C. Jones, of the University of California; A. M. Dobie, of the University of Virginia; A. M. Thompson, of the University of Pittsburgh, and H. Claude Horace, of the University of Iowa.

English Notes*

CONDONATION OF MATRIMONIAL OFFENSE BY LETTER.—In Crocker *v.* Crocker, recently decided by the Court of Appeal, the interesting question was raised whether a letter written by a spouse offering forgiveness for the commission of adultery was sufficient to establish condonation of that offense. The facts were that a husband petitioner for divorce on the ground of his wife's adultery, who was at the material times a soldier in service abroad, had, with knowledge of the adultery, written the respondent a letter in which he offered to forgive her and stop the divorce proceedings he was contemplating if she would leave a certain town and live with him elsewhere. She replied three days later accepting that condition, and took certain action on the strength of his offer, but the following day received another letter in which he withdrew his offer of forgiveness, and said he would have nothing more to do with her. He had, before he made the offer, stopped the respondent's allowance, and caused the children of the marriage to be taken from her, and he had not, when he retracted his offer, taken any action to restore the previous position in respect of either of these matters. The respondent admitted adultery, but pleaded condonation. It was decided by Sir Henry Duke, P. (149 L. T. Jour. 106) that there cannot, in view of the decision of the full court in Keats *v.* Keats and Montezuma (1 Sw. & Tr. 334), be condonation by mere words of forgiveness, whether spoken or written, but that to constitute condonation there must be such conduct as in the circumstances of the parties amounts to reinstatement of the offending spouse. Condonation therefore was not established. His Lordship decided also that the letters relied on by the respondent did not for want of consideration moving from the wife constitute a con-

*With credit to English legal periodicals.

tract binding the petitioner not to institute divorce proceedings. The respondent appealed to the Court of Appeals where the judgment of the lower court was affirmed.

PRACTITIONERS OF LIGHTER VERSE AT THE SCOTS BAR.—Ever since the classic days of Scott and Jeffrey, literature has always had numerous votaries among members of the Scottish Bar. Following the great names that have been mentioned came those of Wilson, Lockhart, Aytoun, Sir William Hamilton—all distinguished in general literature—and those of Cosmo Innes and John Hill Burton in the domain of historical research. But, apart from those who have taken the pursuit of letters seriously, there have been not a few others who have thrown off in their leisure hours many a *jeu d'esprit* for which they have made the Profession their debtors inasmuch as several of the products of their sprightly muse have made sport of the substance or the terminology of Scots law and procedure. One of the most distinguished of those who achieved success in this lighter vein was George Outram, whose "Legal and Other Lyrics," enshrining such gems as "The Annuity," "The Process of Augmentation," "Multiplepoinding," "Soumin and Roumin," have been the delight of two or three generations of Scots lawyers and others; while Lord Neaves' "Songs and Verses," originally contributed to *Blackwood's Magazine,* with their rollicking humor, have also found many enthusiastic admirers. One of Neaves's *jeux d'esprit* was his "Tourists' Matrimonial Guide to Scotland," which on more than one occasion has been cited in the English Divorce Court as an accurate, though humorous, exposition of the peculiarities of the Scots law of marriage. Since the days of Outram and Neaves there have been fewer successful practitioners of lighter verse at the Scots Bar, but the tradition has always been maintained, and now Professor Gloag, of the Law Chair in the University of Glasgow, has entered the field with his "Carmina Legis"—verses illustrative of the law of Scotland, which, like Sir Frederick Pollock's "Leading Cases Done into English," is intended to make the study of legal principles a little more palatable to the student than the usual mode of instruction by the average text-book is apt to be; yet while this is the professor's design, a touch of humor is not wanting in the resetting of familiar decisions in a metrical dress.

JUDGES AS LITIGANTS.—Cynical critics of legal matters have occasionally been heard to comment on the fact that members of the Profession, always ready, as they say, to counsel others to embark on litigation, are ever chary about indulging in it on their own account. And to this it has to be said, first of all, for the honor of the Legal Profession, that its members do not readily, and without due consideration of the facts laid before them, advise proceedings; but we suppose it is the fact that lawyers do not very often go to law on their own account, a circumstance no doubt in part due to their familiarity with the law's uncertainty. But suits at the instance of lawyers, and even of judges, are not unknown. Mr. Justice Peterson was, recently, one of the plaintiffs in an action before Mr. Justice Astbury to restrain what was alleged to be a serious nuisance caused to the enjoyment of his house by two noisy sawing operations, and the learned judge, with his co-plaintiffs, was successful in obtaining an injunction. An earlier instance in which a judge was plaintiff occurred in a somewhat curious case in Scotland in 1771, when Lord Monboddo, one of the Senators of the College of Justice, a learned and acute thinker, though in some ways eccentric, brought an action against a farrier for the value of a horse which died while under his charge. Lord Monboddo had employed the farrier to attend to the horse, and had given him positive instructions that he should give the animal no medicine but nitre. The farrier gave the horse nitre, but, in order to take off the sharp taste of the medicine, and to make the horse swallow it more readily, mixed it with a small quantity of treacle. The horse died, hence the action. It is interesting to recall that counsel for Lord Monboddo was James Boswell, the biographer of Dr. Johnson, who argued very learnedly in support of the action, citing various passages from the civil law and from the Dutch as well as Scottish jurists. Despite his arguments, however, the action failed and was dismissed with costs, the court holding that the farrier had not gone *ultra fines mandati,* but that the mode followed was necessary to fulfil the orders given. There is a tradition, of doubtful reliability however, that Lord Monboddo was so disgusted at the decision that thereafter he always sat at the clerks' table instead of on the Bench beside his brother judges. That he did take his seat below, instead of on the Bench, during the later years of his judgeship is well authenticated, but probably his growing deafness rather than the other reason was the true explanation of this idiosyncrasy.

DICKENS AND THACKERAY AS STUDENTS AT THE MIDDLE TEMPLE.—By the death of Mr. John Digby, one of the senior Benchers of the Middle Temple, what is probably the last link connecting the present generation with the Temple student days of Dickens and Thackeray has been broken. It was one of Mr. Digby's proud recollections that he had dined in hall with both distinguished writers. Dickens joined the Middle Temple in 1839, but in 1855, finding that his life work was to be in the domain of literature rather than in that of law, he presented a petition to the Benchers of the Inn in which, after reciting that he had entered himself a student of the Honourable Society with the intention of keeping the requisite number of terms and of being called to the Bar, he continues as follows: "That although your petitioner was at that time a writer of books, he did not foresee that literature as a profession would so entirely engross his time and become the business of his life, as it has since done and now does; that in the pursuit of his art (both in his own country and in others) your petitioner has been entirely diverted from the pursuit of the law; and he has long had reason to believe that the separation is final. Your petitioner, with this expression of his inability to become a law student in anything but in name, respectfully begs permission to withdraw himself from the student list and to have his deposit money returned to him if your worships should see no objection to granting him this favour." Upon this petition the relevant minute of the "Parliament" of the Middle Temple is to the effect: "It is ordered that the same be allowed." We cannot, therefore, claim Dickens as a member of the Bar. We wish we could, for the law and its practice greatly interested him, and by his exposure of the dilatory methods of Chancery he helped to bring about a much needed reform. But while we cannot claim for the author of "Pickwick" more than that he was for a time a Bar student, we can claim for his great contemporary, William Makepeace Thackeray, that he was duly called to the Bar, his student experiences being turned to excellent literary account in the pages of "Pendennis." Thackeray entered the Middle Temple as a student in 1831, and was called in 1848 in the hope of being able to obtain an appointment as police magistrate. This was not to be, and happily for himself and for his admirers was it so ordered, for, had he received such an office, one feels fairly sure that he would not have found it congenial, and certain that we should have been without some of those masterpieces that have long been the delight of all lovers of pure English and brilliancy of portraiture.

CONTRIBUTIONS BY CORPORATIONS TO BENEFICENT OBJECTS.—The recent case of Evans *v.* Brunner, Mond & Co., Limited, has raised, not for the first time, for there appear to have been a considerable number of cases reported bearing on the point, the question whether a trading company can apply its funds to promote objects which, however beneficial to the community, may be said to be but remotely conducive to the attainment of its own special *raison d'être*. Many of us, especially during the war, have noticed in the published accounts of banks and other public companies items recording benefactions out of the corporate funds towards various beneficent objects which, although not legally within the ambit of the company's constitution, few shareholders would raise the slightest objection to, but, on the other hand, whole-heartedly approve. The recent case, however, was of a somewhat different character. The company's main object was the manufacture of chemicals, and it had been formed in 1881 to acquire the business of a firm of the same name engaged in similar business to that which the company carried on. By the memorandum of association the company was authorized to do all things necessary or conducive to the attainment of its main object. The shareholders, at a meeting held after the directors' proposition had been placed before them in reports and at a previous general meeting, resolved by a very large majority of votes to authorize the company's directors to distribute to universities or other scientific institutions the substantial sum of £100,000 out of the company's funds for the furtherance of scientific education and research. A small minority of shareholders raised objections to their money being so dealt with, and, as a matter of first impression, there seems considerable force in the contention. Mr. Justice Eve, however, while admitting the impression the view taken on behalf of the objecting shareholders had made on him, refused the injunction restraining the directors from making the proposed application of the funds. The evidence of the chairman of directors, who had been intimately acquainted for a long period with the conduct of the company's business, showed that the carrying out of the proposal in the resolution would not be an application of funds for objects foreign to those of the company and of too general a character. The cogent argument that the company's funds might be used for the training of persons who would afterwards enter the service of the company's rivals in business was on the balance of advantage and disadvantage brushed aside, and the benefit to be derived by the company held to be not too remote, the resolution being limited by an implied obligation of the directors to exercise it bona fide in the company's real interests.

USE OF FORCE TO PREVENT ESCAPE OF CRIMINAL FROM CUSTODY.—Sir Hamar Greenwood, K. C., in reply to a question addressed to him as Chief Secretary for Ireland, by Mr. T. P. O'Connor recently, enunciated the law clearly in reference to the intentional infliction of death or bodily harm in the prevention of the escape of criminals from custody. Sir Hamar Greenwood said that four men under arrest tried to escape and "were shot dead. He had no information as to the wounding of two men. The police and military were entitled to fire on men who were attempting to escape or who refused to halt when called upon to do so." "The intentional infliction of death or bodily harm," writes Sir Fitzjames Stephen in his Digest, "is not a crime when it is done by any person in order to arrest a traitor, felon, or pirate, or retake or keep in lawful custody a traitor, felon, or pirate who has escaped or is about to escape from such custody, although such traitor, felon, or pirate offers no violence to any person . . . provided that the object for which death or harm is inflicted cannot be otherwise accomplished." The doctrine laid down by Hale as to the degree of force or violence which may be used in order to arrest a criminal seems to be applicable in the case of the prevention of a criminal from effecting his escape from lawful custody. Hale pronounces that if a felon flies or resists those who try to apprehend him and cannot otherwise be taken he may be lawfully killed: (1 Hale, pp. 481, 489). "The rule," writes Sir Fitzjames Stephen in commenting on the position enunciated by Hale, "seems to overlook the distinction between taking a man prisoner and taking possession of his dead body, for it is difficult to see in what sense a pickpocket can be said to be taken if he is shot dead on the spot. The rule would be more accurately expressed by saying that a man is justified in using any violence to arrest a felon which may be necessary for that purpose, even if it puts and is known or meant to put his life in the greatest possible danger and is inflicted by a deadly weapon and does in fact kill him." Everyone commits a misdemeanor and is liable, upon conviction thereof, to be sentenced to hard labor who, being lawfully in custody for any criminal offense, escapes from that custody. Escape from custody is distinguishable from prison breach in which there must be an actual breaking of the place in which the party is confined, whether intentional or not. The voluntary permission of escapes by prisoners on the part of persons in their lawful custody renders such persons guilty of high treason if the escaped prisoner was guilty of high treason; of being an accessory after the fact to the felony of which the captured prisoner was guilty if he was guilty of felony; of misdemeanor if the escaped prisoner was guilty of misdemeanor; but, as Sir Fitzjames Stephen observes, "it does not appear what is the effect of voluntarily permitting the escape of a person lawfully charged but innocent in fact."

REMINISCENCES OF FREDERICK HARRISON.—In a recent issue of the London *Times*, Mr. Frederick Harrison, who entered on his ninetieth year on October 18, 1920, has, through the medium of a special correspondent, placed on record some of the principal memories and impressions in a review of his life in which he has entered into every field of intellectual and social activity. "I was a friend," Mr. Harrison said, "of George Eliot, read her books when they first came out, and I have read many of them since, but find they are rather—rather solemn and elaborate." Mr. Harrison, in the report of his interview with the *Times* correspondent, touches very lightly on his career at the Bar, a matter which would, of course, be a great attraction to persons learned in the law. He simply says, "When I was at the Bar I kept myself fit by riding." His reference, however, to George Eliot may recall the fact that Mr. Harrison was frequently consulted by her as to legal subtleties in the construction of the plots for her novels, just as in a more recent time Mr. Graham Murray (Lord Dunedin) advised Stevenson with a view to greater accuracy as to questions of law and legal history in the writing of his novels. Mr. Harrison, in a delightful article in *Harper's Magazine* for September 1901, entitled "Reminiscences of George Eliot," relates that he actually wrote in Felix Holt the opinion of the Attorney General, designated by the novelist "one of the first conveyancers of the day," an opinion "given in the case more than twenty years ago." The opinion, which is printed in italics, is in the thirty-fifth chapter of that novel, and Mr. Harrison told the author that he "should always boast of having written one sentence that was embodied in English literature." The opinion is as follows: "To sum up, we are of opinion that the title of the present possessors of the Transome Estates can be strictly proved to rest solely upon a base fee created under the original settlement of 1729 and to be good so long only as issue exists of the tenants in tail by

whom the base fee was created. We feel satisfied by the evidence that such issue exists in the person of Thomas Transome, otherwise Trounsem, of Littleshaw. But upon his decease without issue we are of opinion that the right in remainder of the Bycliffe family will arise, which right would not be bound by any statute of limitation." Mr. Harrison has related in *Harper's Magazine* that the first application George Eliot made to him for advice on knotty legal points in the development of the plots of her novels was when she was engaged over Felix Holt in 1865 and 1866. "As every reader knows," wrote Mr. Harrison, "the plot and the dénouement of the latter part of the story turn on an intricate legal imbroglio whereby an old English family were suddenly dispossessed of their estates which they had held for many generations. She [George Eliot] had endeavored to work out this problem for herself, but found herself involved in hopeless technicalities of law. She had written to invite me to join a party consisting of Herbert Spencer, T. Huxley, and others, and she then imparted to me her difficulties as to the law of entail and the statutes of limitations. She wrote of it in a letter to me of the 9th June [1866] that she must go sounding on her dim and perilous way through law books amidst agonies of doubt. I offered her text-books, but she preferred to put to me her difficulties in writing. The law case she required to fit her plot in the year 1832 was one which on the first sight of it seemed impossible in the face of the statutes of limitations, for she wanted to dispossess a family which had been in peaceable possession of estates for a century." Mr. Harrison's "opinion" of the Attorney-General in Felix Holt was the result of an exhaustive "statement of her needs" submitted to him by George Eliot. Mr. Harrison was again consulted on an incidental point of law in Daniel Deronda by George Eliot. She had consulted Mr. Charles (Lord) Bowen, then a junior barrister, in a casual conversation, but she afterwards sent a statement of the case to Mr. Harrison, who forwarded to her a sketch of a possible solution which satisfied her requirements. Mr. Harrison was called to the Bar at Lincoln's-inn sixty-two years ago, and practiced for some time as a conveyancer, serving also a few years on the staff of the long defunct New Reports, a series remarkable for the extraordinarily brilliant group of men who worked for it. As colleagues Mr. Harrison had John Rigby, Horace Davey, James Stirling, Leonard Courtney, W. Court Gully, Farrer Herschell, Charles Bowen, A. R. Jelf, Gainsford Bruce, and Lumley Smith—a galaxy of legal talent of whom Mr. Harrison is the sole survivor. After retiring from the New Reports, Mr. Harrison acted as secretary to various Royal Commissions, among others that appointed in 1869 "to inquire into the expediency of a digest of law, and the best means of accomplishing that object, and of otherwise exhibiting in a compendious and accessible form the law as embodied in judicial decisions." Like so many other Royal Commissions, the net result of this was *nil*, but Mr. Harrison retained a keen interest in the subject, and, indeed, ever since his early days when he was a pupil of Sir Henry Maine, he has been a consistent advocate of the study of jurisprudence. It fell to him to expound this subject for many years as Professor at the Inns of Court, and not so very long ago his lectures were published under the editorial supervision of a Canadian jurist.

"The principle which protects a person against the operation of judicial proceedings to which he is not a party is one of universal jurisprudence, because it is the dictate of common justice." —Per Matthews, J., in Renaud *v.* Abbott, 116 U. S. 288.

Obiter Dicta

A PRETTY BAD SCHISM.—Moses *v.* Bible, 5 West. L. Rep. 520.

JUSTICE IS SLOW BUT SURE.—In June, 1920, Cain was convicted of manslaughter.—Cain *v.* State, 86 So. 166.

THE LAW AS AN EXACT SCIENCE.—"It has been aptly (if tartly) said that the uncertainty of a lawsuit is the only certain thing about it."—Per Lamm, J., in Thompson *v.* Lindsay, 242 Mo. 53.

TOO RELIGIOUS, PERHAPS.—"He is of quiet, pleasant demeanor, of steady habits, and religious; withal, is very apt to make friends, perchance victims."—See Stewart *v.* Hall, 83 Ky. 378.

REVENGE IS SWEET.—A recent Connecticut statute (Laws 1919, ch. 173) provides for a close season for hares and rabbits generally, but allows "German hares" to be taken without limitation as to time, number or method.

AS IT WAS IN THE BEGINNING, ETC.—"The right of marriage is not conferred by statute, but has existed ever since there were two human hearts, and will continue to exist as long as there is a man and woman upon the earth."—Per Brett, J., in Draugher *v.* State (Okla.) 158 Pac. 890.

A PITY!—"William the Conqueror may have brought the trial by wager of battle to England, but we are not informed that any one ever brought it to America."—Per Haff, C. J., in Panhandle, etc., R. Co. *v.* Laird (Tex.) 224 S. W. 305.—Well, it's a cinch that justice would have been more swift and sure.

"BY THEIR FRUITS," ETC.—We see by the papers that the Calder Senate Committee plans a "sweeping lumber inquiry." Having in mind the beneficial results of that same Committee's fiery investigation of the coal situation, we have decided not to build that new garage we had promised ourselves—just yet.

WHAT IS THE ANSWER?—Our office boy has handed us a facer. Happening to stumble on a case of Illinois Match Co. *v.* Chicago, etc., R. Co., 250 Ill. 396, he has asked us how there could possibly be any recovery for the destruction of matches by fire when that was the very purpose for which the matches were manufactured.

PERHAPS!—"And he stole a kiss?"

"He did, and I shall never forgive him."

"Do you really feel so bad about it as all that?"

"I should say so! He said it was petty larceny, while any other young man would have said it was grand."—*Legal Laughs.*

THE BEGINNING OF PRECEDENTS.—In the English case of Damport *v.* Sympson, 78 Eng. Rep. (Reprint) 769, decided near the end of the sixteenth century, it was said by the court: "If he should be punished in law by this action, there would be some precedent of it before this time: but being there is not any precedent found thereof, it is a good argument that the action is not maintainable."—All we want to know is, how actions ever got started anyway. Or, in other words, which came first, the chicken or the egg.

A ROSE BY ANY OTHER NAME.—In State *v.* Fowler, 13 Idaho 317, a criminal prosecution for an assault committed on an Indian woman, the court remarked: "The words used by the witnesses were not drawing-room terms, and are neither found in the statutes nor dictionaries, but judging from the familiarity with which the witnesses used them, they must have imparted quite a definite notion of what transpired. A man cannot claim protection from the penalty of his acts or conduct, either civilly or criminally, simply because he has uttered words or his act has been described in language not used in the statutes or found in the lexicons."

YOU CAN'T BEAT THE IRISH!—It seems that a certain Commission holding sessions in this country desired to hear the testimony of a certain foreign witness, to wit, the Lord Mayor of Cork. So he promptly came over in the only manner possible, to wit, as a stowaway. On his arrival, two of the big governmental departments, to wit, the Departments of State and Labor, became involved in a heated controversy, to wit, as to his right to land. So he was paroled in the custody of his counsel until his right to land might be determined. Having landed, under the parole, he promptly carried out the purpose of his coming, to wit, the giving of his testimony before the Commission. Can you beat it?

TIMELY DEFINITIONS.—"Drawing upon our judicial knowledge of that specimen of the genus homo, a bootlegger is a person who sells intoxicating liquors on the sly, not from any particular business location, but carrying his wares in his bootleg, in his pockets, or keeping them in some fitting hole in the wall of easy access to himself and provokingly hard of discovery to the officers of the law. When such a person establishes himself in a definite place of business, where by skilful legerdemain he can sell or pretend to sell the innocent juice of the apple as well as beer—both 'near' and 'far'—and other intoxicants, the niceties of the Kansas language designate him as a 'jointist,' and no longer in the mere plebeian class of 'bootlegger.'"—Per Dawson, J., in Scriven *v.* Lebanon, 99 Kan. 602.

SHAKESPEARE'S KNOWLEDGE OF LAW.—Whatever difference of opinion may exist as to Shakespeare's knowledge of law as shown in the decision of Portia in the "Merchant of Venice," there can be no doubt that he was well up in the older English decisions. Take, for instance, the language used in "King John," Act I, Scene 1, which is evidently taken almost verbatim from Fletteshame *v.* Julian, Year Book, 7 Hen. IV. 9, in which Rickhill, J., said: "*Cestui John fuit deins la mere l'issue fuit mulier*—for who bulleth my cow, the calf is mine." In the scene in "King John," above referred to, the following language is used:

> "Sirrah, your brother is legitimate;
> Your father's wife did after wedlock bear him.
> And, if she did play false, the fault was hers;
> Which fault lies on the hazards of all husbands
> That marry wives. Tell me, how if my brother,
> Who, as you say, took pains to get this son,
> Had of your father claimed this son for his?
> In sooth, good friend, your father might have kept
> This calf, bred from his cow, from all the world."

This has also been cited in a North Carolina case. See Woodward *v.* Blue (N. Car.) 22 Am. St. Rep. 897. Such a similarity scarcely leaves it to be doubted that the greatest of dramatists had the above case in mind when writing.

"DAMN" AS A CUSS WORD.—As a good illustration of the erudition frequently to be found in the law reports but which does not become available to the seeker for knowledge, we quote the following from the opinion in Harris *v.* Harris (Mo.) 223 S. W. 771, an action for divorce: "We may state here, as a sample of much of the trivial character of the evidence in the case for either side, that much space is taken up with a discussion of whether the word 'damn' was profanity, cursing, or swearing. It seems these parties are negroes, and a negro preacher called on for his view of the matter stated that in his opinion it was not, and illustrated his position this way: 'Take it strictly from the scriptural standpoint; it says, "He that believeth shall be saved; he that believeth not shall be damned." God wasn't cursing when he said that.' But whether 'damn' is swearing or cursing, or what not, both these parties used the word on occasion, and therefore neither can claim an advantage from having been damned by the other."

CONJURING AS A CONSIDERATION FOR A PROMISSORY NOTE.—The Supreme Court of Florida in the case of Cooper *v.* Livingston, 19 Fla. 684, was called upon to determine a novel question. An action was brought on a note for $250, after the death of the maker. The defendant, his executor, pleaded that the note was given without consideration, and that a woman extorted it from him "in his last sickness, while weak in mind and body, and upon her promise to cure him by conjuring and incantations." The conjurer, according to the evidence, was an old woman who lived by conjuring and fortune-telling. She called on her patient, or subject, every other day for several weeks, and conjured him and once gave him a dose of spirits of turpentine and oil. Notwithstanding this he died. After two trials the Circuit Court gave judgment for the plaintiff, and an appeal was taken. The Supreme Court quoted Hawkins, in his Pleas of the Crown, as saying that "conjurors are those who by force of certain magic words endeavor to raise the devil and oblige him to execute their demands"; and also cited Blackstone as an authority for punishing such persons as rogues and vagabonds. "Our conclusion," said Chief Justice Randall, "is that, 'conjuring' over a sick man 'to make him well' is not a valid consideration for a promissory note; and that no man with a healthy mind would voluntarily give a note for $250, with interest at two per cent a month, for the services of a conjurer who proposes to cure a lingering disease by conjuring and incantations. The necessary conclusion is that the plaintiff upon the case made is not entitled to judgment."

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Prosecutions under the Anti-Trust Laws.

COMMENT has been made frequently on the comparative futility of the prosecutions instituted under the Sherman Law and the innocuous character of the decrees which have been entered therein. The prevailing impression even among lawyers is that the act is more or less of a joke. In the December, 1920, issue of the *Georgetown Law Journal,* Prof. Richard S. Harvey contributes a thoughtful article on "Limitations Inherent in Anti-Trust Prosecutions," which puts a somewhat different face on the matter. He admits that the prosecutions which he reviews have been more or less abortive, that "the lunch box of the working man and the larder of the housewife have not been particularly benefited." The value of the act he finds to have consisted in the general deterrent effect which it exercised during a period of transition and popular education. Unrestricted competition, he points out, produced evils which bred the "trusts," these in turn produced evils which gave rise to the effort to maintain "enforced competition." He says: "The American public has cause to be thankful for the restraining influence exerted by the Sherman Act and the other anti-trust laws. Whereas Great Britain has backslidden and no longer maintains her high estate as exemplar of fair play in things commercial, since the comparatively recent date when Parliament and the English courts effectually overruled the ancient tenets which formerly protected the small trader and kept the channels of trade as royal highways free to all—upon America has devolved the duty and privilege of leadership in combating monopolies and oppressive trade restraints. We make no claim to possession of the gift of prophecy; yet we dare to predict the preference now being given to material considerations when dealing with monopolies operating within the jurisdiction of the English government denotes a backward drift which if unchecked will carry that nation far from her position as leader in the cause of free and independent commercial dealings." But experience gained from the Sherman Act has, Prof. Harvey declares, brought us logically to the next step, the era of "regulated competition" as represented by the Federal Trade Commission Act. Viewed in this light, as a preparatory step to a regulatory system which squares with all that is most efficient in business administration and yet protects the public from the abuses which may result from the aggregation of great business interests under a single management, the Sherman Act may be vindicated. As a permanent policy it cannot but fail, because it wars against fundamental laws of business administration. The article referred to deals interestingly with the possibilities of the Federal Trade Commission, and will be referred to again in a later issue in connection with that subject.

The Situation in Canada.

IN the January, 1921, issue of the *Canada Law Journal* it is said: "We are now in a similar state of commercial development which was found in the United States during the early decades following the Civil War. The development of trusts and combinations which can be traced in the United States forty or fifty years ago is now apparent in Canada. A study of the causes which led to the trusts of the United States and the methods devised to counteract them should be fruitful in Canada at present." In this connection the writer (Thos. Mulvey, K.C.) calls attention to the efforts made in the United States to secure a federal incorporation law and suggests legislation along this line as a solution of the situation in Canada. The message of President Taft to the Sixty-first Congress is in this connection quoted at some length. The constitutional difficulties which most seriously complicated the question in the United States are of course not present in Canada. The practical question how existing corporations could be induced to come in under the act is not so important, there being at present comparatively few large corporations in the Dominion. Such a measure if adopted would to a great extent obviate the preliminary stage which the United States has passed through before finding in the Federal Trade Commission a practical equivalent. If such a step is taken in Canada, and economy of production thereby preserved without injury to the public interest, the resultant competition will give point to another suggestion of Prof. Harvey in the article referred to in the preceding paragraph. He says: "The time is approaching when something formative must be enacted in the way of adjusting our statutes to the imperative needs of a nation inspired by aspirations to be classed among the controlling factors in world trade. Provision for freedom in important activities must be provided—that is, freedom to combine in import trade. Our existing laws are parochial, antiquated and altogether out-worn as to that. Unless American ships are expected to return in ballast to their home ports, Congress must enact a measure akin to the Webb-Pomerene Law, applicable to the requirements of our interests concerned in import trade. The existence of a federal board (the Federal Trade Commission) now

engaged in supervising the course of export trade, greatly simplifies the question of administrative control of combinations in the traffic flowing into the United States from foreign parts; and no doubt proper safeguards against monopolies and 'trusts' can be incorporated in the provisions of the measure when drafted by Congress. Opponents of such modernizing of our foreign trade requirements no doubt will endeavor to raise the issue of 'tariffs *v.* free trade'; but in reality that is a question quite apart from the privilege of co-operation by our merchants when engaged in bringing foreign goods to American shores."

Better Education for Lawyers

Thoughtful members of the legal profession are becoming aware that the influence of the profession is waning and that at a time when the pre-eminence of lawyers is of prime importance in meeting the demands of a period of transition without impairing the foundation of our governmental system. One reason for this condition is undoubtedly the steady lowering of the average of academic education possessed by members of the bar. The report for 1919 of the Committee on Legal Education of the Bar Association of New York city presents the case very strongly. There are now 125 law schools in the United States and of these approximately 100 admit students with a bare high school education, and only three are attended by students who are practically all college graduates. No state requires more than a high school education as a prerequisite to admission to the bar. This requirement is lower than that prescribed in most states by schools of medicine or dentistry. Even a veterinary is required in New York to devote a longer period to education than the future lawyer. As is well said by the Committee: "The consequence of our relatively low standard of admission to the bar is that there is a rapidly increasing number of men who seek admission to the legal profession merely because it is easier to become a lawyer than it is to secure a license to practice medicine or enter the other 'learned' professions. Too often the license to practice law becomes a license to prey upon the public as an easier method of earning a livelihood than by manual labor or engaging in small business enterprises. Men of this type often possess acute minds. They easily acquire sufficient knowledge of the technical rules of law to pass the bar examinations, but they offer the minimum requirement of general education for admission to the bar. They cannot be said to be in any sense liberally educated or to have any adequate appreciation of the responsibility of the lawyer to the courts and to the public." The lawyer of the future should be more than a man capable of conducting a law suit acutely. He should have the culture, the broad viewpoint, the mental and moral discipline which are rarely attained except in college.

The Deterioration of the Profession.

As is pointed out in the report referred to in the preceding paragraph, while the educational requirements for admission to the bar have not been lowered the average of the applicants for admission has steadily approached the minimum of the requirements. At an early period in our history practically every lawyer was a college graduate. In 1903 in New York State thirty-three per cent of the applicants for admission to the bar were college graduates. In 1913 the number of college men had fallen to twenty-two per cent. In addition to this, at the time of the last census fifteen per cent of the lawyers in New York city were of foreign birth and more than fifty per cent were either of foreign birth or foreign parentage. "Many of these men," says the committee, "came to the bar with little knowledge of American institutions and with little or no appreciation of those ideals and traditions which have in the past dominated the spirit of our Anglo-American legal system. In the countries of their origin, membership in the bar is an office of dignity and importance to be attained only by meeting most exacting requirements of which a liberal education in a university is the first prerequisite. It is not surprising therefore that in the New World they eagerly grasp at a prize so easily won. The result is that the bar is carrying an almost insupportable burden of a large membership unfitted by education or experience to bear its responsibilities and without the inclination, which comes naturally from familiarity with our institutions, to maintain its traditions. In consequence the bar as a whole is suffering in its public reputation and influence and its efficiency, and its capacity to perform the public service, which is its primary duty, is diminishing rather than increasing." Practically every evil in the condition of the profession to which bar associations in the past have called attention could be remedied by a requirement of one or more years of college training as a prerequisite for admission. The declining influence of the profession, the overcrowding of its ranks, the steadily increasing number of cases requiring professional discipline, would all yield to this remedy. The lack of influence possessed by the profession to which reference was made at the outset is well illustrated in this matter. Practically every bar association which has taken cognizance of the subject has recommended that some collegiate training be required, but every legislature in which it has been brought to a vote has disregarded the recommendation.

The Empty Jails.

The advocates of prohibition are just now making some capital of the fact that the population of the county jails throughout the United States is at a very low ebb. The wave of crime which is now terrorizing the cities not only shows that it is no lessening of criminal proclivity which has depopulated the jails, but suggests what is probably the true explanation for the temporary decrease of crime in the villages. The economic conditions of the war, the extraordinary wages which were offered at shipyards, munition plants and the like, caused a great influx of labor to the industrial centers. This tendency was of course most marked among those without established positions or family ties. The "work or fight" order drove the village loafers to the places where remunerative labor could be secured. In other words the very class of persons who are most apt to be guilty of disorder or petty crime have been drawn from the country to the cities. As a result, crime has decreased in the country and increased in the cities. It is probable that the inability to secure intoxicants freely will have some tendency to decrease petty crime, though few men who have ever made any study of the subject expect it to reduce the number of more serious offenses. But it certainly is not the main factor in the present low ebb of disorder in the rural dis-

tricts. Industrial conditions will return to normal, population will redistribute itself as excessive wages decline, the "hobo" will again infest the highways, and the good old village lockup will regain its pristine popularity.

Wives as "Employees."

IT is reported that a woman member of the Kansas legislature has introduced a bill to give to married women the status of employees, so as to entitle them to recover from their husbands under the Workmen's Compensation Act for injuries received while engaged in their household duties. It is scarcely to be expected that the bill will pass, even in Kansas which has put some strange measures on its statute books. Considerations of policy believed to be sound have led to the exclusion of hired domestic servants from the operation of American compensation laws. And, of course, a number of added difficulties attend the application of such laws to the services of a wife. But waiving this aspect, the whole proposition reflects very strongly the unfair and unthinking attitude of many who put themselves forward to represent the interests of women. If a wife is to be regarded as a servant so that the husband must make compensation for her injuries in the domestic service, the husband must in common justice have the same powers to guard against accidental injury as in the case of other servants. She must be bound to obey implicitly his orders, to conform to all rules which he may post as to the manner in which work is to be done and the precautions to be observed therein. He must have in some form the disciplinary power to enforce that obedience. Of course such a suggestion will be repudiated with scorn by the feminist element, but it is none the less simple justice. You cannot make a person a servant for one purpose only, or confer benefits without the concomitant duties. Luckily there is no particular danger that any such proposition will carry. There are always a certain number who seek to promote class legislation without regard to its fairness, but such is the inherent good sense of the American people that none of these has been able to carry with him any great number of the class to which he appeals. Efforts to solidify for selfish purposes the vote of a class or race have always failed and it is not believed that the effort to make political capital of sex antagonism will be more successful.

The "Osborn Method of Document Execution."

MR. ALBERT S. OSBORN, the well known handwriting expert, contributes to the January, 1921, issue of the Journal of the American Bar Association a suggestion looking to the more ready detection of forgery. A suggestion from a man of Mr. Osborn's extensive experience is entitled to serious consideration, the more so as it requires no change of law and may be adopted at any time by an attorney having charge of the execution of a will or other important document. Briefly put, the thought is that since legal documents are usually typewritten, the signature is all that is available for comparison in case of a dispute. Mr. Osborn says: "As is here suggested, it should be more generally recognized and understood that successful forgery of certain kinds of writing is possible, especially if assisted by perjury. A feeble woman is asked to sign a will by which a great estate is to be distributed, and if her name happens to consist of only a few letters, and she writes it slowly and with a trembling hand, her signature can so easily be imitated that it may be difficult, if not impossible, to prove the fraud if one is attempted and is then bolstered up by plausible perjury." To avoid this he suggests that in case of an important document some brief formula, a repetition of the attestation clause, or the like, in the handwriting of the person executing the instrument, should precede the signature. With that much material to use as the basis of comparison, a competent expert should have no great difficulty in showing to the satisfaction of a court whether the handwriting is that of the supposed testator or grantor. As a guard against an unwarranted attack on the genuineness of an instrument it would be quite effective, and that alone is sufficient to recommend its use. There is, of course, another phase of the question, in which the Osborn method of execution would not be effective. Given a will thus executed it would be subject to revocation by a forged will of later date with only the signature written. This can be met only by legislation making such a method of executing wills imperative, but the best possible prelude to such legislation is a voluntary use of the suggestion for the value which it undoubtedly contains. Once that value is established in practical experience any extension which may be deemed desirable is comparatively simple. It is all too rarely that the experts in the several branches of science which are availed of in determining litigated issues make to the profession a constructive suggestion by which future trouble may be avoided, and this one is entitled to the serious consideration of the bar. Certainly it can do no harm, and the author's belief that it will do good is not to be disregarded lightly.

Acquittal of the Guilty.

IN the last issue of LAW NOTES reference was made in passing to the statement of Mr. Maclay Hoyne, former State's Attorney of Cook county, Illinois, that under our present system a guilty man has an even chance of acquittal. This statement is so frequently made in substantially the same form, and if true is so severe an indictment of our administration of the criminal law, as to merit some examination. Obviously, if it is true, fifty per cent of criminal trials would result in acquittals if every indicted man was guilty, while the actual acquittals would amount to seventy or eighty per cent. Another former prosecuting attorney (Mr. Arthur Train, "Courts, Criminals, etc.," p. 58) gives the results of the trials for homicide in New York county for the decade from 1901 to 1910, inclusive, as follows: Convictions 382, acquittals 138, percentage of convictions seventy-three per cent. Of the twenty-seven per cent of acquittals certainly a considerable number were innocent, since grand juries acting ex parte are not infallible. Of the remaining cases, there were undoubtedly many where the proof of guilt was so defective that an acquittal was necessary. The actual cases of miscarriage of justice shown by this table are insignificant in number. And it must not be forgotten that these figures are confined to prosecutions for homicide, notoriously the hardest cases in which to secure a conviction. The chief witness has been removed by death, the defense is able and zealous, and the extreme punishment makes the jury insistent on strict proof. Going across the continent for results in another community, in 1914 there were in Los Angeles county, California, 774 criminal

prosecutions. About sixty per cent of those charged pleaded guilty and of those going to trial thirty-five were acquitted, the acquittals being about ten per cent of the whole number accused. (See report of Public Defender of Los Angeles, VII Jour. Crim. Law, etc., 230.) These figures, which might be multiplied indefinitely, would seem to disprove entirely the suggestion that any considerable proportion of guilty men go unwhipped of justice. Our criminal procedure is slow, cumbersome, costly and unscientific, but it does not seem to be open to any serious charge so far as its ultimate results are concerned. The weakness of our punitive justice lies in the detection and apprehension of offenders rather than in their trial, and where a guilty man is acquitted the fault can usually be traced to bungling police methods rather than to the fault of the court or jury.

Fighting Words.

IN an opinion delivered as late as 1917 the Missouri Supreme Court referred to an altercation wherein the "conventional opprobrious epithet" was applied, and an examination of the statement of facts shows that the conventional funeral followed in due course. (*State* v. *Willard,* 192 S. W. 437.) But in the matter of private relations the times grow more peaceable; "the individual withers and the world is more and more." Since Col. "Jack" Chinn brought suit because of the publication of a bogus patent medicine testimonial purporting to come from him, it is hard to imagine a revival of the ancient spirit of private vengeance anywhere. No man who lived in the southwest a few decades ago can resist the instinct to dodge when he hears some of the epithets which are bandied about in the conversation of the effete east, but the instinct is purely atavistic—nothing serious ever happens. Yet a recent New York case apparently announces the doctrine that there still are "fighting words." In *Knocks* v. *Metal Package Corp.,* 185 N. Y. S. 309, an employee claimed under the workmen's compensation act for injuries sustained from an assault by his foreman. The court said: "In our case the claimant called his foreman 'a liar,' while the foreman, acting in the line of his duty, was merely giving the claimant needed instructions. It was a word of insubordination, spoken in injury of his master's business, and destructive of his master's proper discipline. In speaking it the claimant created a risk not before existing, and thereby drew down upon himself precisely that which he should have expected." Von Ihring argues with great force that law always reprobates most stringently infractions of that principle which at the moment is regarded as the dominant virtue of the times. Can it be that at the present time truth has become the summum bonum of New York state?

Being a "Good Sport."

A CORRESPONDENT whose letter is published in this issue and whose attitude is worthy of comment, urges those opposed to the Eighteenth Amendment to emulate the qualities which made Sir Thomas Lipton popular, and to accept defeat gracefully. The analogy is far from convincing. If a coterie of gamblers who had placed wagers on the cup defender had by threats intimidated the crew of the *Shamrock* into throwing the race, it is probable that the genial Sir Thomas would have favored the American people with some forceful language on the subject, and might have been moved to discharge the offending sailors. There are a great many people in the United States who believe that this illustration rather than that of a fair contest represents the manner in which the ratification of the Eighteenth Amendment was brought about. But even accepting our correspondent's analogy at its face value, after the race was over the sportsmanlike challenger has been known to point out that the conditions under which the races are held do not afford the best test of seamanship and naval architecture, and to express a desire to challenge again under different rules. Just so the opponents of the Eighteenth Amendment, admitting that it is now the law of the land, asseverate that it was passed under conditions which afforded no fair test of the popular will and seek such an amendment of the "rules" as will submit the matter to a referendum. And speaking of sportsmanship, is this not another illustration of the common human tendency to discover the merits of a virtue only when its practice subserves our own interest? In the last twenty years prohibition measures have been defeated repeatedly in legislatures and by popular vote, but memory is searched in vain for any spirit of "sportsmanship," any graceful acceptance of defeat. The advocates of prohibition boast of the years of struggle against repeated defeats which brought about the Eighteenth Amendment. With what grace do they criticise the initiation of a struggle to wipe it out? And while the struggle should be carried on by lawful means, why cannot our "temperate" friends view an evasion of the Volstead Act with the same complacence with which they did the equally lawless acts of Carrie Nation?

Federal Anti-Tobacco Legislation.

IT was recently attempted in the United States Senate to affix a rider to the Sundry Civil Bill prohibiting smoking in government buildings, and the measure had been under consideration some time before it was pointed out that as drawn it applied to the White House and penalized the after dinner cigars of the President and such distinguished guests as he may wish to regale with the story of the big fish that got away. It is needless to say that no such carelessness was exhibited with respect to the committee rooms of the Senate. Primarily the incident is rather humorous, but it presents some food for reflection. The ostensible object of the measure was to prevent fire from "cigar stubs thrown into waste baskets." Granting the sincerity of the purpose why should there be any exception? A presidential perfecto will start a conflagration as quickly as a department clerk's stogie. A senator is just as apt to throw a stub into the waste basket as is a stenographer. This is supposed to be a republic without privileged classes; if there is an evil the remedy should be as broad as the occasion. It was however charged on the floor of the Senate that the measure was the entering wedge of a blue law campaign, and it may well be that such is the case in view of the well known propensity of the average "reformer" to camouflage his earlier efforts under some specious plea of public welfare, realizing that phariseeism, like vice, "to be hated needs but to be seen." It may be a coincidence that the need of the prohibition should after over a century be discovered just at this time. The moral is very plain. This is no time to palter with anything that may be the entering wedge of the blue law

propaganda. If a law has the least tendency in that direction no man who is not in sympathy with the entire program of the "blues" should give it a moment's countenance. Minority domination succeeds at the outset by attacking its foes in detail. The man who does not interest himself as long as his personal privileges are not threatened will find himself with few allies when the hosts of "verboten" get around to him.

Procedure in Bankruptcy.

At a recent meeting of the Bar Association of the City of New York, Federal Judge Mayer addressed the Association on the Bankruptcy Act, pointing out what are in his opinion defects in its administrative features. Among these, it is almost needless to say, is the provision for the appointment of both a receiver and a trustee, the compensation of each being fixed by the statute. It certainly should not be difficult to provide for the appointment of a trustee at the outset, saving the inevitable lost motion and duplication of effort in the transition of the estate from one management to the other. And while the report at hand does not indicate the views of Judge Mayer on the subject it would seem that a provision for fixed compensation must in many instances be inequitable and that the compensation of the trustee should be fixed by the court, with some regard to the work actually done. Another unnecessary expense was pointed out by the Judge in the requirement of three appraisers, since in small estates the court, if given a discretion in the matter, might well appoint but one. Passing these matters of mere economy Judge Mayer proceeded to discuss a real abuse, the manner of electing the trustee. As he well said, the election of a trustee by the creditors often results in degenerating the matter into a contest for tactical position. It involves the solicitation and rounding up of claims, a course often necessary in order to protect the interest of legitimate creditors, and substitutes what, in effect, is a sort of primary election for the exercise of judicial discretion such as is found in equity cases. A recent article in a popular magazine of large circulation set forth in some detail instances of abuses under the Bankruptcy Law, and in most instances where members of the legal profession were involved the key to the whole situation was the fact that the attorney for the bankrupt could confederate with another lawyer, giving the latter a list of the creditors and time to get control of a majority of the claims, and then the two would control the entire proceeding, enriching themselves at the expense of both bankrupt and creditors. Of course these are exceptional instances, but the profession numbers "shysters" sufficient to make it expedient to close up this opportunity for fraud. It is hard to see a legitimate interest which would not be better served if the appointment of the trustee were in all instances committed to the court. It is true that the trustee is in a sense the agent of the creditors, but in actual practice creditors will be better served by an agent selected by the court on full hearing than by one selected by the majority of a number of scattered creditors, acting usually on solicitation from an interested person, and in the haste incident to an attempt to gain an initial tactical advantage.

"It is a general principle that every one must be presumed to intend the necessary consequences of his acts."—Per Field, J., in Toof *v.* Martin, 13 Wall. 48.

RIGHTS OF ILLEGITIMATES UNDER WORKMEN'S COMPENSATION ACTS

Anglo-Saxon civilization as contrasted with the systems to which it succeeded has shown an increase of morality, but with it came a loss of realism which has at times manifested itself as sheer prudery. Unwilling to recognize that certain things deemed to be wrong are none the less inevitable, the tendency has been to stand on the bare prohibition and regard as a scandalous compromise with immorality any suggestion that much more good can be done by recognizing and dealing frankly with a condition which does not yield to prohibition. A notable example is to be found in the common law attitude toward illegitimate children, an attitude so at variance with good sense and humanity that it is hard to see how it survived even among the most insular of people the contrast with the civil law. In the United States statutes giving rights of inheritance have wiped out much of the ancient hardship and the monstrous doctrine of the common law that marriage of the parents did not effect legitimation has largely disappeared. But when the rights of an illegitimate child come up in respect to a matter not covered by a statute many courts are still prone to revert to the spirit of the common law rather than the spirit of modern legislation. This is well illustrated in connection with one of the most recent of legislative measures, the Workmen's Compensation Acts. A workman has an illegitimate child, that he takes into his home, recognizes and supports. He is killed by an accident arising out of and in the course of his employment. Is the child a dependent to whom compensation is payable? Common sense would unhesitatingly answer in the affirmative. The child has actually received its support from him and has every reason to expect its continuance. He has recognized the moral obligation of his parentage, and it would not seem to lie in the mouth of the employer to question a condition thus existing de facto. But as a matter of fact the question is made to depend on a close and critical analysis of the statute which in some cases has led to a denial of the right to compensation. Thus under an Illinois statute allowing compensation to a "child" of a deceased workman compensation was refused to an illegitimate child, the court saying: "At common law a child born out of wedlock was nobody's child. He was without parents or kindred, without name, without heritable blood, and without many rights. He could have no heirs except his own lineal descendants. He could not inherit even from his mother or she from him. His settlement did not follow his mother, but was wherever he was born. His parents were under no moral obligation for his support. This is his condition in Illinois to-day except as it has been changed by statute." *Murrell* v. *Industrial Commission,* 291 Ill. 334, 126 N. E. 180. A similar holding was made under a like statute in *Scott* v. *Independent Ice Co.* 135 Md. 343, 109 Atl. 117, a case wherein the facts showed a common law marriage. But the jurisdiction is one in which a ceremonial marriage is required, so that the penalty visited on these innocent children did not arise from the "immorality" of their parents but from a failure to conform to regulations dictated by ecclesiastical polity. A like holding was made in *Bell* v. *Terry, etc., Co.,* 177 App. Div. 123, 163 N. Y. S. 733, but was promptly followed by an amendment of the statute

admitting to the benefits of the act an "acknowledged illegitimate child dependent upon the deceased."

While the foregoing holdings may be sustained by a strict construction of the statute, it seems an unjustifiably strict construction. It was admitted in the Murrell and Scott cases that "child" has been construed as including an illegitimate child where the legislative intent so to extend the term was apparent. See the note to *Peerless Pac. Co.* v. *Burckhard,* 90 Wash. 221, 155 Pac. 1037, Ann. Cas. 1918B 247, L. R. A. 1918B 247, wherein many illustrations are collated. While no specific intent is manifested, the general intent and purpose of the workmen's compensation acts to provide for dependents bearing a close relationship is plain, and a relationship existing de facto though not de jure is well within the beneficent purpose. This was admirably pointed out by the Connecticut court in *Piccinim* v. *Connecticut Light, etc., Co.,* 106 Atl. 330, wherein it was said: "It has been suggested that it is not fair and just to employers that they should be called upon to contribute toward the maintenance of illegitimate offspring of an injured employee, and that, therefore, it is not consonant with public policy that they should be so called upon. Looked at from one angle that may seem to be true. So also when viewed from a similar angle, to wit, that of the old common law which attached liability to fault, it would appear to be in like manner unfair to employers that they should be compelled to assist in supporting the children or dependents of an employee who, without the employer's fault, has met with a mishap occasioning the loss or diminution of his earning power. But that is not the point of view of our compensation legislation. Compensation is not awarded either as the price of fault or as a measure of a duty owed to the injured employee. It is given in the execution of a general public policy that sees in its giving a blessed relief to those called upon to suffer as the result of industrial accidents, and a humane and wholesome social regulation. The underlying principle of this kind of legislation is that the ends of justice and equity will best be subserved and the general good promoted by lifting from the shoulders of unfortunate victims of industrial mishaps and their dependents some measure of the resulting burden, and casting it upon the industry which occasioned it and through that industry upon society at large. It is not the immediate employer who, by this procedure, ultimately bears the burden that he is in the first instance made to assume. In its final distribution society bears it. These children and all other children similarly circumstanced, whether they be legitimate or illegitimate, being in the world, must be supported. If their means of support is withdrawn, society is compelled to supply it. Why may it not as well and fairly supply it in the method provided by the workmen's compensation legislation as in any other? The act faces the certain prospect that individuals will have their earning power cut off or diminished either permanently or temporarily as the result of accidents attending their employment, and that other persons dependent upon them will be deprived for a longer or shorter time of their customary means of support, and seeks to provide a way in which the burden of that deprivation or diminution will be lightened. The result aimed at will be achieved only in part as long as any class of these sufferers are excepted from the beneficial operation of its provisions. Is there any reason why it should not be fully achieved, and all those who are called upon to suffer through industrial mischances be given an equal measure of relief in the manner the statute provides? We can conceive of none, and we are impelled to query whether, if it be true that this employer ought not, upon grounds of public policy, to be compelled to contribute to the maintenance of these children because their relationship to their father is not free from stain, the same test should not be applied to all claimants, so that all be required to establish their fitness to receive an award of compensation by showing a record of stainless ancestry."

Under statutes somewhat different in form the right of an illegitimate to compensation has been recognized, and in so holding courts have used language putting the matter on a high and humane plane, above mere quibbling over statutory phrases. In *Roberts* v. *Whaley,* 192 Mich. 133, 158 N. W. 209, L. R. A. 1918A 189, under a statute giving compensation to "dependents," it was said: "It appears to be conceded upon the record that Murna and Ellis are the children of the deceased. It further appears that they lived with him and were members of his family, and that they were dependent upon him at the time of his decease. They were actually cared for and supported by the deceased, and they had a right to expect a continuation of the support and care had he lived. This brings them clearly within the statute, and establishes as a matter of fact that they were dependent, and therefore entitled to the fund. But it is said they are illegitimate children, and that the law will not encourage the immoral and unlawful relation of the parents by recognizing them. The children are in no wise responsible for their existence or status. They are here, and must be cared for and supported. They were cared for and supported by the deceased up to the time of his death. It was his legal and moral duty to support them, and he was responding to that duty when death overtook him. We think they are clearly within the class entitled to the fund, and it must be passed to them."

So in Gritta's Case (Mass.), 127 N. E. 889, under a statute designating as dependents "members of the employee's family," the court said: "The question remains whether the illegitimacy of these children affects their status as members of the employee's family under the act. It is the contention of the insurer that, as the act does not specifically include illegitimate children as entitled to its benefits, they should not be held to take by implication; and that in the interests of marital morality and sound public policy they should not be held to be members of the employee's family. Considerations of public policy which would prevent a wrongdoer from participating in the benefits of the act ought not to apply to innocent children born out of lawful matrimony; they are not responsible for their existence or status, they have committed no wrong, and they must be supported, as the death of the employee has taken from them the care and maintenance which they had previously received from him as the head of the family. We are of opinion that upon the facts disclosed by the record they are entitled to compensation under the act." Under an identical statute the Maine court said in Scott's Case, 117 Me. 436, 104 Atl. 794: "Harry Scott was violating no law in fulfilling these natural and moral obligations of caring for and supporting his illegitimate children. The law condemns his acts so far as his relations with Rachel Somers were concerned;

but, having brought these children into the world, it was his duty to care for them. They are not to blame for their conditions, nor their manner of coming into existence, and, having been recognized by him as his children, the law regards it as his duty to support them, and, having assumed that obligation and maintained them in his household, we think they became members of his family and dependents within the meaning of the workmen's compensation act of this state." So, again a like statute was construed to embrace illegitimates in *Piccinim* v. *Connecticut Light, etc., Co.,* (Conn.) 106 Atl. 330.

In England (*Lloyd* v. *Powell-Duffryn Steam Coal Co.,* [1914] A. C. 733) and in Quebec (*Canada Cement Co.* v. *Hanchuk,* 26 Quebec K. B. 434) the workmen's compensation act expressly extends its benefits to an illegitimate child of a deceased workman, and like provisions are found in several American states. In New Jersey such a statute has been strictly construed, the court holding (*Splitdorf Electric Co.* v. *King,* 90 N. J. L. 421, 103 Atl. 674, affirmed 92 N. J. L. 524, 105 Atl. 894) that an illegitimate child of a workman's daughter was not a grandchild within the act, and saying: "In the absence of anything to the contrary, we must conclude that when the legislature made use of the descriptive term 'grandchildren,' it used it in the ordinary sense and as applicable only to persons who stood legally in that relation to the decedent workman, and not as intending to alter the common-law rule by making one who could not stand in such relation a grandchild. The legislature had in mind the question of illegitimacy, for it provided for the illegitimate children of the decedent, but went no further, and we are now asked to supply what it omitted by construing the law to include among grandchildren those who have no such legal status. If the legislature had intended that the bastard children of a decedent workman's children were his dependents, it could readily have said so."

Some of the American statutes like those of California, Michigan, Ohio, Oregon and Rhode Island allow compensation to "dependents," and this term as has been seen has been construed in Michigan as including dependent illegitimate children. Others, as in Connecticut, Maine, Massachusetts, Colorado, and Wisconsin, provide for a "member of the family" and in the three states first named this has been held in cases heretofore cited to include an illegitimate child.

But in addition to the Illinois and Maryland statutes heretofore referred to the term "child" is used in a number of acts, including those of Arizona, Iowa, Kansas, Minnesota, Nebraska, Nevada, New Hampshire and Pennsylvania. As has been pointed out, the interpretation thus far given to such an act has excluded illegitimate children, and while there is room for a more liberal construction, clarifying legislation should not await a decision in those jurisdictions since the tendency of the courts has become apparent.

W. A. S.

"It would seem to be a consequence of that absolute power which a man possesses over his own property, that he may make any disposition of it which does not interfere with the existing rights of others, and such disposition, if it be fair and real, will be valid. The limitations on this power are those only which are prescribed by law."—Per Marshall, C. J., in Sexton *v.* Wheaton, 8 Wheat. 242.

LESSONS FROM MILITARY JUSTICE*

I. The prime object of military organization is Victory, not Justice. The Army's object is to kill, disable, or capture our enemy before he can kill or capture us. In that death-struggle which is ever impending, the Army, which defends the Nation, is strained by the terrific consciousness that the Nation's life and its own is every moment at stake. No other objective than Victory can have first place in its thoughts; there is never any remission of that strain. If the Army *can* do Justice to its men, well and good. But Justice is always secondary; and Victory is always primary.

This cardinal truth will explain why it is not always feasible to do exact Justice in the Army, in the midst of war.

II. But I am not here to defend military justice. It is civilian justice that is upon the defensive. It has been on the defensive for a generation past. It has done very little in that generation to take up that defensive. It is doing very little now.

This Bar Association, and every Bar Association, has a prime duty to improve civilian justice.

Civilian justice will have to remain on the defensive until it can show that it is at least as efficient in its machinery as military justice. When civilian justice shall have adopted all the efficient measures now already possessed by military justice, and capable of equal use by civilian justice, then and not till then can it start a counter-offensive.

III. The military system can say this for itself: It *knows what it wants;* and it systematically *goes in and gets it.*

Civilian criminal justice does not even know what it wants; much less does it resolutely go in and get anything.

Military justice wants *discipline*—that is, action in obedience to regulations and orders; this being absolutely necessary for prompt, competent, and decisive handling of masses of men. The court-martial system supplies the sanction of this discipline. It takes on the features of Justice because it must naturally perform the process of inquiring, in a particular case, what was the regulation or order, and whether it was in fact obeyed. But its object is discipline.

The civilian penal system, on the other hand, has not even formulated what it wants. Some still say Retribution to the individual; some say Prevention of other wrongdoers; some say not Retribution, but Reformation of the individual; and most ignore a fundamental element, viz., the public re-affirmation of the community's principles of right and wrong.

Nor does the civilian system resolutely go about any one of these purposes. It maintains a substantive law which is a hodgepodge of inadequate and illogical definitions. It maintains a procedure which has not been revised for a century. It maintains a prosecuting personnel which is in large proportion crude and untrained and narrow-minded, and a defense personnel which is usually skilled only in evading the law. It maintains a judiciary personnel which seldom studies its large problems and

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* Address delivered before Maryland Bar Association by JOHN HENRY WIGMORE, formerly Colonel Judge Advocate, U. S. A.

which seldom understands more than the elementary features of its duty. It maintains a police which, in the rural regions, is often the match of Dogberry the ancient watchman, and in the city regions is frequently undermined by politics and petty intrigue. And it organizes all this personnel in a shiftless manner which would break down the efficiency of the ordinary business house in thirty days.

IV. Military justice is a theme of many aspects. My remarks to-day will be limited to pointing out five features in which civilian criminal justice may take a lesson from military justice—features in which military justice has already arrived at methods to which civilian justice has scarcely begun to aspire.

1. *Centralized supervision of all criminal courts within the State.* The fundamental shortcoming of civilian criminal justice is that the several courts are virtually independent of each other. The Supreme Court, to be sure, is supposed to interpret the uniform static rule of law as established by the legislature. But it stops there. We have forgotten that the efficiency of any penal system is largely dependent on the *current administration* of that law. And there is no provision in our system for administration. For example, in New York city there are some forty magistrates, each of whom is virtually the final arbiter in most cases coming before him. They rotate in turn among the different districts. But there is no central control giving a common policy, and they remain even ignorant each of what the other does or what policies he is following. A recent statistical inquiry shows the inefficiency of this (Journal of Criminal Law and Criminology, X, 90, May, 1919). A single illustration will suffice, viz.: the sentence. Of the 17,000 cases of *intoxication,* it appeared that the percentage *discharged,* by the several magistrates, ranged between two per cent and seventy-nine per cent. Of those *convicted,* the disposition of the man by suspended sentence ranged between one per cent and eighty-three per cent; the disposition by fine ranged between six per cent and eighty per cent. On the charges of *disorderly conduct,* the discharges ranged between eighteen per cent and fifty-four per cent. On the charges of *vagrancy,* the discharges ranged between five per cent and seventy-nine per cent. On convictions of disorderly conduct, the suspension of sentence ranged between two per cent and fifty per cent. On conviction of *peddling without a license,* the fines ranged between twenty per cent and one hundred per cent. All of this represented a single community and the same set of judges sitting in the same courts. Such a helter-skelter treatment of a problem demanding consistent and known policies spells complete inefficiency, and is unworthy of an enlightened community seeking to repress crime.

The same features would be found throughout all the administrative stages of penal justice—arrest, bail, defense, and the rest. We possess a vast aggregation of administrative officials, with no inspection, no supervision, no central control—not even knowledge of what the others are doing.

What we need here is to adopt the Federal military system. Every division and department is, to be sure, an independent command, in military justice as in other matters. But a record of every general court-martial is kept, and under U. S. Rev. St., sec. 1199, it is forwarded to the Judge Advocate General at Washington for revision. There the records are scrutinized, not only for errors of law, but for deviations from sound policy. The J. A. G. notifies the entire body of division commanders of policies desirable to follow, and notifies individual commanders of specific errors or deviations. For example, the regular army tradition called for a sentence of penitentiary and discharge for any offense in the nature of larceny. But the J. A. G. recommended, when our new army was forming, that caution be here exercised, and that for men capable of reclamation a lighter sentence be imposed, and a confinement only in the probationary barracks, pending restoration to duty, if possible. Thousands were saved to the Army in this way. The best policy was made known by the central superintendent to all commanders, and a common administrative attitude became possible.

So, also, procedural errors of frequent occurrence were noted, and circular letters were sent out calling attention to their frequency and warning against their recurrence. In this manner the average court-martial was improved, and greater efficiency attained.

Such a central supervision is the one feature most needed for state criminal justice. Its lack is one of the most obvious glaring defects.

What we need is a *chief judicial superintendent* in every state. We need such an official for civil justice also. But we need him most in criminal justice. And the example is already here awaiting us, in Federal military justice. We have no excuse for failing to avail ourselves of that example.

2. *Verbatim record of trial.* The foregoing measure is futile unless a verbatim stenographic report is preserved of each trial. This practice exists in military justice, for all general courts-martial, and has made possible the method of central supervision. In common fairness, also, such a report should be made at the expense of the state. The practice is not yet universal in civilian justice; usually, only enough is transcribed to explain the legal exceptions. For administrative supervising purposes a complete record should be preserved and forwarded.

3. *Automatic appellate scrutiny for every accused's case.* In spite of the several specific safeguards on which we place such high value—right to witnesses, right to counsel, right to jury, right to remain silent, and so on—the one vital measure which insures the constant observance of all these is still lacking in our law, viz., the automatic appellate scrutiny of *every* criminal case by a higher court.

We are accustomed to think of these things from the point of view only of an accused's rights; from that point of view he is entitled to the protection of appellate scrutiny. But it is even more important from the administrative point of view. An effective central supervision of criminal justice is impossible without complete data showing the central authority what is being done daily in our trial courts. *Every* record should go up for appellate scrutiny.

In Federal military justice every record of every case goes up to at least one higher authority; and all records of general courts-martial go up two stages, to the Judge Advocate General or the President. Every convicted man thus obtains an appellate scrutiny; and this he obtains without any cost, paying no counsel fee and no transcription expense.

This is an ideal of which civilian justice has been dreaming ever since Magna Carta. Complete justice to

the poor man is still a dream in our civilian courts. In the military courts, it is already a fact. And it costs not a cent. It does not even need a motion in court. It is automatic.

Here is an object lesson for civilian justice.

4. *Minimum indeterminate sentence.* The whimsicalities and inequities of sentences have long been a glaring defect of our civilian justice. One reason for this fault is that there is always a conflict between the principle of publicly rebuking the crime itself with an adequate penalty, and that of allowing for the offender's extenuating circumstances. A severe sentence may be needful to deter others, but may be needless for the individual offender. There is only one way to reconcile these principles, viz., impose a deterrent sentence of maximum period, and leave the minimum entirely unfixed, so as to permit individual treatment. E. g., impose for a burglary a sentence of not more than ten years, and then after the man has been studied in prison, extend clemency and release him, if proper, at any early period deemed suitable. This also enables the case to be adequately considered after a fuller examination of the man's personality and history than is possible at the time of trial.

The minimum indeterminate sentence already exists in the Federal military justice. A section of the J. A. G. O., known as the Clemency section, passes upon all applications for clemency, examining both the record of the trial and the report of the prison superintendent. The law authorizes the Secretary of War to direct the release of any prisoner at any time. Thus the administration of the sentence after conviction is flexible, and is centralized in the same hands as the trial itself.

Only two states yet possess the genuine minimum indeterminate sentence, i. e., a law which permits the release of the convicted person at any time that is deemed fit, prior to the maximum period. Moreover, the parole and sentence laws that do permit reduction of time are administered by all sorts of disjointed boards, which constitute rival authorities and have no direct connection with the courts, the original organs of criminal justice. The only way to secure efficient administration of the minimum indeterminate sentence is to bring it under control of the central supervising officer.

Federal military justice does this. The machinery is next to perfect. How deplorably imperfect are the state systems can be seen by perusing in the Journal of Criminal Law and Criminology, the reports from 1913 to 1916 of the Committee on Indeterminate Sentence and Parole.

5. *Psychiatric examination of the accused.* Modern science is unanimous that mental defects are responsible for a large share of crime. E. g., of 100 paroled prisoners who violated their parole, a prison record showed that thirty-five had been classed as mental defectives. Modern science agrees that every court should have attached to it a medical officer who will report upon the accused's mental condition, and that the sentence and treatment of the accused should be determined in the light of this report. There are perhaps 2000 criminal courts sitting daily in the United States; no more than twenty of these have a regular psychiatric examiner attached to them. In the city of Baltimore you have recently given the medical man a status in one of your courts.

In the Federal military justice, the probationary barracks at Fort Leavenworth have for eight years past had the best kind of psychiatric advice. At our entrance to the war, the Secretary of War sanctioned a plan to assign psychiatric officers to every division for examination of accused men before trial. Owing to the lack of sufficient qualified officers, and to other obstacles, this was not immediately done. But after some time it was achieved in many, if not most, cantonments; and now the records on appeal usually contain a report by the psychiatric officer as a matter of course.

Here the Federal military system has rapidly accepted a measure which still remains unadopted by any state in the Union.

This measure brings us back to the necessity of a centrally directed administration. The psychiatric staff must be organized from state headquarters, because in the rural courts there are not enough criminal cases to require the entire continuous service of one officer, and the staff must therefore go on circuit when and where needed. It remains for the state civilian justice to take this step.

6. *Conclusion.* And so, throughout, we come back to the prime fact, viz., that the most needed measure for state criminal justice to-day is centralized supervision under a chief judicial superintendent; that this measure not only itself brings vast improvement in efficiency, but that it alone will enable other measures to work well; that the Federal military justice already possesses this and several other features well worth imitation; and that civilian justice is put on the defensive to take a lesson in becoming efficient by adopting these features.

JUSTICE AND THE LAW

MANY believe, ideally perhaps, that justice is the basis of all law. That frequently in human experience this situation does not obtain, however, every careful observer is well aware. Consequently, whenever a considerable body of citizens, from a sense of injustice, express definite antagonism to a given statute, there can at most no harm arise from investigation of the reasons for their opposition, with a view to determine if it is well founded. Furthermore, if perchance the disaffected persons are of sober mind and notably law-abiding, the reasons for investigation are increased. A situation of this kind now exists with a group of citizens, the Christian Scientists, in regard to a provision in the Penal Codes of several states, including New York (section 482, Penal Law), which declares that "A person who . . . wilfully omits without lawful excuse to perform a duty by law imposed upon him to furnish . . . medical attendance to a minor . . . is guilty of a misdemeanor." In the case of People *v.* Pierson, 176 N. Y. 201, 68 N. E. 243, 98 Am. St. Rep. 666, 63 A. L. R. 187, "medical attendance" was defined as "attendance by a duly licensed physician," that is, by a medical doctor, but this case was decided prior to the amendment of the Medical Practice Act in 1907, and the question of the legality of Christian Science treatment was not directly under discussion.

Examination of the situation in the light of this decision is particularly timely because in the neighboring state of New Jersey, under a similar statute, a father, who relied upon Christian Science treatment for his child in an illness which terminated fatally, has been found guilty of manslaughter; and another indicted under a similar charge now awaits trial.

Two very interesting questions which have not been adequately

placed before the public are immediately raised, important since they deal with certain fundamental rights of citizenship stated in general terms in the Constitution of the United States, and more definitely set forth in the constitutions of the individual states. Notwithstanding that the guaranty of religious liberty is a specific provision of the constitution of the state of New York, opposition to the exercise of this privilege arose immediately when it appeared that the practice of the "religious tenets of a church" in healing the sick ran counter to the interests of established medical practice. To define and safeguard this constitutional right in relation to Christian Science practice, has been the purpose of legislative enactment in New York and more than thirty other states.

The constitution of the state of New York declares in art. I, sec. 3, "The free exercise and enjoyment of religious profession or worship, without discrimination or preference, shall forever be allowed in this State to all mankind." The Medical Practice Act as amended in 1907 contains the following: "This Act shall not be construed to affect the practice of the religious tenets of any church." In 1916 the Court of Appeals reversed an adverse decision of the lower court in the well known Cole case in terms which definitely confirmed the right of Christian Scientists to practice the tenets of their church in healing disease (see People *v.* Cole, 219 N. Y. 98, 113 N. E. 790, L. R. A. 1917C 816). In a separate memorandum Chief Judge Bartlett, then presiding, while concurring in the decision of the court, said, "But I would go further. I deny the power of the legislature to make it a crime to treat disease by prayer." The legality of Christian Science practice in healing disease was confirmed by the Court of Appeals in 1917 in the case of People *v.* Pierson, 176 N. Y. 201, 68 N. E. 243, 98 Am. St. Rep. 666, 63 L. R. A. 187. In this decision the following statement appears, "We held in People *v.* Cole, 219 N. Y. 98, 113 N. E. 790, L. R. A. 1917C 816, that the exception protected the practitioners of Christian Science who taught as part of their religion the healing power of mind." Citation is made of many states in which Christian Science practice is legal and the decision further states: "There are like provisions in other states. Through all this legislation there runs a common purpose. ***The law exacts no license for healing by prayer or by the power of religion, but one who heals by other agencies must have the training of the expert.***"

This would seem to establish beyond peradventure of doubt the legality of Christian Science practice in the state of New York. The Penal Code, however, apparently conflicts with this well defined provision of the constitution; and there is presented the direct question as to whether a method of healing which is lawful in the case of an adult is unlawful and criminal when administered to a minor. Which then shall prevail? Was Judge Bartlett correct in assuming that it is beyond the prerogative of the legislature to forbid the healing of disease by prayer? If so, then plainly either the provision of the Penal Code in question is unconstitutional, or the court's construction of the term "medical attendance" (People *v.* Pierson, supra) is too restricted. That the former is true appears self-evident; that the latter proposition is also correct seems capable of proof. Webster defines "medical" as "pertaining to or dealing with the healing art." The Century Dictionary defines it as "relating to the practice of medicine;" and medicine is defined as "the art of preventing, curing or alleviating disease." Its students are convinced that Christian Science is the best and safest method of preventing, curing, or alleviating disease in its manifold forms; and it appears reasonable to hold that a correct interpretation of "medical attendance" should include all legal methods of healing.

In the light of the decisions above cited the question inevitably arises, "Is then a parent to be adjudged guilty of a felony—manslaughter in New Jersey—whose only offense is found in having provided treatment for his child in accordance with his judgment and conscience, a right based upon constitutional provision and a specific statute supported by two decisions of the Court of Appeals? Or are we to conclude that constitutional guaranty of religious liberty together with statutory enactment and judicial confirmation establishes a right to be exercised only by adults in their own behalf, but precluded in the case of minors? Manifestly the only possible reason for such a conclusion rests upon the welfare of the child. If the state, superseding the parental prerogative, presumes to determine what healing practice shall be furnished for a sick child, such action must be based upon indisputable proof that the means prescribed not only is the best available, but will result in cure; otherwise the argument that such treatment is for the child's welfare falls to the ground. If the state insists upon a given method of treatment and the child dies, it seems justifiable that it should assume the responsibility for his death; for the medical practitioner acting in accordance with the law can scarcely be held answerable. Under such circumstances what proof is there that, had the parent been at liberty to choose the method of healing, even spiritual means, in accordance with his conscience and judgment, the child might not have been healed?

The case of Bradley *v.* State, (Fla. 1920) 84 So. 677, is the most recent decision of an appellate tribunal, although Christian Science was not involved in the question under discussion. The court held that, under a statute which reads that "the killing of a human being by the act, procurement or culpable negligence of another . . . shall be deemed manslaughter," the defendant was not guilty of the crime of manslaughter. The facts were as follows: The minor child of the defendant Bradley was an epileptic, and in a paroxysm occasioned by this malady, fell into a fire and was seriously burned. The defendant was a member of a religious sect which taught that prayers alone would cure the sick. The injury was sustained on April 26, 1918, and from that time until May 30 following the defendant prayed for the child in lieu of medical attendance. On the latter date the patient was taken to the hospital and received medical treatment but died June 22, 1918. Physicians testified that in their opinion if the child had received proper medical attention she would not have died from the burns. In a concurring opinion Chief Justice Brown says: "The question of the father's religious belief is in no wise involved.

"The all-important question is, must a parent call a physician every time his child is sick, or risk being adjudged guilty of manslaughter if the child should die? If not, who is to decide when the child is sick enough to place upon the father the obligation to call a physician? Is it the father, or the neighbors, or must the father call a physician to ascertain if the child needs a physician?

"Has the practice of medicine become an exact science, so that after death, human testimony can establish beyond a reasonable doubt that if a physician had been called the child would not have died?

"Does the duty of a parent to call a physician attach where a child is afflicted with a necessarily fatal ailment, such as consumption, and continue until death occurs? Can the law fix what class of ailments a child must be suffering from before the failure to call a physician becomes culpable negligence, so that if death ensues in one class it is manslaughter and in another class it is not? Shall a parent who belongs to that exemplary band of Christians who have no faith in the efficacy of medicine as

a curative agency be convicted of manslaughter because he fails to call a physician to attend a sick child that subsequently dies? Until the practice of medicine becomes an exact science so that it can be established beyond the peradventure of a doubt that death would not have ensued if a physician had been in attendance, I think the answer to all these questions must be an unqualified 'No.'"

Commenting on the contention raised in the case that had the father called a physician at the beginning of the illness rather than three weeks later, the child would have survived, hence the father was responsible for the child's death, Justice Brown further states: "The fallacy of this is that it was not proven, and was not capable of being proven, that if the child had had medical attention it would have recovered. And that must always be the fallacy in an attempt to attach the guilt of manslaughter to a father for failing to call a physician whenever his child is sick, if it subsequently dies." These conclusions are so manifestly sound that no comment is needed.

Another phase of the problem presents two altogether pertinent questions: "Has medical treatment of disease acquired a degree of certainty as to success sufficient to justify its mandatory use for a sick minor? And has it been proved successful above all other means of treating disease, as, for example, spiritual healing as taught and practiced by Christian Science?" Regarding the inadequacy of medical treatment, a vast amount of testimony supplied by medical doctors themselves may be offered in evidence, so conclusive, it is believed, as to prove to any unprejudiced person that the practice of medicine is too far from being demonstrably safe or scientific to justify such compulsion; and it is by no means my desire to discredit the medical profession. But taking its practitioners on their own words as to the inefficacy of drug treatment, I contend that the present degree of uncertainty in the practice of medicine renders impractical and unwarranted its mandatory employment.

To cite a few statements relative to the inadequacy of material means of treatment: An editorial in the New York Medical Journal of January 10, 1920, states: "In our combat with disease we have found few medicaments or methods of treatment that are completely satisfactory. At times, as in the last epidemic of influenza, we are forced to acknowledge a complete defeat." Regarding the failure of medical treatment of pneumonia Dr. Turck of New York, writing of conditions in the Army camps in the Medical Record of March 22, 1919, stated: "Pneumonia still remains the most terrible scourge of our cantonments. Reports show that the mortality runs from 41.8 to 89.6—a condition too appalling to permit of apology. It is a challenge to the medical profession;" and he quotes the Public Health Association as stating that during October, November and December of the previous year it reported more than 400,000 deaths from that disease alone in the United States.

Dr. Victor Heiser in the Journal of the American Medical Association for December 7, 1918, writes as follows: "Viewed from another standpoint it is apparent that it is more dangerous to be a soldier in peaceful United States than to have been on the firing line in France. From the statistics so far available the death rate in the military camps where materia medica treatment is universal and compulsory, is higher than among the civil population, even in similar age groups;" and this despite the fact that soldiers are selected risks of the highest class. The mortality in New York and Chicago for instance shows that the death rate in the Army is more than double that of the civil population of the same age group. If medical means are the best at man's disposal then how utterly is he at the mercy of disease!

Regarding the treatment of diphtheria, concerning which the medical profession claims great improvement in recent years, the facts set forth by the Pennsylvania Bureau of Statistics for 1915-19 are pertinent. It is shown that the yearly average of diphtheria cases for that period was 11,235 with 1,781 fatalities. or one in every six cases. There are many who will believe that a system of treatment which loses 16% of its patients is far from being safe enough to justify the making of its use mandatory. The daily press contains ample substantiation of these statements.

That the present situation is rife with prejudice no one can deny, for public opinion has accepted medical practice as a necessity. When in New Jersey last spring the press was carrying the news of the trial for manslaughter of a father whose child had passed away under Christian Science treatment, it also published news of the death of three children in New York city, orphans in different institutions, two of them from diphtheria, yet no word of protest was raised regarding the treatment.

An editorial in the September issue of the Medical Review of Reviews is directly pertinent. Quotation is made from the Weekly Bulletin of the Health Bureau of New York city of March 15, 1920, giving an account of a child ill of diphtheria with symptoms which the first physician called declared to be due to teething; but when after a few days the parents, becoming alarmed at the child's condition, called another doctor, he diagnosed the case as diphtheria and administered antitoxin; and the child died within a few hours. The editorial then quotes from the Journal of the American Medical Association of May 22, 1920, the story of the conviction of a Christian Science parent for manslaughter in New Jersey because he failed to furnish material treatment for a child that subsequently died; and the article closes with the pertinent comment, "Now suppose the New Jersey father had employed the New York physician, how much better would he have fared? So far as the record goes the New York physician was as grossly incompetent as the Christian Science practitioner. In one case the father is fined; in the other even the physician goes free *because he is an M. D.*"

Before a legislative committee in Massachusetts in 1898, William Lloyd Garrison stated the case clearly: "One had only to read the candid opinions of eminent physicians of long practice to realize how tentative and purely experimental is the science of medicine. The death of a patient under 'irregular treatment,' although it may be demonstrated that the greatest care and intelligence were used, is heralded abroad as something scandalous and dreadful, but if any regular physician were to make public the deaths coming to his knowledge from misapprehension of the disease, or because of mistaken remedies used, the public might well be alarmed."

Recently the health officer of an up-state city threatened prosecution of a parent whose child passed away from what was declared to be diphtheria, because Christian Science treatment was resorted to in the earlier stages of the disease; yet no word of complaint was heard of other cases of the same disease which later terminated fatally under medical treatment in that city. Apparently no criminality attaches to the parent whose child dies under the prescribed treatment, that is, in the orthodox fashion.

The use of drugs has long been the basis of the practice of medicine. To be sure mental therapy under various names is now becoming the popular adjunct of drug therapy, but the pharmacopeoia is still the physician's chief resort. Yet there is much evidence of the rapidity with which the public is turning from the use of material means of healing. A vast number of

individuals would scarcely hold that the welfare of a child demands medical treatment; nor is it likely they would agree that it is against public welfare to leave with a parent the right to consult his conscience and judgment in selecting any legalized method of healing, including spiritual means. It must not be forgotten that it has never been proved, and I hold it incapable of proof, that Christian Science treatment is inadequate and accordingly to the child's detriment. It is a strange fact that in the trials in New Jersey and wherever Christian Scientists have been held for illegal practice under whatsoever complaint, evidence to prove the efficacy of this method of treating disease has usually been excluded; and it has been customary to exclude from the jury box those who believe that the commands of Christ Jesus to heal the sick are possible of fulfillment.

In the discussion of Christian Science by those unfamiliar with its teachings and practice, it is usually assumed that it has no standing as a therapeutic means and its adherents are fanatics who permit their children to die when they could be healed through medical means. In refutation of this erroneous position, then, what has Christian Science to present in the way of testimony as to its healing efficacy? With a view to answering this question I have gathered data from various available sources concerning recent cases of healing in the state of New York. Early in 1919 during the epidemic of influenza a questionnaire was sent to all authorized practitioners of Christian Science in the state of New York asking for accurate statements of their experience with that disease. Analysis of the data thus gathered showed that the failures, including pneumonia cases, were less than three in a thousand. In a considerable number of these cases the patient had turned to Christian Science at the eleventh hour, when hope of relief through material means had been quite abandoned. For a similar period the health reports showed the fatalities to be many times greater under medical practice.

A few months ago a letter was sent to one hundred authorized Christian Science practitioners in the state asking for testimonies of recent healings of disease which had been diagnosed by physicians. The response has been most convincing, multiplying the evidence that Christian Science heals disease of every type, even the so-called malignant, some of which the medical profession have declared incurable. Among these testimonies are healings of cancer, three by one practitioner, two of which had been examined by the X-ray before and after treatment, the later examination showing no trace whatsoever of the disease. There were healings of several cases of tuberculosis, including two young men, who, rejected by Army surgeons as tubercular, after Christian Science treatment were reexamined and accepted for the service. A sailor suffering from injury to his hand followed by blood-poisoning and gangrene was told by the surgeon that only an operation could save that member. He was healed by Christian Science in a few weeks and went on the next voyage of his ship. The testimonies also described the healing of severe injury; a case of burning where a dress recently cleaned by gasoline was ignited from a gas flame and literally burned from the body, the flesh in places being reduced to a crisp. Yet under Christian Science treatment this injury was so perfectly healed that there remains no scar, in fact no trace of the experience. Typhoid fever, heart disease, diseased tonsils, infected eyes, mumps and appendicitis were among the diseases healed. Three cases of insanity had been healed by one practitioner, two of which had been diagnosed by medical doctors as *dementia precox* and declared incurable. Yet both persons so affected, through the ministrations of Christian Science, have been restored to health and their rightful places in the world's activities. Also included were cases of eczema, grippe, neurasthenia, pyorrhea and many other maladies; and it should be remembered that nearly all these cases have passed under the eye of the medical profession.

These testimonies are but a small group gathered from a large and constantly increasing number available. The proof of the healing efficacy of Christian Science is irrefutable, and is open to any honest seeker. More than 1800 Christian Science churches are monuments to the gratitude of healed and regenerated thousands, many of whom have recovered health after the failure of all material measures. Christian Science treatment is especially efficacious with children who, since their mentalities are less filled with fixed material beliefs, as a rule respond to spiritual healing even more quickly than adults.

Parents who are Christian Scientists have accepted this religion from definite and positive proof of the power and availability of God to heal all man's diseases in fulfillment of His promise. It is based upon the teaching and practice of Christ Jesus, and is carried on in obedience to his definite injunction to "heal the sick, cleanse the leper, raise the dead." When resorted to for a sick child it is from strong conviction that it is the best means available. Since its ministration is spiritual and Christian no evil results follow, and its percentage of healings is very large. To many the situation is utterly devoid of logic that permits a parent to choose religious teaching for his child but forbids the utilization of spiritual Truth embodied in such teaching to heal him of disease. That religious teaching may be invoked to "save his soul" but must not be utilized to heal his body is false reasoning. It requires no violence to the imagination to look forward a few decades when if the present rate of defection continues the majority of our population will have turned away from the use of drugs and medical methods. To compel such treatment by statute then will be an anachronism indeed.

If it be conceded, as it certainly must be under the provisions of the Medical Practice Act and the decisions of the Court of Appeals in the state of New York already cited, that Christian Science treatment for adults is in all respects legal and proper, does it not necessarily follow from what has been already stated relative to the uncertainty of the results where medical treatment is had, and its many admitted failures to heal, that any statute which attempts to compel medical attendance for a minor at this day is an unreasonable exercise of the "police power" of the state, the only authority that gives validity to a statute of this nature?

If, as held in People *v.* Pierson, supra, "medical attendance" as required by the Penal Code means attendance by a medical doctor, then in the light of present day knowledge of the various means of healing, and especially the proved efficacy of Christian Science treatment, the Penal Code provision is now unconstitutional and unwarranted, even if it is admitted that it was constitutional and warranted at the date of its enactment. It is a naked and arbitrary power conferred upon the health authorities to compel a parent to employ a prescribed mode of healing for his minor child without the right to choose what he conscientiously believes to be the best for his child; and it is therefore unreasonable and unconstitutional (Yick Wo *v.* Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 U. S. (L. Ed.) 220).

It is unconstitutional because it is an artificial distinction in favor of one system of healing disease as against any other system, and is not based upon everyday facts and statistics (Noble State Bank v. Haskell, 219 U. S. 104, 31 S. Ct. 186, 55 U. S. (L. Ed.) 112, Ann. Cas. 1912A 487, 32 L. R. A. (N. S.) 1062).

It is an elementary principle of law that the sanctity of the home cannot be invaded; and the natural rights of the parent as to the custody and control of his child would be flagrantly violated by the exercise of police power on the part of the state which would invade the home unless there arises indisputable demand for such invasion on behalf of the public welfare. That public welfare would be subserved by the compulsory medical treatment is far from indisputable.

An excellent illustration of the fallacy of any attempt to control a parent's choice of healing remedy for a child is had in the present interpretation of the school laws of the state of New York by the Department of Education. An amendment to the General Education Laws passed in 1913 provides that in case of a physical defect revealed by medical inspection of the child "if the parents or guardians are unable or unwilling to provide necessary relief and treatment for such pupils, such fact shall be reported by the principal or teacher to the medical inspector whose duty it shall be to provide relief for such pupils." (Section 573.) While it seems reasonable to assume that a strict interpretation of this passage would give the medical inspector the right to compel treatment in certain cases, in actual practice the Department invariably leaves to the parent the choice of remedial means on the ground that "the law recognizes the parent or guardian as the rightful custodian of the child's health" (School Health Service Bulletin, p. 11).

It seems conclusive that there is no evidence that public welfare demands compulsory medical treatment for a sick child. Justice based upon individual rights guaranteed by the Constitution would seem to rest the whole problem of the child's physical well-being, so far as remedial measures are concerned, in the hands of the parent or guardian, his natural protector.

ALBERT F. GILMORE.

Cases of Interest

DRIVING OF MOTOR TRUCK AS "OPERATION OF ENGINE."—It seems that one employed in driving a motor truck is engaged in the operation of an engine within the meaning of an Employers' Liability Act providing compensation for persons injured in such employment. It was so held in Haddad *v.* Commercial Motor Truck Co., 146 La. 897, 84 So. 197, wherein the court said: "We think we may take cognizance of the fact that motor trucks are operated or propelled by gasolene engines or motors, which by the use of gasolene produce their own energy or motive power. The driving of such motor trucks necessarily involves the operation of such engines. 'The word "engine" is defined as an ingenious or skilful contrivance used to effect a purpose, and is often synonymous with the word "machine." Within such definition, an electric passenger elevator is an engine. Lefler v. Forsberg, 1 App. D. C. 41.' 3 Words and Phrases, p. 2395. An engine, according to the Century Dictionary, is: A skilfully contrived mechanism or machine, the parts of which concur in producing an intended effect; a machine for applying any of the mechanical or physical powers to effect a particular purpose; especially a self-contained, self-moving mechanism for the conversion of energy into useful work; as a hydraulic engine for utilizing the pressure of water; a steam, gas, or air engine, in which the elastic force of steam, gas, or air is utilized.' According to the same authority, machinery is defined as follows: 'The parts of a machine considered collectively; any combination of mechanical means designed to work together so as to effect a given end, as the machinery of a watch, or of a canal lock; . . . any complex system of means and appliances, not mechanical, designed to carry on any particular work, or keep anything in action; or to effect a specific purpose or end; as the machinery of government.' There could be but little doubt that if the deceased had been required, in the course of his employment, to operate a stationary gasolene engine on the premises of the defendant, the service would have fallen clearly within the provisions of the Employers' Liability Law, no matter for what purpose its use might have been intended. Can it be said that because he was required to operate the same character of engine in a self-propelling vehicle, the statute does not apply? We think not. Would the driver of a motor bus for the transportation of freight and passengers be engaged in the operation of an engine or machinery? We think so."

RIGHT TO REMOVE COAL FROM BENEATH HIGHWAY.—It seems that one over whose property a public highway is laid has the right to remove the coal from beneath the highway, provided he does not injure the surface or create a condition which may cause injury. The court so held in Breisch *v.* Locust Mountain Coal Co. (Pa.) 110 Atl. 242, saying: "It is admitted defendants are the owners in fee of the coal underlying and on either side of the public highway, as it affects the present case. There is nothing to show how Krebs road originally became a public highway. If, in the original taking, the right of property in any aspect had been injuriously affected, the owner would have been entitled to damages; but, as the ownership of the coal is not in dispute, it is clear that when the road was laid out the owner had full dominion and control over the coal with the right of an absolute owner to it, subject, however, to the easement in favor of the public. He has the right to mine and remove it, but the removal must be done in such manner as not to injure the surface of the highway, or create a condition whereby injury may later follow. The servient estate must always be in such condition that the road may be continued as a highway for the traveling public in the future. From the undisputed facts this servient estate owed to the road above such support as will at all times preserve and keep it from subsiding. An abutting owner may use the land (the surface) for his own purposes in any way not inconsistent with the public easement, and is entitled to all profit and advantage that may be derived therefrom. 13 R. C. L. § 107, p. 121. 'The rights and title of an abutting owner . . . are subject . . . to the easement and servitude in favor of the public, and to the right of the public authorities to occupy the space above [and below] the surface of the way for any purpose within the scope of the public uses to which highways may be put.' 13 R. C. L. § 108, p. 123. But above and beyond this reasonable use of the public, the owner undoubtedly retains the right to use his land, and so it has been held, where one owns the fee in the minerals under the surface of the highway, and the mines on the surface adjacent thereto, they may work such mines, but must do so in such way as not to cause the road to subside. 17 E. R. C. p. 554."

POWER OF LEGISLATURE TO INVESTIGATE PRIVATE INSTITUTION.—In Greenfield *v.* Russell, 292 Ill. 392, 127 N. E. 102, reported and annotated in 9 A. L. R. 1334, it was held that the legislature cannot conduct a public or judicial investigation of charges made against any private institution or individual under the pretense or cloak of its power to investigate for the purpose of legislation. It appeared that the legislature of Illinois had adopted a joint resolution appointing a committee to investigate charges made against the Christian Catholic Apostolic Church at Zion City

and against its overseer. Holding that payment of the expenses of the investigation should be restrained, the court said: "The investigation was not of a character that the legislature could undertake under the provision of the Constitution. All criminal charges, if any there were against these parties, and all invasions by them of the private rights of others, could only be investigated legally by a grand jury or a court legally constituted for the purpose. If the rights of private individuals and private institutions could be invaded by the legislature in that manner, their reputation and their character and their business would be greatly endangered if not entirely destroyed, and they would not have or enjoy in such public investigations their constitutional right of answering and making a defense to such charges, however false they might be. This whole investigation may have been started with the very best of motives on the part of the members of the legislature, and it may have been carried out by the committee, so far as it did conduct the investigation, with the utmost fairness possible. Nevertheless, the act of the general assembly in question was not only an invasion of the private rights of the individual and institution investigated, but it was also an invasion of the province of the judiciary. Under such circumstances, it is the duty of the courts to protect the rights of individuals by refusing to permit the legislature to thus invade the jurisdiction of the court. A judicial investigation should at all times proceed in an orderly manner before a tribunal legally constituted to make such investigation, and in such a manner as to give all parties thereby affected a complete and full hearing and an adjudication that will determine and settle the rights of the parties. An investigation by the legislature that can in no way be serviceable to it in future legislation, and that must necessarily endanger the constitutional rights of private individuals, ought never to be made, and such an investigation is prohibited by the constitution of Illinois."

TAXICAB AS PUBLIC CONVEYANCE.—In Anderson *v.* Fidelity, etc., Company, 228 N. Y. 475, 127 N. E. 584, reported and annotated in 9 A. L. R. 1544, it was held that an automobile operated as a public taxicab for fares controlled by taximeter is within the provision of an accident insurance policy for extra compensation for injuries while in or on a public conveyance provided by a common carrier for passenger service, although at the time of the accident the cab is engaged for the exclusive use of the person injured and his companion. The court, after declaring that the company furnishing the taxicab was a common carrier, said inter alia: "The stipulated facts show that the Yellow Taxi Service, Incorporated, sent its taxicabs, equipped with taximeters, on the streets of Albany, under the control of their chauffeurs, to wait at stands, or, when traveling upon the streets and unemployed, to transport any applicant for their service. The city ordinance clearly applies to them, and penalizes both the chauffeur and the owner for any refusal to accept any proper applicant. Certainly the owners and drivers of purely private conveyances cannot be subjected to this penalty. It is clear that a taxicab equipped with a taximeter, 'cruising' along the streets of a city, offering its services to the first comer, looking for 'fares' to any place within the city limits, at a fixed price to be controlled by the distance and recorded by a taximeter, is a public conveyance within the usual concept of the term and also legally. Its character does not change by reason of some passer-by accepting the offer publicly made of its services. It was a public offer of conveyance which he accepted, and the instrument of conveyance must remain as to him a public conveyance to his journey's end or his dismissal of the cab. There does not seem to be much reason in the argument that if all the seats were occupied the conveyance was a public one, but that if only two or three of the four available seats were occupied, it was a private conveyance. The fact that, by custom, when engaged by a 'fare,' taxicabs proceed under the direction of that 'fare' to the destination desired by him, and accept no other passengers, does not change the means or character of the conveyance. The custom is the result of business convenience, inherent in the successful conduct of the taxicab business. Those employing taxicabs desire greater speed and conveyance in transacting their business or journey than is furnished by the ordinary street car or jitney bus. This means of speed and convenience is offered by the taxicab, and that is what warrants its higher rate of charge."

LIABILITY OF PHYSICIAN FOR DISCLOSING NATURE OF PATIENT'S DISEASE.—In Simonsen v. Swenson (Neb.) 177 N. W. 831, reported and annotated in 9 A. L. R. 1250, it was held that where a physician makes a disclosure of information imparted by a patient to secure treatment, believing that a disclosure is necessary to prevent the spread of the disease, if he acts in entire good faith, with reasonable grounds for his diagnosis and without malice, he cannot be held liable in damages by his patient, even though he is mistaken in his diagnosis. Referring to a statute of Nebraska providing that the license of a physician may be revoked for the "betrayal of a professional secret to the detriment of a patient," the court said: "By this statute, it appears to us, a positive duty is imposed upon the physician, both for the benefit and advantage of the patient as well as in the interest of general public policy. The relation of physician and patient is necessarily a highly confidential one. It is often necessary for the patient to give information about himself which would be most embarrassing or harmful to him if given general circulation. This information the physician is bound, not only upon his own professional honor and the ethics of his high profession, to keep secret, but by reason of the affirmative mandate of the statute itself. A wrongful breach of such confidence, and a betrayal of such trust, would give rise to a civil action for the damages naturally flowing from such wrong. Is such a rule of secrecy, then, subject to any qualifications or exceptions? The doctor's duty does not necessarily end with the patient; for, on the other hand, the malady of his patient may be such that a duty may be owing to the public and, in some cases, to other particular individuals. . . . When a physician, in response to a duty imposed by statute, makes disclosure to public authorities of private confidences of his patient, to the extent only of what is necessary to a strict compliance with the statute on his part, and when his report is made in the manner prescribed by law, he of course has committed no breach of duty toward his patient, and has betrayed no confidence, and no liability could result. Can the same privilege be extended to him in any instance in the absence of an express legal enactment imposing upon him a strict duty to report? The statute making the 'betrayal of a professional secret' misconduct on the part of a physician is in derogation of the common law, and should be strictly construed. We believe the word 'betrayal' is used to signify a wrongful disclosure of a professional secret in violation of the trust imposed by the patient. No patient can expect that if his malady is found to be of a dangerously contagious nature he can still require it to be kept secret from those to whom, if there was no disclosure, such disease would be transmitted. The information given to a physician by his patient, though confidential, must, it seems to us, be given and received subject to the qualification that if the patient's disease is found to be of a dangerous and so highly contagious or

infectious a nature that it will necessarily be transmitted to others unless the danger of contagion is disclosed to them, then the physician should, in that event, if no other means of protection is possible, be privileged to make so much of a disclosure to such persons as is necessary to prevent the spread of the disease."

New Books

Marriage, Divorce, Separation and Domestic Relations. By James Schouler. Sixth edition in three volumes by Arthur W. Blakemore of the Boston Bar. Albany, N. Y.: Matthew Bender & Company. 1921.

The treatise named above is an enlargement of Prof. James Schouler's former works on "Husband and Wife" and "Domestic Relations." Volume one just issued from the press contains the law of Domestic Relations, embracing husband and wife, parent and child, guardian and ward, infancy, separation and divorce. Two other volumes will follow shortly. Professor Schouler will be remembered as a teacher of the subjects covered by these works at the Boston University School of Law. Arthur W. Blakemore is a member of the Boston Bar and has had considerable experience in legal writing during the past few years. Of course the profession needs not to be told of the merits of the law books bearing the name of James Schouler as author. They have been in use, some of them, since the early seventies. The editor of the sixth edition has as far as possible preserved Schouler's text intact, adding however such new subjects as the passing years have made necessary. This has necessitated a rearrangement of the whole work. The editor makes the claim that substantially every case of importance during the last twenty-five years has been cited, and the size of the first volume, which consists of over twelve hundred pages, would seem to bear out his claim.

News of the Profession

NEW JERSEY JUDGE REAPPOINTED.—Supreme Court Justice Thomas T. Trenchard has received a reappointment.

WELL-KNOWN CHICAGO LAWYER DEAD.—Robert Redfield, of Chicago, died recently at the age of 50. He had a wide knowledge of municipal legal problems.

OHIO JURIST TO PRACTICE LAW.—Hugh L. Nichols, Chief Justice of the Ohio Supreme Court from 1913 to 1921, will practice law in Cincinnati.

DEATH OF INFLUENTIAL COLORADO LAWYER.—Corydon Rood, of Loveland, Colorado, is dead. He was born in Waterloo, New York, and once practiced in Syracuse.

MONTGOMERY COUNTY BAR ASSOCIATION OF PENNSYLVANIA.—Joseph Fornance has been elected president of the Montgomery County Bar Association of Pennsylvania.

DEATH OF ALABAMA JURIST.—Judge John C. Pugh, for eight years a judge of the circuit court of Jefferson county, is dead. He was a son of the late Senator James L. Pugh.

JACKSONVILLE BAR ASSOCIATION.—At the annual meeting of the Jacksonville Bar Association of Florida, William T. Stockton was elected president, succeeding Albion W. Knight.

FORMER IOWA JUDGE DEAD.—Former Judge M. C. Matthews of Dubuque, Iowa, died recently at the age of 59. For twelve years he was a district court judge.

EL PASO COUNTY BAR ASSOCIATION.—Willis L. Strachan of Colorado was elected president of the El Paso County Bar Association at a recent meeting.

ADAMS COUNTY BAR ASSOCIATION OF NEBRASKA.—The Adams County Bar Association met at Hastings recently and elected J. W. James president.

DEATH OF MONTANA JUDGE.—Judge W. A. Clark of Virginia City, Montana, died recently. He was 55 years old and was a district court judge.

NEW YORK STATE BAR ASSOCIATION.—At the annual meeting of this association held in New York city, William D. Guthrie was elected president, succeeding Governor Nathan L. Miller.

EDITOR OF JOURNAL OF AMERICAN BAR ASSOCIATION APPOINTED.—The Journal of the American Bar Association has as its editor Major Edward Tolman, formerly of the First Illinois Cavalry.

WASHINGTON LAWYER RETURNS TO PRACTICE.—Francis S. Key-Smith of Washington, D. C., who entered the army in 1917 after having been a practitioner in that city for twenty years, has resumed practice.

LAW BOOK FIRM CELEBRATES 100TH ANNIVERSARY.—The anniversary of the completion of 100 years of business activity in New York city is being celebrated by Baker, Voorhees & Co., law book publishers.

CHANGE IN CIRCUIT COURT OF CHICAGO.—Harry B. Miller, former city prosecutor of Chicago, has been appointed Circuit Court judge of Cook County, succeeding Judge George F. Barrett who resigned.

SOUTH CAROLINA BAR ASSOCIATION.—The annual convention of the South Carolina Bar Association held at Columbia was addressed by former United States Senator James Hamilton Lewis of Chicago.

DEATH OF PROMINENT OREGON ATTORNEY.—The death of Mr. Charles J. Schnabel, a prominent Oregon attorney practicing at Portland, occurred in February. He was actively interested in the American Bar Association.

OKLAHOMA BAR ASSOCIATION.—J. B. Moore was recently elected president of the Ardmore Bar Association, succeeding Judge T. W. Champion. C. McCasland was elected president of the Atoka County Bar Association.

TEXAS COURT OF CRIMINAL APPEALS HAS NEW JUDGE.—Judge Frank L. Hawkins of Warahachie, Texas, has been appointed a judge of the Texas Court of Criminal Appeals, succeeding Judge W. L. Davidson who recently died.

AMERICAN BAR ASSOCIATION.—The Executive Committee of the American Bar Association will meet at Cincinnati for the purpose of arranging details of the annual convention to be held in that city from August 30 to September 2.

UNITED STATES SENATOR OF ILLINOIS TO OPEN LAW OFFICE.—United States Senator Lawrence Y. Sherman of Illinois, whose

term of office has just expired, will practice law in Springfield, and will have as a law partner Judge Noah C. Barnum.

PENNSYLVANIA JURIST HONORED BY BANQUET.—J. Hay Brown, who recently retired as Chief Justice of the Pennsylvania Supreme Court, was given a testimonial dinner by the Lancaster Bar Association. He formerly practiced in that city.

MINNEHAHA COUNTY BAR ASSOCIATION OF SOUTH DAKOTA.—The Minnehaha County Bar Association at its annual meeting at Sioux Falls elected as president Henry Robertson of Dell Rapids. Judge J. Howard Gates, of the state Supreme Court, was a speaker at the meeting.

DEATH OF WISCONSIN JUSTICE.—Justice James C. Kerwin of the Wisconsin Supreme Court is dead. He has been in that court since 1904 and was born in 1850. He was a graduate of the law school of the University of Wisconsin.

FEDERAL BAR ASSOCIATION OF WASHINGTON.—David D. Caldwell of the Department of Justice has been elected president of the Federal Bar Association of Washington, D. C. James W. Witten is the retiring president.

ARKANSAS BAR ASSOCIATION.—The annual meeting of the Arkansas Bar Association will be held June 2 and 3 at Hot Springs. Former Governor Frank O. Lowden of Illinois will be one of the speakers. The president of the association is W. F. Coleman.

DES MOINES BAR ASSOCIATION.—James L. Parrish is the new president of the Des Moines Bar Association of Iowa. At its annual meeting it was addressed by Judge F. F. Faville of Fort Dodge, a member of the state Supreme Court.

CRAWFORD COUNTY BAR ASSOCIATION OF KANSAS.—The annual banquet of the Crawford Bar Association held in Pittsburg, Kansas, was addressed by a number of prominent jurists and lawyers, including Judge West of the state Supreme Court.

DEPUTY ATTORNEY GENERAL OF MINNESOTA RESIGNS.—C. Louis Weeks of St. Paul, deputy attorney general of Minnesota, has resigned to become a member of the law firm of Denegre, McDermott & Stearns. He was in the attorney general's office for fourteen years.

ALABAMA BAR ASSOCIATION.—At the annual meeting of the Alabama Bar Association to be held in Birmingham April 29 and 30, L. E. Jeffries, vice president and general counsel of the Southern Railroad, will deliver the annual address. He is a native of Selma in that state.

IDAHO BAR ASSOCIATION.—In January at Boise occurred the annual meeting of the Idaho Bar Association lasting three days. Willis E. Sullivan, the president of the association, addressed it on the subject "The Problems of the Hour and of our Association."

ST. JOSEPH BAR ASSOCIATION OF MISSOURI.—At a banquet given by the association Martin J. Wade of Iowa City, Iowa, Judge of the United States District Court, made the principal address, taking for his subject "The Faith of Our Fathers." Orestes Mitchell, president of the association, presided.

MASSACHUSETTS JUDICIAL CHANGES.—Judge Jabez Fox of the Massachusetts Superior Court has resigned and his place has been filled by the appointment of Judge Henry T. Lummus of the District Court of Essex County. Ralph W. Reeve of Lynn succeeds Judge Lummus as judge of the Essex County District Court. The latter was a well-known athlete at Dartmouth College.

VERMONT BAR ASSOCIATION.—At the annual meeting of the Vermont Bar Association held at Montpelier, John W. Redmond of Newport was elected to succeed Marvelle C. Webber of Rutland. The association was addressed by Chief Justice John H. Watson of the state Supreme Court and Moorfield Storey of Boston, former president of the American Bar Association.

OHIO BAR ASSOCIATION.—The Ohio Bar Association held a meeting in Toledo the latter part of January. Many judicial reforms, including enlargement of the jurisdiction of the Supreme Court, were discussed. Daniel W. Iddings, president of the organization, presided. The Columbus Bar Association at a recent meeting elected J. M. Butler president.

NEW MEXICO BAR ASSOCIATION.—The annual convention of the New Mexico Bar Association held in Santa Fe recently elected as president for the ensuing year O. L. Phillips of Raton. He succeeds J. L. Lawson of Alamogordo. Governor M. C. Meechem of Socorro and Captain W. C. Reid of Albuquerque were selected as delegates to the next convention of the American Bar Association.

NEVADA BAR ASSOCIATION.—The annual meeting of the Nevada Bar Association was held Jan. 29 and 30, at Reno. Benjamin F. Curler of Reno was elected to succeed Judge P. A. McCarran as president. A. L. Height was elected to succeed Judge B. F. Curler as vice-president; L. D. Summerfield and E. L. Williams were re-elected to the offices of secretary and treasurer, respectively.

MEETINGS OF VARIOUS BAR ASSOCIATIONS OF ILLINOIS.—The Winnebago Bar Association at its annual meeting at Rockford elected as its president A. Philip Smith. The Lawyers Association of Illinois at its annual meeting held in Chicago elected as its president Justus Chancellor. The Knox County Bar Association held a meeting at the Galesburg Club, which was addressed by Logan Hay of Springfield, president of the State Bar Association. The Rock Island County Bar Association is now headed by Andrew Olson of Moline, and the Cook County Bar Association by Richard E. Westbrooks.

MAINE BAR ASSOCIATION.—The biennial meeting of the Maine State Bar Association held in Augusta in January was given up to a celebration of the one hundred years of the jurisprudence of the state since its admission to statehood in 1820. President Cyrus N. Blanchard of Wilton presided and addresses were delivered by Chief Justice Cornish of the state Supreme Court, Judges Johnson and Hale of the United States courts, Judge Henry H. Braley of the Massachusetts Supreme Court and others. The Association was organized in 1891.

MONTANA BAR ASSOCIATION.—The State Bar Association of Montana will hold its annual convention in August and the place of meeting will be either Hunters Hot Springs or Billings. The Fourth Judicial District Bar Association at its annual meeting at Missoula chose as president John E. Patterson of that city. He succeeded Harry H. Parsons. The students of the state university law school attended the banquet which followed the meeting. The Cascade County Bar Association, consisting of 65 members, held its annual meeting at Great Falls in February. W. F. O'Leary, president of the association, presided.

"The pleadings in an action are governed by the dignity of the instrument on which it is founded."—Per Story, J., in Mills *v.* Duryee, 7 Cranch 484.

English Notes*

THE INTERNATIONAL COURT OF JUSTICE.—A curious impression seems to exist that the establishment of the International Court of Justice by the General Assembly of the League of Nations is not a reality, says the *Law Times*. The protocol provides that the statute of the court shall become effective as soon as a majority have signed and ratified it. The signatures of the requisite number, twenty-two, have already been affixed, and no doubt the ratification by the various legislative bodies will follow at the first opportunity. Of the twenty-two, four nations —Portugal, Switzerland, Denmark, and Salvador—signed the additional protocol for compulsory adjudication. Having regard to the prominent, it might almost be said eminent, part which distinguished jurists of the United States have taken in the formulation of schemes for international courts, it is unfortunate that their country has no immediate intention of assenting to its establishment. While this aloofness is generally regretted, it is entirely a misapprehension to think that the League is unable to function adequately without the assistance of the United States.

LORD READING AND INDIA.—From a strong sense of duty and at considerable personal sacrifice Lord Reading has resigned the great office of Lord Chief Justice of England—a position he has filled with both dignity and ability since October, 1913—to become Viceroy of India. To give up a unique and assured position and to accept one that at the present time is both difficult and uncertain demonstrates in a high degree both courage and love of country, two attributes possessed by Lord Reading in a high degree. Both the Lord Chief Justice and the Attorney-General, when Sir Gordon Hewart tendered the congratulations of the Bar of England to the new Viceroy, laid stress upon the importance of law and justice and its due administration. The lawyer has ever been made the butt for cheap witticisms, but it is a significant fact that in cases of difficulty and stress it is to the lawyer that the country turns for assistance. No one underestimates the greatness of the task that lies before Lord Reading, but the profession is certain that he will make good in the future as he has in the past. Lord Reading carries with him the confidence and good wishes of his fellow-lawyers, and what the Profession loses the Empire gains.

CREATION OF AN INTERNATIONAL LAW LIBRARY.—The late Sir Edward Fry, formerly one of the Lords Justices of Appeal and first delegate of Great Britain at the second Hague Conference, well known also for the work he did as arbitrator in international disputes, attempted to establish in his lifetime an international law library in London, and, not very long before his death, expressed regret that this had not been effected. His family, therefore, thought that the creation of such a library would be the best form of memorial to him. They have accordingly, with the object of setting such a library on foot, handed over to the trustees (Viscount Haldane, Sir Eric Richards, Professor Pearce Higgins, Mr. E. A. Whittuck, Sir Cecil Hurst, Professor Goudy, and Mr. Charles P. Sanger) the sum of more than £3000. The London School of Economics is most fortunate in having been selected as the place where this library is to be deposited. The trustees, out of the sum of money in their hands, have thought well in the first place to purchase the library of the late Professor Oppenheim, the well-known Whewell Professor of International Law at Cambridge. The collection of books on international law which Professor Oppenheim made comprises about 1200 volumes. These with some works of special personal interest belonging to the late Sir Edward Fry, will, in conjunction with the large number on the subject already in the library of the London School of Economics, form the nucleus of an international law library worthy of Great Britain. The trustees will as far as possible keep it up to date and in good order out of the interest on the sum of money that remains in their hands. The library will be available for reference to any student of the subject. As soon as funds allow, a catalogue of the books will be printed. Donations of books, pamphlets, and periodicals on any aspect of international law, as well as sums of money towards the maintenance of the library, will be very cordially welcomed by the trustees.

LAW BOOKS BY JUDICIAL AUTHORS.—The late Sir Edward Fry's treatise on Specific Performance, of which a new edition has just appeared immediately after the lamented death of its latest editor, Mr. G. R. Northcote, has long attained the position of a legal classic. Originally published in 1858, when its distinguished author was still at the Bar, it reached a second edition in 1881, by which time the author had been for a few years on the Bench. It was in the preface to the second edition that he incidentally referred to the popular notion that a text-book, written or revised by a member of the Bench, possesses a quasi-judicial authority—a notion which he mentions only to reject. As he pointed out, "it is hardly enough remembered how different are the circumstances under which a book is written and a judgment pronounced, or how much the weight and value of the latter are due to the discussions at the Bar which precede the judgment." This observation is not always borne in mind even by some judicial authors, who naturally look with parental fondness on the fruit of their studies; but that it is right there can be no question. The attitude adopted by Sir Edward Fry was also that taken up by Lord Fraser, a former judge of the Court of Session. While at the Bar, and before success as an advocate came to him, he devoted his enforced leisure to the writing of erudite volumes on Husband and Wife, and Parent and Child, which, when he was promoted to the Bench, were frequently quoted to him. Counsel would often preface a quotation from one of these treatises with the remark, "As your Lordship says," but this was invariably met with the observation, "Do not say that I say so and so; you may, if you like, say that the author of the book says so and so." Like Sir Edward Fry, Lord Fraser knew the value of discussion in court when the question in debate would be looked at from different angles and a true view thereby more likely to be obtained. Much is to be said in favor of the idea underlying the somewhat rhetorical phrase used some years ago by counsel in the Court of Appeal about "the bound and rebound of ideas and arguments between the Bench and the Bar."

"OWNER'S RISK" AND ONUS OF PROOF.—In cases arising out of the special contract at "owner's risk" made between customers and railway companies, the question of the onus of proof as regards the exception of wilful misconduct by the company's servants frequently arises. Goods are lost, and the customer alleges that they were lost by the wilful misconduct of the company's servants, while the company contends that the customer has not proved that allegation. It is well settled that if the probabilities clearly are that the loss was due to such wilful misconduct, the court may draw that inference (H. C. Smith Limited *v.* Midland Railway Company (1919) 121 L. T.

*With credit to English legal periodicals.

Rep. 27), but the court is not entitled to arrive at that conclusion by speculation and guess work. If the facts are equally consistent with either view, the plaintiff fails. In the most recent case in the Court of Appeal by the same plaintiffs against the Great Western Railway Company, the goods were handed to the company's carman, who took them to the company's parcel office, and there was no further trace of them. There was no evidence as to whether the public had access to the office. The defendants, who gave no evidence, took up the position that as there was no evidence as to whether the goods were lost by theft by the company's servants, or by outsiders, or the negligence of their servants in misdelivery or otherwise, the plaintiffs had not discharged the onus of proof. The defendants gave little or no assistance to the court as to the course of business, the inquiries they had made, or who was the last person who to their knowledge either did or should have handled the goods. In such circumstances Lord Justice Atkin thought that the County Court judge was justified in drawing the inference that the goods were lost through the wilful misconduct of the company's servants, while Lords Justices Bankes and Scrutton came to the opposite conclusion. The plaintiffs relied on the case of Curran *v.* Midland Great Western Railway (1896, 2 I. R. 183), where the company were held liable for the unexplained disappearance of some live pigs. Lords Justices Bankes and Scrutton were of opinion that that case did not afford any general rule, irrespective of the particular facts of the particular case under consideration; while Lord Justice Atkin thought that Curran's case did not turn on the nature of the goods carried, and was indistinguishable from the present case, and that in both cases the refusal to deliver, which was unaccounted for, was evidence of wilful misconduct. Should the case go to the House of Lords, their decision will be awaited with considerable interest by traders and the railway companies.

THE "MACERS" OF SCOTLAND.—A comparison of the terminology in use in English and Scottish law respectively has often formed the subject of inquiry and of humorous comment. Those differences extend not merely to the body of the law of each country, but likewise to the titles of the judges, practitioners, and of the various officials connected with the courts. Certainly in some respects there is about Scottish titles a more dignified air, as is exemplified by those borne by the highest as well as by the humblest of the officials concerned with the administration of justice. Thus, a judge of the Court of Session is not known as Mr. Justice So and So, but as Lord So and So; while those who correspond to the ushers of the English courts bear the more dignified title of "Macers," from the fact that they carry the mace before the judge when he enters the court. An additional dignity seems given to the office of macer when we find in the *Gazette*, as we did quite recently, a notice to the effect that "The King has been pleased, on the recommendation of the Secretary of State for Scotland, to approve the appointment of Mr. A. B. as macer of the Court of Session in the room of Mr. C. D., who has retired." It sounds sufficiently imposing. But not only in his title, but likewise in his history, has the macer of the Court of Session a certain interest. The office is said to be coeval with the Court of Session, and at one time it enjoyed considerably greater distinction than it does now. Till 1821 the macers occasionally exercised quasi-judicial functions when "brieves to serve heirs to lands in divers shires" were directed to them, the judges acting as their assessors in cases of intricacy. A condition of things so topsy-turvy as the ushers holding court while the grave and reverend seignors of the Bench acted as their assessors suggests a page from "Alice in Wonderland" rather than from the sober page of Scottish legal history; but so it was, and the piquancy of the situation did not escape the attention of Sir Walter Scott, who made effective use of it in the pages of "Guy Mannering," where he describes how Counsellor Pleydell got Bertram served heir. The counsellor explained how the Scottish Legislature "for the joke's sake, I suppose, have constituted those men of no knowledge [the macers] into a peculiar court for trying questions of relationship and descent, such as this business of Bertram, which often involves the most nice and complicated questions of evidence." "The devil they have! I should think that rather inconvenient," said Mannering. "Oh, we have a practical remedy for the theoretical absurdity. One or two of the judges act upon such occasions as prompters and assessors to their own doorkeepers." This quaint procedure was at last abolished by 1 & 2 George IV, c. 38, s. 11; and, thus shorn of their judicial functions, the macers have since been confined to the ordinary duties of their office—that of carrying the mace, keeping silence in court, calling the cases as they are about to be reached, and such like. There are seven macers of the Court of Session, the appointment of six of them being in the Crown, while the seventh is in the gift of the owner for the time being of the barony of Myres in Fifeshire by virtue of an ancient grant.

Obiter Dicta

BREACH OF PROMISE SUIT?— Re Love and Bilodeau (1912) 22 W. L. R. 689.

A BREACH OF TRUST.—In State *v.* Trusty, 122 Iowa 82, the defendant got twenty years.

DIDN'T WORK.—In Seidlitz *v.* Auerbach, 174 N. Y. S. 82, it was held that the plaintiff had no action.

STATE PHILANTHROPY.—The index to the Michigan Session Laws for 1917 contains this line: "Good Time—paroled convict entitled to."

EXPERIENCE OF DOUBTFUL VALUE.—A detective agency, in a recent issue of the London *Law Times*, advertises as follows: "Divorce, Blackmail, and all Confidential matters conducted with ability, tact, and skill. 25 years' experience."

BUICK DEALERS TAKE NOTICE!—"This must be regarded as meager experience for a boy 19 years old to prepare him to operate, upon the public streets, that tremendous engine of power known as a Buick 6."—Per Spear, J., in Bragdon *v.* Kellogg, 6 A. L. R. 669.

SO TRUE—AND SO SAD!—"Public opinion, prevailing morality, emergencies, may warrant denouncement as a crime today what was lawful yesterday; may do in behalf of public welfare today what could not be done yesterday; may regulate a business or employment today that could not be yesterday."—Per Bourquin, J., in A. M. Holter Hardware Co. *v.* Boyle, 263 Fed. 134.

RESTORING GRETNA GREEN.—Speaking of the blue laws, it has just come to our notice that as recently as 1913 the Pennsylvania Legislature repealed two laws, enacted respectively in 1701 and 1730, and designed to "prevent clandestine marriages" (see Pa. Laws 1913, p. 93). Could the blue lawyers of the

Commonwealth have been asleep when the wicked legislators rammed this repeal through?

AND VICE VERSA.—"Many of plaintiff's charges of cruelty range in a field of delicate consideration and sentiment beyond the commonly recognized scope of legal relief. In that aspect it may be conceded that as to certain of the amenities they tend to relegate defendant to that unfortunate but not uncommon type of husbands who fail to rise to the prenuptial ideals of their wives."—Per Steere, J., in La Du v. La Du (Mich.) 164 N. W. 512.

WITHOUT AMBIGUITY.—In Youman *v.* Commonwealth, (Ky.) 224 S. W. 860, the court concluded its judgment as follows: "Wherefore the judgment is reversed, with directions to the lower court to enter an order restoring to the possession of Mrs. Youman, the wife of Roy Youman, the whisky in the possession of the court, and for further proceedings not inconsistent with this opinion." Can there be the slightest doubt as to the meaning, in Kentucky, of "further proceedings" in such circumstances?

MAKING JURY SERVICE ATTRACTIVE.—One court has done its best, it seems, to break up the practice, so common with talesmen, of evading jury service if it can possibly be accomplished. In Hall *v.* Manson (Iowa) 34 L. R. A. 207, the court held that the measurement in the presence of the jury of a woman's foot and her leg six inches above the ankle, in a suit for injuries to the foot and ankle, is a right which the court must allow when there is a direct conflict as to such measurement by the medical men called by the respective parties, at least if the witness herself does not object.

INDEXING IN MAINE.—A resolve of the Maine Legislature in 1919, in aid of navigation on Lewy Lake, Long Lake, and Big Lake in that state, is thus indexed in the Session Laws for that year: first, under "B" we find the line "Big, Long, Lewy's Lakes"; next, under "L" we find "Lewy's, Long, Big Lakes"; and again under "L" we find "Long, Lewy's, Big Lakes." Just read these lines without the commas! Perhaps the indexer of these statutes was trying to emulate the feat of the reporter of volume 80 of the Maine Reports, who gave us this soul-satisfying cross-reference in his index: "Magistrate, see Lobster."

CANADIAN LATIN (BECAUSE IT ISN'T LATIN!)—In a recent address to the Toronto University Schools Old Boys, Mr. Justice Riddell said: "When I was a lad, my old Scots tutor taught me that 'lucus,' a grove or thicket, was the same as 'lucus,' light, and that both were derived from 'luceo,' I shine, because the latter did and the former did *not* shine. On the same *lucus* a *non lucendo* principle were formed 'bellum,' war, because it is not 'bellum,' agreeable; 'canis,' a dog, because he does not sing, *a non canendo*, etc., etc.; so also Woodrow, because he wouldn't row but insisted upon steering; and a stream on my father's farm we called Trout Creek, because there were no trout in it."

SECRET SOCIETIES.—Attorney—"Let me ask you, sir, how many secret societies you belong to?"

Witness—"What has that to do with this case?"

Attorney—"Never mind what. I insist on knowing."

Witness—"Do I have to answer that question, your honor?"

The Court—"It can do no harm. I think you may answer it."

Witness—"Well, I belong to three."

Attorney—"What are they?"

Witness—"The Odd Fellows, Knights of Pythias, and the Anti-Saloon League."

THE BLOODHOUNDS OF PROHIBITION.—"If an officer may arrest when he actually sees the commission of a misdemeanor or a felony, why may he not do the same if the sense of smell informs him that a crime is being committed? Sight is but one of the senses, and an officer may be so trained that the sense of smell is as unerring as the sense of sight. These officers have said that there is that in the odor of boiling raisins which through their experience told them that crime in violation of the revenue law was in progress. That they were so skilled that they could thus detect through the sense of smell is not controverted. I see no reason why the power to arrest may not exist, if the act of commission appeals to the sense of smell as well as to that of sight."—Per Sater, J., in United States *v.* Borkowski, 268 Fed. 408.

CHILIASTIC LIBEL.—In Meyerle *v.* Pioneer Publishing Co. (N. Dak.) 178 N. W. 792, it was held that a complaint for libel was sufficient to withstand a demurrer which alleged a publication by the defendant to the effect that the plaintiff, believing that the world was coming to an end, had invited his six children to one last feast under the parental roof and had bought shrouds for them all, together with a gun to help them on their way. We rather imagine that most lawyers will dissent from the legal proposition laid down, and particularly, perhaps, after reading the following from Judge Robinson's dissenting opinion: "The occasion of the libel was thus: An alleged scientific astrologist in California gave out the item that the world would come to an end on December 17, 1919. In many newspapers the item was published, with comments. It frightened many people, and caused some to commit suicide. Since 1841 there has been a religious cult known as Adventists and Seven Day Adventists. They have been looking for the millennium and the end of the world at certain scheduled times. Such good people are numerous, and they have many churches and are quite susceptible to fake reports concerning the millennium. It is quite possible that the plaintiff is some kind of an Adventist, and that his neighbors gave out some such report as was published as a raillery on him. If he is an Adventist, he should not take offense at imputations quite common to those of that creed. If he is not an Adventist, such raillery should be to him as water on a duck's back. As the plaintiff is a farmer of 60 years, his fame must be local. 'It begins and ends in the small circle of his foes and friends.' To those who know him the millennium item is no news—no gospel truth; to those who know him not, it is the same as if it referred to a person by any other name."

SUSAN'S RIGHT TO REMARRY.—In 1849, William Geigley, a resident of the state of Pennsylvania, directed by his will that his "loving wife, Susan" should have all of his estate, personal and real, provided that said Susan remained a widow during her life, but in case of her remarriage, then she was to leave the home premises, and the estate should pass to the mother and father of the testator. It appears that Susan was both young and comely, and she remarried. The mother of the testator claimed the property, and the court sustained her claim; but one of the judges gave rather an interesting opinion, and it deserves a place in legal literature as something rare in these matter-of-fact and prosaic days. He said: "The principle of reproduction stands next in importance to its elder-born correlative, self-preservation, and is equally a fundamental law of existence. It is the blessing which tempered with mercy the justice of expulsion from Paradise. It was impressed upon the human creation by a beneficent Providence to multiply the images of himself, and thus to promote his own glory and the

happiness of his creatures. Not man alone, but the whole animal and vegetable kingdom are under an imperious necessity to obey its mandates. From the lord of the forest to the monster of the deep—from the subtlety of the serpent to the innocence of the dove—from the celastic embrace of the mountain kalmia to the descending fructification of the lily of the plain, all nature bows submissively to this primeval law. Even the flowers which perfume the fields with their hues, are but curtains to the nuptial bed. The principles of morality—the policy of the nation—the doctrines of the common law—the law of nature and the law of God—unite in condemning as void the condition attempted to be imposed by this testator upon his widow."—See Commonwealth *v.* Stauffer, 10 Pa. St. 350.

Correspondence

THE "BLUE LAW" CRY UNFOUNDED.

To the Editor of LAW NOTES.

SIR: A lawyer who says that your "LAW NOTES" takes a very high rank among law journals, has sent me a copy of your issue of January, that I may see your stand in regard to prohibition and censorship. I am sending you several mimeographs that will bring to your attention some important facts that these editorials indicate have not come to your knowledge.

Your very first editorial on the "blue laws" is based on the assumption that the statements of New York papers and others in regard to drastic legislation pending in Congress are correct, whereas if you had read the papers more carefully you would have seen that the Anti-Saloon League, which is absurdly charged with having meddled with another reform, denied it completely, and that the Lord's Day Alliance and the International Reform Bureau both declared there was no national Sunday law pending in Congress, nor had any national society endorsed one. It was simply the effort of motion picture men, begun on November 22d, to create a prejudice against Sunday and against prohibition in order to clear the way for the exhibition of their films, both on week days and on Sundays—many of them lewd by confession of the officials of fourteen companies. The whole plot was to create prejudice against every kind of moral legislation.

The point that you make when you say "an organization of active minority interests, supported by powerful lobbies, is rapidly making a farce of representative government" is therefore true, but in a different sense than you meant it. The active minority that is making a farce of representative government today is the motion picture interest, which, with the use of its screen and by a powerful propaganda in the press, compelled by their advertising patronage, is attempting to overcome the American laws and customs with reference to the observance of Sunday, just as the brewers, as a very small minority, attempted to terrorize government in the days before prohibition, an effort which has not yet ceased and which is back of much of the violation of the prohibition law.

Surely a law journal ought to stand first and always for obedience to existing laws by the citizen, and enforcement of the laws impartially by executive officers, that, as Grant said in substance, all laws may be enforced, bad laws repealed and imperfect laws amended, and that good laws may make it harder to do wrong and easier to do right.

As Lipton has made a world-wide fame as a good sport by taking his lickings "with a smile," so those who have been outvoted in the matter of prohibition, if they are good sports and good citizens, should quit both their whining and their law breaking and accept the decision of democracy worked out by the regular processes of law, having the privilege to change the law by the same methods that it was secured. The example of ex-President Taft should be applauded, that although opposed to prohibition, there is nothing to do but to obey it while it is the law.

Washington, D. C. WILBUR F. CRAFTS.

"Ownership of property implies two things: First, attention to it; second, a discharge of all obligations, of taxation or otherwise, to the state, which protects it."—Per Brewer, J., in Underwood *v.* Dugan, 139 U. S. 384.

"There is no power so dangerous as that which can be traced to no definite or authoritative source, or which is exercised without a reference to some fixed principles."—Per Baldwin, J., dissenting, in Harrison *v.* Nixon, 9 Pet. 530.

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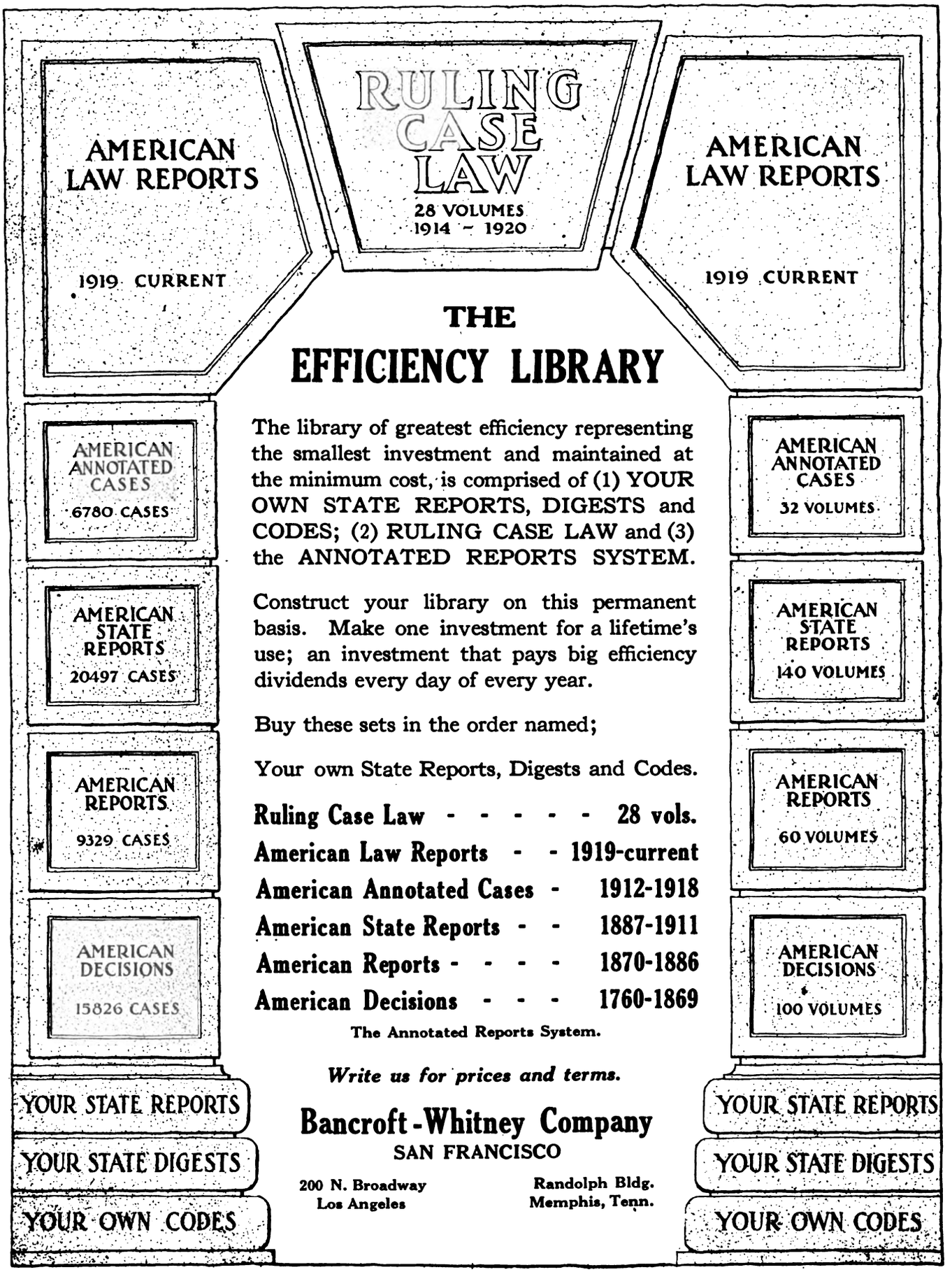
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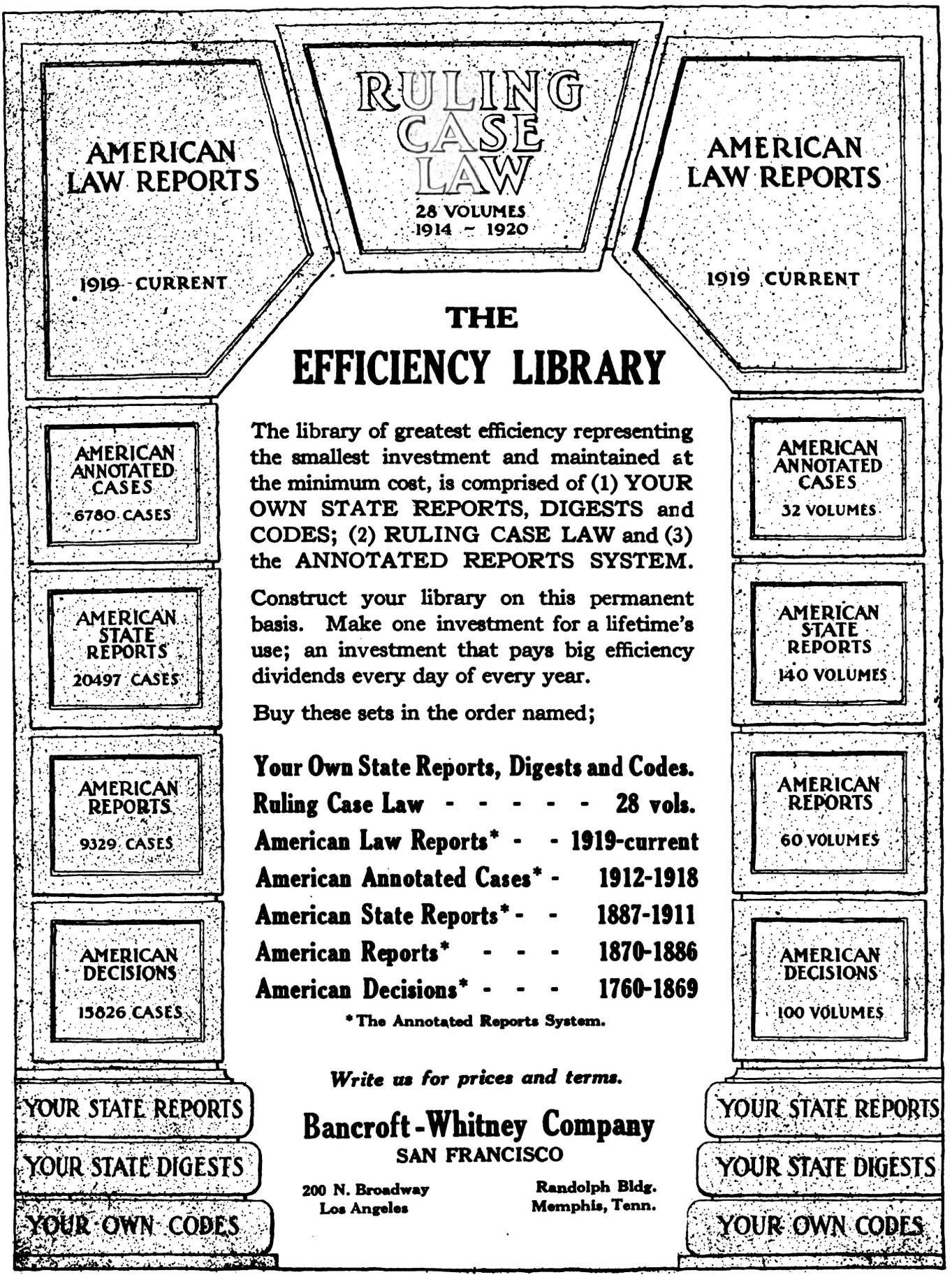
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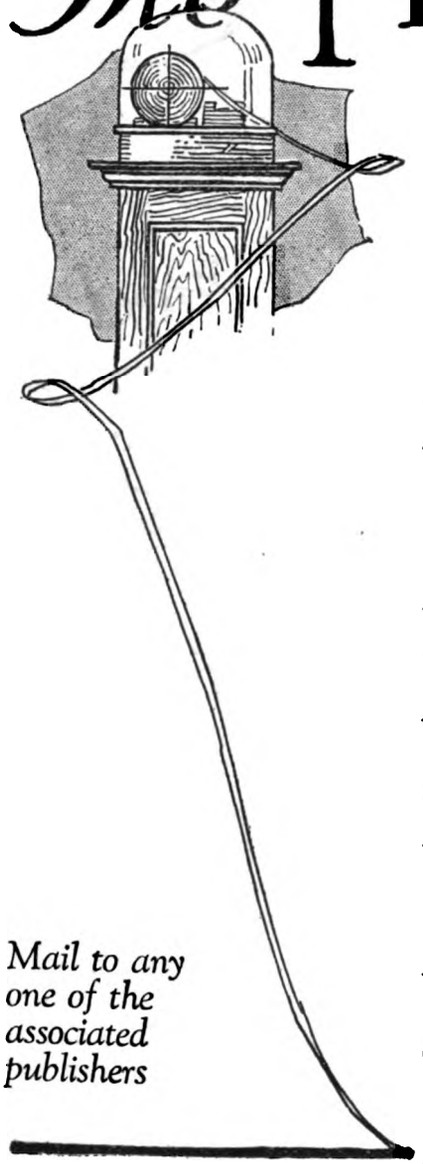

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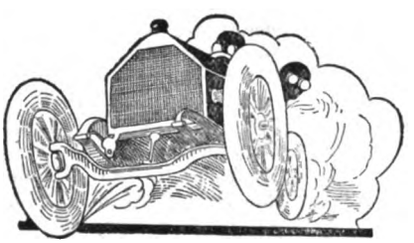

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87. Rule Stated.—Before a law can be attacked by any person on the ground that it is unconstitutional, he must show that he has an interest in the question in that the enforcement of the law would be an infringement on his rights.[13] One who is not prejudiced by the enforcement of an act of the legislature cannot question its constitutionality,[14] or obtain a decision as to its invalidity on the ground that it impairs the rights of others.[15] It has been said that courts cannot pass on the question of the constitutionality of a statute abstractly, but only as it applies and is sought to be enforced in the government of a particular case before the court, for the power to revoke or repeal a statute is not judicial in its character.[16] An exception to this rule has been recognized in some jurisdictions in the case where the jurisdiction of the court itself depends on the validity of a statute, and the attention of the court is brought to that fact by persons interested in the effect to be given to the statute, although not actually interested in the case before the court.[17]

88. Interest as to Discriminatory Laws.—Where the class which includes the party complaining is in no wise prejudiced the general rule is that it is immaterial whether a law discriminates against other

Entire section 87 quoted in State v. Packard, 35 N. D. 318.

Paragraph 13 quoted in Vroman v. Fish, 181 App. Div. (N. Y.) 509.

Entire section 87 referred to in McGlue v. Co. Comrs. 225 Mass. 60.

Paragraphs 14 & 15, quoted in N. O. M. & C. R. Co. v. State, 110 Miss. 305.

Entire section 87 cited in State v. Hefernan, 40 R. I. 181

Paragraph 13 quoted in State v. Taylor, 38 N. D. 102.

Entire section 87 cited in Coman v. Baker, 179 S. W. 939 Texas.

Entire section 87 cited in State v. Cage, 176 S. W. 931 Texas.

Entire section 87 cited in Gay v. Dist. Ct., 41 Nev. 330.

Paragraphs 14, 15 & 16, quoted in Olson v. Ross, 167 N. W. 886 N. D.

Entire section 87 cited in McCoy v. Davis, 38 N. D. 328

Paragraph 14 cited in Barth v. Pock, 51 Mont. 438.

13. Brown *v.* Smart, 145 U. S. 454, 12 S. Ct. 958, 36 U. S. (L. ed.) 773; Red River Valley Nat. Bank *v.* Craig, 181 U. S. 548, 21 S. Ct. 703, 45 U. S. (L. ed.) 994; Hoker *v.* Burr, 194 U. S. 415, 24 S. Ct. 706, 48 U. S. (L. ed.) 1046; Citizens' Nat. Bank *v.* Commonwealth of Kentucky, 217 U. S. 443, 30 S. Ct. 532, 54 U. S. (L. ed.) 832; Brown-Forman Co. *v.* Commonwealth of Kentucky, 217 U. S. 563, 30 S. Ct. 578, 54 U. S. (L. ed.) 883; Franklin County *v.* State, 24 Fla. 55, 3 So. 471, 12 A. S. R. 183; People *v.* McBride, 234 Ill. 146, 84 N. E. 865, 123 A. S. R. 82, 14 Ann. Cas. 994; Fesler *v.* Brayton, 145 Ind. 71, 44 N. E. 37, 32 L.R.A. 578; Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 A. S. R. 228; Sullivan *v.* Berry, 83 Ky. 198, 4 A. S. R. 147; *In re* Wellington, 16 Pick. (Mass.) 87, 26 Am. Dec. 631; Wiles *v.* Williams, 232 Mo. 56, 133 S. W. 1, 34 L.R.A. (N.S.) 1060; State *v.* Blake, 241 Mo. 100, 144 S. W. 1094, Ann. Cas. 1913C 1283; Cram *v.* Chicago, B. & Q. R. Co., 84 Neb. 607, 122 N. W. 31, 21 L.R.A.(N.S.) 1022; People *v.* Turner, 117 N. Y. 227, 22 N. E. 1022, 15 A. S. R. 498 and note; Pugh *v.* Pugh, 25 S. D. 7, 124 N. W. 959, 32 L.R.A.(N.S.) 954; State *v.* Candland, 36 Utah 406, 104 Pac. 285, 140 A. S. R. 834.

14. Walsh *v.* Columbus, H. V. & A. R. Co., 176 U. S. 469, 20 S. Ct. 393, 44 U. S. (L. ed.) 548; Vought *v.* Columbus, H. V. & A. R. Co., 176 U. S. 481, 20 S. Ct. 398, 44 U. S. (L. ed.) 554; District of Columbia *v.* Brooke, 214 U. S. 138, 29 S. Ct. 560, 53 U. S. (L. ed.) 941; New York Life Ins. Co. v. Hardison, 199 Mass. 190, 85 N. E. 410, 127 A. S. R. 478; Cram *v.* Chicago, B. & Q. R. Co., 84 Neb. 607, 122 N. W. 31, 26 L.R.A.(N.S.) 1022, 85 Neb. 586, 123 N. W. 1045, 19 Ann. Cas. 170 and note; Newport *v.* Horton, 22 R. I. 196, 47 Atl. 312, 50 L.R.A. 330.

15. Smiley *v.* Kansas, 196 U. S. 447, 25 S. Ct. 289, 49 U. S. (L. ed.) 546; Knight, etc., Co. *v.* Miller, 172 Ind. 27, 87 N. E. 823, 18 Ann. Cas. 1146; Kansas City *v.* Union Pac. Ry. Co., 59 Kan. 427, 53 Pac. 468, 52 L.R.A. 321; Sullivan *v.* Berry, 83 Ky. 198, 4 A. S. R. 147; State *v.* Haskell, 84 Vt. 429, 79 Atl. 852, 34 L.R.A.(N.S.) 286; McKinney *v.* State, 3 Wyo. 719, 30 Pac. 293, 16 L.R.A. 710.

16. Note: 12 A. S. R. 827.

17. New York Life Ins. Co. *v.* Hardison, 199 Mass. 190, 85 N. E. 410, 127

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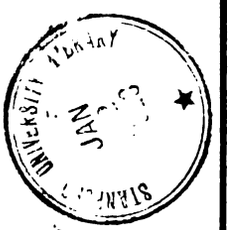

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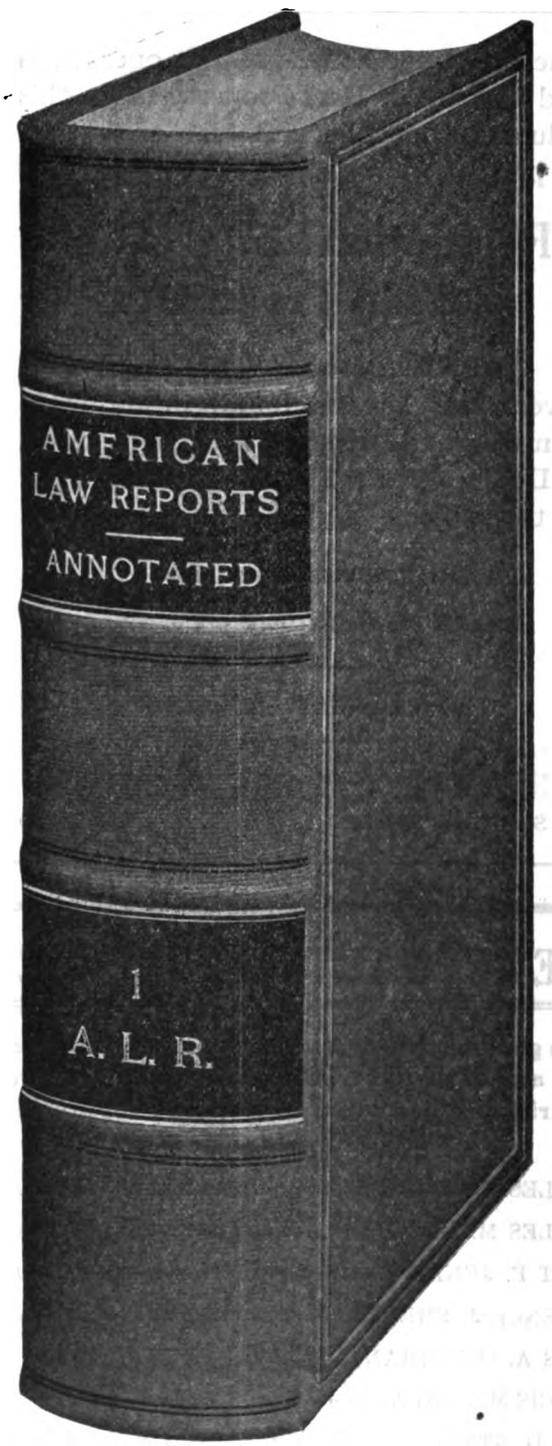

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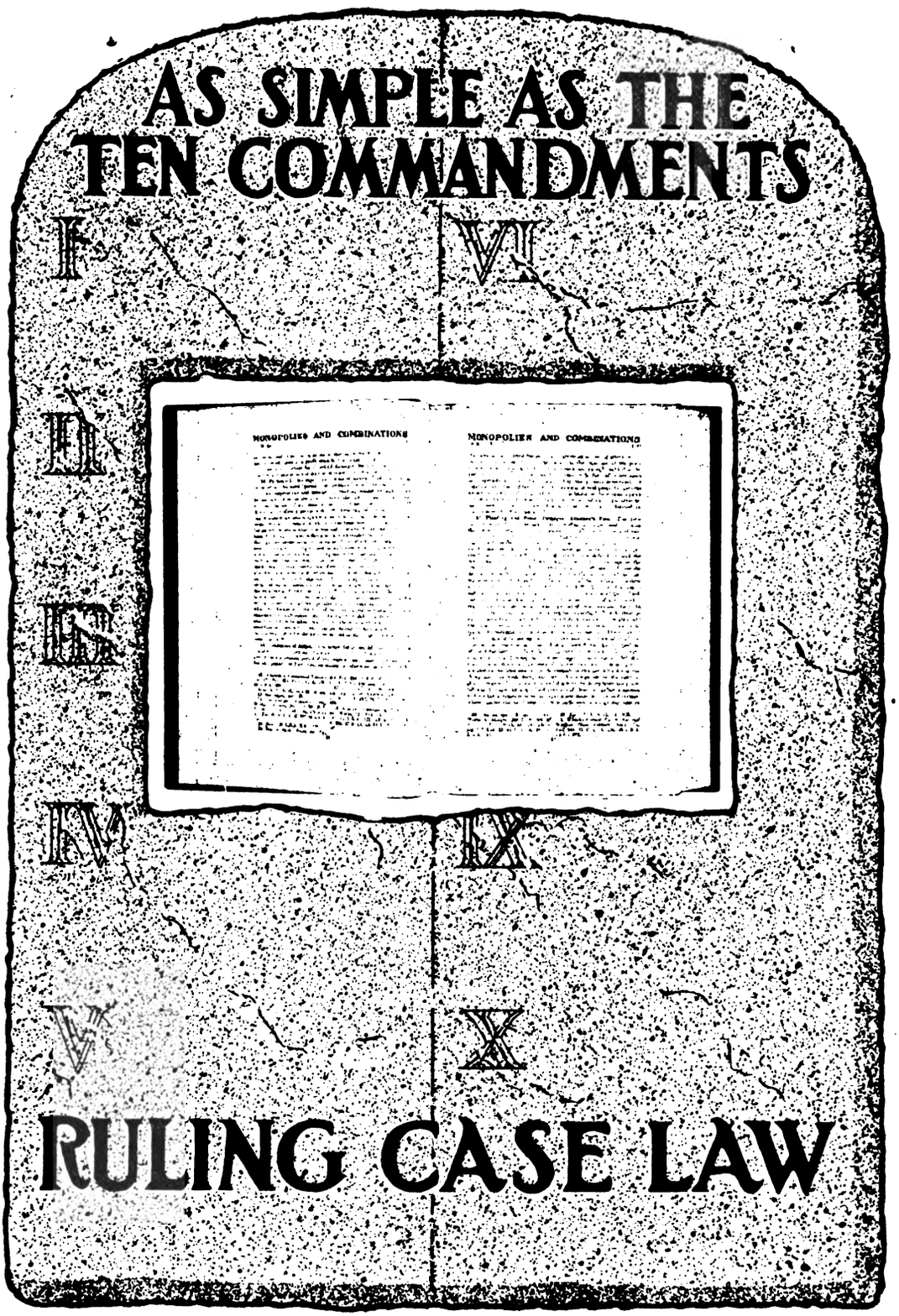

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